



**the dtic**

Department:  
Trade, Industry and Competition  
REPUBLIC OF SOUTH AFRICA

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## **DISCUSSION DOCUMENT: PUBLICATION OF THE FRANCHISE ASSOCIATION OF SOUTH AFRICA (FASA) INDUSTRY CODE “THE CODE”**

### **1. INTRODUCTION**

- 1.1 The Department of Trade, Industry and Competition (**dtic**) is publishing this document so as to solicit the views on the code that has to be published in order to be considered for accreditation by the Minister as recommended by the National Consumer Commission (Commission) in terms of Section 82 of the Consumer Protection Act, 2008 (CPA).
- 1.2 The Code for the Franchise Industry of South Africa (FASA) together with the Franchise Industry Ombud (FIO) have been formulated after an extensive wider consultation conducted by the Commission in terms of Section 82 of the CPA.
- 1.3 Further, the Code and the FIO is consulted upon for the consideration to be accredited by the Minister in order to perform alternate dispute resolution (ADR) for disputes amongst Franchisees and Franchisors.
- 1.4 The discussion document is not a replacement for a legislative process and the normal public consultation process wherein the public comments or participates and it does not preclude the public from later commenting/ participating on the Code once published in the Government Gazette. The discussion document creates an informal platform for **the dtic** and the public to engage on possible areas for consideration.

- 1.5 Written input on the discussion document can be e-mailed to [SSasayi@thedtic.gov.za](mailto:SSasayi@thedtic.gov.za) by no later than 15 July 2020. The Code is herein accompanying as annexure A.

## **2. DISCUSSION**

- 2.1 FASA represents a significant number of franchise businesses and it is known by its members to have the requisite expertise to ensure fair market conduct as envisaged.
- 2.2 FASA founded in 1979, as of 2018 it had a membership of 184 members and has over the years built up an infrastructure that is capable of resolving disputes arising from franchise contractual disputes and deceptive market conduct. Their experience precedes the promulgation of the Act.
- 2.3 Further to this, FASA with its mediation intervention will assist the National Consumer Commission (NCC) in simplifying disputes and providing expertise should the need arise to conduct investigations. The Commission invariably needs the support of the franchise industry in dealing with matters of this nature.
- 2.4 The FASA and the Ombud scheme is a genuine attempt by the industry to customise the relevant provisions of the Act to ease the processes of application of the Act to consumer disputes on franchising services. The Code further intends to regularise interactions in the supplier value chain within the industry to ensure proactive compliance with the Act and set norms and standards of consumer protection within the franchising community.

**3.1 THE KEY FEATURES OF THE CODE AMONGST OTHERS INCLUDE:**

- 3.1.1 The composition and representation in the Board with directors from FASA, namely Franchisors and Franchisees with some role players within the franchise industry such as car dealers to ensure effective participation;
- 3.1.2 The funding of the FIO will be through contributions from the franchise industry. The contributions to be made by the industry will be done through a transparent process, which allow all affected stakeholders to comment and make representation before the Board within a reasonable commentary period of 2 months;
- 3.1.3 The transparency principles will follow the rules of governance as embodied in prescripts such as Companies Act, Act 71 of 2008, Kings Code etc. The Ombud term will be limited to serve two terms of not more than 5 years for each term;
- 3.1.4 The FIO as a non-profit company will be governed by the Companies Act, further by the provision of the Code and the Memorandum of incorporation;
- 3.1.5 The FIO will comply with the requirements of the King Code of Governance Principles, 2009 as amended from time to time;
- 3.1.6 The FIO will be reporting to the Commission on a monthly basis setting out the trends, statistics, challenges and successes further provide for the copies of the annual financial statements to the Commission to ensure continuous monitoring or review effