Whether goodwill or other compensation should be paid upon termination of franchise agreements is not a new topic and over the last 20 years or so has been often discussed or muted.

This paper was first prepared on 31 May 2012 and was not prepared for lawyers but for franchisors [prospective or existing] and other interest parties [including if appropriate franchisees and politicians]. If it had been prepared for lawyers then there would be reference to numerous case law to back up some of my assertions. I have written this paper hopefully in plain English so that it is easily understood.

I have now made some additional comments at the end of this paper for the benefit of lawyers when I deal with the existing common law treatment of goodwill upon termination or expiry of franchise agreements.

It is important to understand some of the background to this end of franchise agreement payment subject matter.

At the end of 2008 the Federal Parliamentary Committee on Corporations and Financial Services [“Committee”] reported on its inquiry into the Franchising Code of Conduct [“Code”]. This was a detailed review of the Code and one of its 11 recommendations related to disclosure of end of franchise term arrangements and the report favoured the franchisor compensating the franchisee...
at the end of the term when there was not to be any ongoing franchise. This compensation was recommended to be on the value of the franchise business as a going concern. The Committee’s recommendation was generally considered to be wrong as it had placed too much emphasis on the franchisee being the owner of the franchise business at the end of the term. It overlooked that the franchisee from the outset only acquired a right or licence to operate the franchise for fixed term(s). The franchisor or its ownership entity normally owns the intellectual property.

Many of the franchisor legal advisors were critical of the Committee’s recommendation and reasoning especially when the franchise agreement had naturally come to an end.

In my view it was fortunate that the 1 July 2010 Code amendments did not reflect the Committee’s end of term compensation recommendation. A new Item 17C of the Code required a disclosure of end of franchise term arrangements and not any obligation for the franchisor to pay compensation.

I attach this Item 17C

The obligation to disclose in Item 17C includes whether the franchisee is entitled to be paid an “exit payment”. This expression is not defined in the Code. It therefore is not limited to payments for unsold stock, fixtures and fittings and could obviously include a payment for goodwill or compensation for early termination.

From a legal point of view goodwill appears to be incapable of a precise definition. In the view of Lord McNaughton.

“Goodwill consists of several elements. It’s structure varies in different economic sectors and different jobs within these sectors. One element can prevail here, another there”.
I have thought about a more practical definition of “goodwill” and in doing so I note that The Australian Concise Oxford Dictionary defines goodwill in a business context as “the established reputation of a business etc as enhancing its value”.

Tony Conoghan with his paper “Rebranding and goodwill in the technological age” concluded that depending upon the context of the use of the term “goodwill” that it may have different meanings especially with tax and accounting considerations. However most importantly it is clear that goodwill is inseparable from the business.

In my view the relevance of the term “goodwill” in the context of this paper is what is the franchise business worth? At the end of the day something is normally worth what someone is prepared to pay for the business for which goodwill is only part of that business.

In the context of the monetary value of the goodwill of a business the most practicable explanation is what a purchaser will pay for a business separate and apart from any specific plant and equipment and/or product value. The goodwill value is normally assessed on the maintainable profit of a business. One of the rule of thumb methods of valuing a business [and there are a few methods] is to assess what a non operator investor would pay for the business. Such a non operator investor is probably looking for an annual return of about 30% of his or her outlay. By way of example if there is a business being purchased for $420,000.00 gross then an investor would be seeking an annual net profit [before tax] of about $126,000.00. This $420,000.00 may well comprise:

(i) goodwill $126,000.00
(ii) product $204,000.00
(iii) plant & equipment $90,000.00

The $126,000.00 will be the net profit after allowing for an owner operator(s) wage(s).
The above example is a very practical assessment in my view. It may differ from the assessment of a formal valuer or an accountant. However at least in South Australia it is the valuation method being used by some of the prominent business selling agents.

The expression "maintainable profit" speaks for itself. Where there is a non franchise business this maintainable profit may be more of an indefinite nature. However in a franchise business as to how long the profit is maintainable may well depend on the length of the remaining term(s) of the franchise agreement as there is no guarantee that the franchise business will continue at the end of the last term. It is my understanding that any formal valuation will have regard to the length of the remaining franchise term(s) when assessing the value attributable to goodwill but if it is less value than that of a non franchise business then normally it would not be very much less if there is a reasonable time to run before the franchise terminates at the end of the last term. Often there are premises lease considerations whether the business is franchised or not. It may well depend upon the reputation and likely longevity of the franchise system as to whether a valuer will have regard to the likelihood of the franchise continuing after the end of the last term [for which the franchisor may or may not ask for an up front payment equivalent to the then Initial Franchise Fee charged to new franchisees].

In the context of franchising and a greenfield franchisee it is not uncommon for an Initial Franchise Fee to be charged by the franchisor. For all practical purposes this Initial Franchise Fee is treated as goodwill. However often a new franchise business has not previously traded so this Initial Franchise Fee is based upon the success and reputation of the franchise system. If there was to be a new Initial Franchise Fee payable at the commencement of each term of the franchise agreement then that certainly should be taken into account where a franchise business [say two or three years after the commencement of an initial five years] is being appraised for selling purposes. Many franchisors do not charge a new Initial Franchise Fee at the commencement of the second and any subsequent franchise terms as they regard the very
fact that they have had a complying franchisee as being a sufficient reward. Other franchisors charge new Initial Franchise Fees at the commencement of each franchise term. The charging or not of these Initial Franchise Fees is a matter of contract and should be covered in the franchise agreement [for which any prospective franchisee who did not get pre-franchising accounting advice could well be “making their own bed”].

A franchisee normally pays an Initial Franchise Fee to join a franchise system and once paid this fee is non-refundable. It may be considered to be a payment to allow someone the right or licence to exploit and use the goodwill of the franchisor (ie the intellectual property, brand and systems) and not a sale or transfer of goodwill to the franchisee. If compensation is to be paid then should it be limited to a maximum of a prorate refund of the unexpired portion or repayment of the whole lot? This issue becomes even more complicated because normally a franchisee purchasing a franchise business from another franchisee pays goodwill to the selling franchisee and not any Initial Franchisee Fee to the franchisor. These aspects make this subject matter even more confusing.

Time does not permit a more clinical assessment of the normal methodology for valuing a business from an accounting perspective [ie future maintainable earnings for calculations of goodwill times a multiplier and net tangible assets]. Is the Initial Franchise Fee paid and amortized over the initial term an asset or a right to be considered goodwill?

The terminology “terminate” speaks for itself as it is clear that it means to bring or come to an end. There are 5 core types of termination which occur in franchising namely:

1. The initial term of a franchise agreement expires without the franchisee exercising a right of renewal or the last term of a franchise agreement expires without any new and continuing franchise arrangement in place.
2. Prior to expiry of the term(s) the franchisor terminates the franchise agreement for breach by the franchisee for which the Franchising Code of Conduct allows for immediate termination in some circumstances [e.g. fraud or dishonesty or the franchisee abandoning the franchise business] and in other circumstances for termination provided that beforehand the franchisor has given the franchisee reasonable notice to remedy the breach(s).

3. Prior to expiry of the term(s) the franchisee terminates the franchise agreement for material breach by the franchisor either pursuant to a contractual entitlement provided for in the franchise agreement or in the absence of this contractual entitlement [which some franchise agreements do not allow for] then by a repudiation of the franchise agreement. This repudiation method is complex and not always legally effective and to attempt a repudiation a franchisee must in writing say to the franchisor that unless you do this and that [usually very fundamental matters] the franchisor’s conduct will be treated as a repudiation of the franchise agreement which is consequently deemed to have ended.

4. Prior to the expiry of the term(s) each of the franchisor and the franchisee mutually agreeing to terminate the franchise agreement which mutual termination would normally be embodied in a deed of mutual termination. This deed would deal with such matters as whether there is to be any ongoing restraint [not to carry on the business after termination] and full and final settlement aspects.

5. The franchisee has the right to terminate the franchise agreement during the 7 day cooling off period which follows the franchisee entering into the franchise agreement. If this cooling off occurs then the franchisee is entitled to a refund of all monies which the franchisee has paid to the franchisor less the franchisor’s reasonable expenses in granting this franchise.

Other areas of termination include either the franchisor or the franchisee terminating because of the insolvency of the other and termination due to the action of a third party e.g. loss of leased
premises due to lease expiry or to lease termination where a lesor exercises its premises demolition entitlement. Also an agreement can come to an end because of novation on sale of a business.

The above preamble to this paper is in my view necessary for there to be a full understanding of the remainder of this paper. This preamble is very much a nutshell of these important observations and generally covers standard type franchise situations which arise from time to time. It does not distinguish between a retail and non retail franchise and probably there is no need to do so.

It is my observation [from various comments made over the last year or so by politicians and others] that there is a policy developing that there should be goodwill or compensation payable by a franchisor where there is an early termination of the franchise agreement. This observation is apolitical. My deep concern is what politicians may legislate. Some politicians have no practical business or franchise business experience and/or they just do not understand. There is a considerable worry because at times it is the politician without practical experience and/or does not understand who is the main proponent for franchise legislating. In this respect:

1. It is my impression that the developing political early franchise termination policy does not make any distinction between a franchisor terminating and a franchisee terminating and if legislated also may not distinguish for differing circumstances where there is a full and final settlement embodied in a deed of mutual termination.

2. This early termination differs from where a deemed or natural termination [this should be made clear in the franchise agreement] occurs because a franchise term expires without renewal or the last term expires with no provision for renewal.

3. For there to be any goodwill payable upon early termination by a franchisor there would have to be legislation because the common law [i.e. court case law] does not normally provide for a goodwill payment upon such early termination.
4. For there to be any goodwill payable then the non plant and equipment product value of the
business would be disregarded and in my view the business would have to have a
maintainable profit for a reasonable period of time if not for this termination. In other words
if a franchise business is struggling financially [which is not always the case] at the time of
termination then there may not be any goodwill value. Why then should a poorly
performing franchisee be entitled to any compensation when that franchisee may have
already destroyed any goodwill which would have been achieved by a compliant
franchisee? Also why should a terminated franchisee be entitled to any payment from a
franchisor when it is the franchisor who is out of pocket not only because of poor
performance by the franchisee but also the loss of future fees?

5. If any prospective legislation [by way of amendment to the Code or otherwise] provides for
compensation which is assessed disregarding the goodwill value then this would be unfair
and would regardless reward an otherwise non complying franchisee or an unscrupulous
franchisee.

6. If the franchisee is running a business with sound maintainable profit and by way of
example its goodwill had a value of say $100,000.00 and the franchisor terminates on the
ground of the franchisee’s dishonesty or fraud then is it fair that the franchisor may still
have to pay goodwill? No

7. If a franchisee is in chronic arrears with payment of its franchise fees or is otherwise in
material breach of the franchise agreement and the franchisor terminates the franchise
agreement then again is it fair that the franchisor may still have to pay goodwill? No

8. If a franchisee has been trying say for six months to sell the franchise business but without
success then that franchisee could deliberately breach the franchise agreement and not
remedy breach(s) when called upon by the franchisor to do so which in effect will [if
legislation exists] force the franchisor to pay goodwill and give the franchisee for all practical purposes an immediate sale of the franchise business. Is this fair? No

9. Where a franchisee is operating a profitable franchise business then why would that franchisee commit a breach of the franchise agreement which exposes the franchisee to possible termination? In other words this franchisee can avoid the risk of termination by complying with the terms of the franchise agreement. Is it fair that this franchisee may be rewarded even though the termination was caused by the franchisee? No

10. Where a franchisee terminates the franchise agreement on the grounds of material unremedied breach by the franchisor or the repudiation method then that franchisee is entitled to make a common law claim for its loss or damage. The Code places a prohibition on release from liability where in Clause 16(1) it says:

“A franchise agreement entered into on or after 1 July 1998 must not contain, or require a franchisee to sign a general release of the franchisor from liability towards the franchisee”.

11. If a franchisee terminates the franchise agreement then why should the franchisee be allowed a statutory right for goodwill or compensation when that franchisee has an existing common law right where the court can assess the franchisee’s loss or damage and order payment of the same?

12. If a franchisor properly terminates a franchise agreement then often there will be a restrictive covenant in the franchise agreement whereby the franchisee is restrained from trading in competition to the franchisor or its franchisees. The franchisee is aware of
this restrictive covenant and should have had their own independent legal advice upon this restraint provision prior to entering into the franchise agreement. Often franchisees do not observe restrain provisions. For the franchisor to enforce these provisions is a very expensive exercise and often franchisors do not seek enforcement solely on economic grounds [even though the certainty of enforcement should not be taken for granted unless there is a very narrow or limited restraint as to time and distance]. These restraint aspects are a relevant consideration because a non complying franchisee may well [if statutory allowed] obtain a goodwill payment and then not observe the restraint provision. If the franchisee receives goodwill and then continues to operate a non franchise business or a business which is re-branded with another franchise system then the franchisee should not have any entitlement to goodwill.

13. If upon early termination or at expiry of the franchise agreement, goodwill or compensation is legislated upon then:

13.1 third parties such as banks or other financiers of the franchisor may be effected and they may well lend less or require franchisors to have sufficient cash reserves to cover the possibility of franchisor termination payments; and

13.2 the franchisee’s secured lender [i.e. bank or other financier] would normally have first claim on any franchisor termination payment.

13.3 what will the situation be with tripartite agreements [ie an agreement between the head franchisor, franchisor and franchisee]? Will there be an obligation upon the head franchisor to pay compensation or goodwill?

14 The Code makes it abundantly clear that a franchisee before entering into any franchise agreement has to certify that the franchisee has had pre-franchise independent legal and
accounting advice or an opportunity to obtain the same. Clearly politicians should put more emphasis on educating franchisees how to evaluate any franchise proposal which would include these prospective franchisees making their own enquiries so as to be satisfied that their legal and accounting advisors understand franchising. Clause 6A of the Code [a copy of which must be served by the franchisor upon the franchisee with the franchisor’s disclosure document] states that the purposes of the franchisor’s disclosure document are:

“(a) to give a prospective franchisee, or a franchisee proposing to enter into, renew, extend or extend the scope of a franchise agreement, information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and

(b) to give a franchisee current information from the franchisor that is material to the running of the franchised business”.

15 Generally any legislation to allow for payment by the franchisor of goodwill upon early termination of the franchise agreement by the franchisor would create a “can of worms” and would be difficult if not impossible to fairly legislate. As stated it also overlooks where the franchisee terminates that the franchisee has a common law entitlement to claim loss or damage.

This paper does not allow for a full explanation or listing of all of the various matters which could go wrong or be very unfair if in the future there is legislation which provides for payment of goodwill [or other compensation] to franchisees where the franchisor terminates a franchise agreement prior to expiry of the term(s) on the grounds of breach(s) by the franchisee which either allowed for immediate termination or termination following reasonable notice to terminate requiring the breach(s) to be remedied. If the apparent developing politicians’ policy for goodwill upon early franchise termination continue to grow then if the participating politicians are serious there should be a public consultation prior to any legislation.
Time does not permit me to expand upon the reasons why there should not be early termination goodwill legislation or to give various further examples of the havoc and unfairness which would certainly be caused by such legislation. Hopefully this paper will sufficiently stimulate its readers to either convince any government that there should not be any payment of goodwill or compensation upon early termination of a franchise agreement or if there is to be that any legislation is fairly worded [ie fair to the franchisor and franchisee].

It is my understanding that there is a general appreciation by politicians that if there is not earlier termination and the franchise agreement naturally comes to an end [i.e. by expiry of a term without the franchisee exercising its right of renewal or expiry without a provision for a new term] then there should be no goodwill payable by the franchisor. In this respect:

1. My summary and view of the common law position is that if a franchise agreement [and most other contracts] expires without renewal or a provision for renewal then in the absence of any earlier promise by the franchisor for a new continuing franchise agreement or in the absence of any earlier conduct by the franchisor that indicated that there would be a new franchise arrangement, the franchisee cannot claim any goodwill or other compensation. By way of case law;

1.1 I refer to the “old faithful” case of “Ranoa Pty Ltd v BP Oil Distribution Ltd and Another [1989 Federal Court of Australia]” where the Federal Court on appeal was not prepared to interfere with the general law that “in the absence of any special covenant and any other applicable statute, upon the tenancy of the appellant coming to an end, the benefit of any goodwill would enure to the benefit of the first respondent as the lessor”. This was regardless that the appellant may regard this result as harsh.
1.2 I also refer to the case of “ACCC V Samton Holdings [2002 Federal Court of Australia]” where the ACCC took action against a landlord claiming that the landlord had engaged in unconscionable conduct contrary to Section 51AA of the then Trade Practices Act and the trial judge had held that the conduct of the respondents fell short, but not far short of being unconscionable. In this case it was accepted on both sides that the landlord was not obliged to offer the lessee a further term. I believe that a set of extreme circumstances may soon arise where a court may find the landlord’s conduct in not renewing a lease may be unconscionable.

2 In South Australia the above common law position was also the same for retail leases until the introduction of their Retail and Commercial Leases Act 1995 ["SA Act"]; I attach Subdivision 2 [Rules of conduct at end of term] of the SA Act where preference in some circumstances is to be accorded to the existing lessee if a lessor of premises in a retail shopping centre proposes to re-let the premises and an existing lessee whose lease is expiring wants to continue with a lease of the premises.

3 The lessor with any non complying lessee may not have to give any preference to an existing lessee. The lessor would then have other options including seeking earlier termination for the unremedied breach(s) or not agreeing to the renewal of a term [where the lessee has the right to renew] because there are unremedied breach(s).

4 I hold the view that there may be some circumstances where it is fair that a franchisee receives goodwill or compensation where a franchisor decides to grant another franchise at the expiry of the last term of a franchisee agreement and does not allow a fully complying existing franchisee the opportunity to take up that franchise. However to effectively and fairly legislate the goodwill or compensation is fraught with difficulties and an almost impossible task. I will
expand upon this later in this paper but first of all I wish to comment upon a hypothetical WA situation

5 I have referred to the WA situation as hypothetical because I do not know all of the facts of a recent WA franchisor/franchisee dispute [which has now been settled] where a head franchisor who operates a retail food franchise system had apparently refused to allow its existing WA franchise a new franchise agreement when the last franchise term expires. I do not know if the WA franchisee had fully complied with the franchise agreement. I understand that the head franchisor said that the franchisee was not a good fit and the head franchisor also expressed some concern that the franchisee during the term had a reasonably significant involvement in a competing business

6 If a franchisee has substantially observed the terms of the franchise agreement and is in full observance say during the last 18 months of the last term then if the head franchisor intends to continue franchising in the same territory should the head franchisor be obliged [and legislation will be necessary if this is to be so] to give the franchisee a first right of refusal for any new franchise agreement? Should the franchisor in these circumstances be made to offer the franchisee the terms and conditions upon which the head franchisor will be prepared to enter into a new franchise agreement? If these terms and conditions were rejected by the franchisee then should the franchisor not grant the franchise to any third party upon terms more favourable than offered to the franchisee without once again giving the franchisee a first right of refusal? If there was to be legislation along these lines then perhaps there could be consideration given to an exclusion of any actual or implied duty for the franchisor to act in good faith as the franchisor should offer its franchise agreement terms but should not then be required to negotiate them

7 I would not overlook the possibility of there being legislation to cover the above fully complying end of term franchisee being along the lines of Section 20D to J of the SA Act. However I
would require considerable amendment to these sections. It is not my intention in this paper to re-draft the SA Act sections to apply to a franchise situation

8 I remain concerned that it is not as straightforward as it may seem to fairly legislate to protect a franchisee in the above WA facts and circumstances. Each case should be determined upon its own facts and circumstances

9 There may be circumstances where a franchisee has not at all times acted in the best interests of the franchise system. My standard franchise agreements often contain the following wording or similar:

“The Franchisee shall actively promote the franchise business within the territory and exercise its best endeavours in the conduct of the franchise business to promote the mutual business interests of the Franchisor and the Franchisee”.

10 The existing common law would not allow the WA franchisee on the above qualified facts and circumstances the right to have the opportunity to agree the terms of a new franchise arrangement with the franchisor where the franchisor is continuing after the expiry date to franchise the same or similar business. As to whether there should be a first right of refusal situation or legislation along the lines as of the SA retail leasing legislation [albeit with significant modifications] remains a very contentious issue. In my view whilst conceptually a fully complying franchisee should be allowed some protection that the greatest difficulty is how legislation can be fair to the franchisor and the franchisee. As is the case with any legislation proposed for goodwill upon earlier termination by the franchisor, there should definitely be a public consultation process if this end of last term legislation is considered.
It is my view that:

1. There should not be any legislation for payment of goodwill by the franchisor to the franchisee where the franchisor has made an early termination of the franchise agreement on the grounds of breach by the franchisee; and

2. Where the term of a franchise agreement expires without renewal and the franchisor chooses not to grant a new franchise to the existing franchisee but to a third party then provided the existing franchisee had been given an opportunity to enter into a new franchise agreement [say some kind of first refusal] then there should not be compensation payable but any covenant not to compete [with the same or similar business] should not be applicable to the existing franchisee;

3. Where an existing franchisee properly terminates the franchise agreement on the grounds of material breach or repudiation by the franchisor then the existing franchisee;

3.1 should not be bound by any covenant not to compete and
3.2 should seek damages at common law for breach of the franchise agreement

There is another subject matter which has been subject to a list of discussion over the last month or so. If the franchise agreement is terminated by the franchisor prior to expiry then should any restrictive covenant be applicable to the franchisee? It has been suggested that as politicians may be so determined to seek compensation upon early termination that as a trade off this non applicability of the covenant not to compete should be offered regardless of the circumstances of the termination. I would strongly oppose any such suggestion as it would be detrimental to a well meaning and compliant franchisor and unnecessarily favourable to franchisee who has not complied with the franchise agreement.
FOOTNOTE: Richard Solomon has practised as a franchising lawyer for about 25 years. Richard and his partner Andrew Bampton conduct their law firm from 341 Halifax Street, Adelaide 5000 under the business name “Solomon Bampton Business & Franchising Lawyers”. They are assisted by Amanda Parkinson who specialises in liquor licensing and business matters.

Richard’s current franchisor clients include Gametraders, Sprint Auto Parts, Raine & Horne Real Estate, TriSkills, Stay Clean Hands, Carpet Clean Australia, Caffe Primo, Karl Chehade Dry Cleaners and Australian Paving Centre. Previously he helped to establish and acted for many years for Quenchy Crusta [now a division of Coca Cola Amatil] and Piccadilly Spring Water [now taken over by Neverfail]. He has also acted for franchisees of Wendys, Lenards, Bakers Delight, Brumbys, VIP Home Services, Beaumont Tiles, Gloria Jeans, Hire A Hubby, Mortgage Choice, Snap-on-Tools, Subway, Poolwerx, Dominos and The Coffee Club to name a few.

He is a member of the Law Society of South Australia Inc, the Franchise Council of Australia (“FCA”) and its national legal committee, the Intellectual Property Society of Australia and New Zealand and The Commercial Law Association. He has a wealth of experience acting for franchisors and franchisees over many years and has:

- attended most annual conventions of the FCA and is a member of their legal team;
- delivered many papers on franchising including to the Institute of Chartered Accountants (South Australian division), The Law Society of South Australia Inc, The Real Estate Institute of South Australia, the Builders Owners & Managers Association and the FCA;
- attended the International Franchise Association annual convention in San Diego, USA Feb-2009;
- often responded to media approaches for his comments on franchising issues which arise from time to time.
Attachment 1

Item 17C of the Franchising Code of Conduct
17C  Arrangements to apply at the end of the franchise agreement

17C.1 Details of the process that will apply in determining arrangements to apply at the end of the franchise agreement, including:

(a) whether the prospective franchisee will have any options to renew, or extend, or extend the scope of the franchise agreement or enter into a new franchise agreement and, if so, the processes the franchisors will use to determine whether to renew, extend, or extend the scope of the franchise agreement or enter into a new franchise agreement; and

(b) whether the prospective franchisee will be entitled to an exit payment at the end of the franchise agreement and, if so, how the exit payment will be determined or earned; and

(c) details of the arrangements that will apply to unsold stock, marketing material, equipment and other assets purchased when the franchise agreement was entered into, including:

(i) whether the franchisor will purchase the stock, marketing material, equipment and other assets; and

(ii) if the franchisor is to purchase the stock, marketing material, equipment and other assets — how prices will be determined; and

(d) whether the prospective franchisee will have the right to sell the business at the end of the franchise agreement; and

(e) if the prospective franchisee will have the right to sell the business at the end of the franchise agreement — whether the franchisor will have first right of refusal, and how market value will be determined; and

(f) whether the franchisor will consider any significant capital expenditure undertaken by the franchisee during the franchise agreement, in determining the arrangements to apply at the end of the franchise agreement.

17C.2 If a franchise agreement is entered into in a financial year commencing on 1 July 2011, 1 July 2012 or 1 July 2013 — details of whether the franchisor has, since 1 July 2010, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.

17C.3 If a franchise agreement is entered into in a financial year commencing after 1 July 2013 — details of whether the franchisor has, in the last 3 financial years, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.
Attachment 2

Subdivision 2 – Rules of Conduct at end of term

[SA Retail and Commercial Leases Act 1995]
Subdivision 2—Rules of conduct at end of term

20D—Preference to be accorded to existing lessee

(1) If a lessor of premises in a retail shopping centre proposes to re-let the premises, and an existing lessee wants a renewal or extension of the term, the lessor must give preference to the existing lessee over other possible lessees of the premises.

(2) The lessor is to presume that the existing lessee wants a renewal or extension of the term unless the lessee has notified the lessor in writing within 12 months before the end of the term that the lessee does not want a renewal or extension.

(3) However, the lessor is not obliged to prefer an existing lessee if—
   (a) the lessor reasonably wants to change the tenancy mix in the retail shopping centre; or
   (b) the existing lessee has been guilty of a substantial breach or persistent breaches of the lease; or
   (c) the lessor requires vacant possession of the premises for the purposes of demolition or substantial repairs or renovation; or
   (d) the lessor—
      (i) does not propose to re-let the premises within a period (the relevant period) of at least 6 months from the end of the term; and
      (ii) requires vacant possession of the premises for the lessor's own purposes during the relevant period (but not for the purpose of carrying on a business of the same kind as the business carried on by the lessee); or
   (e) the renewal or extension of the lease would substantially disadvantage the lessor; or
   (f) the lessee's right of preference is, in the circumstances of the case, excluded by regulation.

20E—Implementation of preferential right

(1) If an existing lessee of premises in a retail shopping centre has a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term, begin negotiations with the existing lessee for a renewal or extension of the lease.

(2) In particular, before agreeing to enter into a lease with another person, the lessor must—
   (a) make a written offer to renew or extend the existing lease on terms and conditions no less favourable to the lessee than those of the proposed new lease; and
   (b) provide the existing lessee with a copy of the lease or proposed lease (as renewed or extended) and the disclosure statement required in relation to it.

(3) When a lessor offers to renew or extend a retail shop lease under this section—
   (a) the offer remains open for a reasonable period (at least 10 days not including any Saturday, Sunday or other public holiday) after it is given or until its earlier acceptance; and
(b) the lessee must notify the lessor in writing within the time stated in the offer whether the lessee accepts the offer; and

(c) if notice is not given within that period, the offer lapses.

(4) The negotiations are to continue until—

(a) the lessee rejects an offer under this section (or the offer lapses); or

(b) the lessee indicates in writing that the lessee does not want to continue negotiations for a renewal or extension of the lease.

(5) The negotiations are to be conducted in good faith.

20F—Notice of absence of right of preference

(1) If a lessee of a retail shop in a retail shopping centre does not have a right of preference, the lessor must, at least 6 months (but not more than 12 months) before the end of the term of a lease, by written notice—

(a) notify the lessee of that fact; and

(b) state why there is in the circumstances of the case no right of preference.

(2) If the term of the lease is for 12 months or less, the periods referred to in subsection (1) are to be reduced by one-half.

Note—

1 See section 20D(3).

20G—Consequences of failing to begin negotiations or give notice

(1) If the lessor fails to negotiate or give a notification to the lessee as required by this Subdivision and the lessee by notice in writing to the lessor given before the end of the term of the lease requests an extension of the lease under this section, the term of the lease is extended until the end of six months after the lessor begins the required negotiations or gives the required notice.

(2) During an extension of the lease under subsection (1), the lessee may terminate the lease by giving not less than one month's notice of the termination in writing to the lessor.

(3) If the term of the lease is for 12 months or less, the period referred to in subsection (1) is to be reduced by one-half.

Subdivision 3—Remedies for non-compliance with rules

20H—Fair dealing between lessor and lessee in regard to renewal of lease

(1) If a lessor fails, in any respect, to comply with the rules prescribed in Subdivision 2 and the lessee has, in the circumstances of the case, been prejudiced by the failure, the lessee—

(a) may lodge a notice of dispute with the Commissioner setting out the lessee's grounds of complaint and applying for mediation of the dispute; or

(b) may apply to the Magistrates Court for orders resolving the dispute.

(2) If a notice of dispute is lodged with the Commissioner under subsection (1)(a)—

(a) the Commissioner (or a mediator appointed by the Commissioner) will attempt to resolve the dispute by conciliation; and
(b) if the dispute is not resolved by conciliation, the Commissioner must, on application by either party, refer the dispute to the Magistrates Court.

(3) On an application or reference under this section, the Court may make any order it considers appropriate to resolve the dispute.

(4) In particular, the Court may—
   
   (a) order the lessor to renew or extend the lease, or to enter into a new lease with the lessee, on terms and conditions approved by the Court (but not to the prejudice of the rights of a third party who has in good faith acquired an interest in the premises); or
   
   (b) order the lessor to pay compensation (not exceeding 6 months’ rent under the lease) to the lessee.

(5) A fee prescribed by regulation is payable on lodging of a notice or an application under this section.

Division 4—Other cases

201—Application of this Division

This Division applies to a retail shop lease other than one—

(a) to which Division 3 applies; or

(b) in relation to which a right or option to renew or extend the lease exists.

20J—Notice to lessee of lessor’s intentions at end of lease

(1) Not less than 6 months, and not more than 12 months, before the end of the term of a lease, the lessor must by written notice to the lessee either—

   (a) offer the lessee a renewal or extension of the lease on terms and conditions specified in the notice; or

   (b) inform the lessee that the lessor does not propose to offer a renewal or extension of the lease.

(2) A notice under subsection (1)(b) may include other information about the lessor’s intentions (for example, that the lessor intends to allow the lessee to remain in possession of the shop as a periodic tenant under a provision of the lease for holding over, or as a tenant at will).

(3) An offer under subsection (1) is not capable of revocation for one month after it is made.

(4) If the lessor fails to give a notification to the lessee as required by this section and the lessee by notice in writing to the lessor given before the end of the term of the lease requests an extension of the lease under this section, the term of the lease is extended until the end of six months after the lessor gives the required notice.

(5) During an extension of the lease under subsection (4), the lessee may terminate the lease by giving not less than one month’s notice of the termination in writing to the lessor.

(6) If the term of a retail shop lease is 12 months or less, this section applies to the lease as if the periods of 12 months and 6 months referred to in the above provisions were reduced by one-half.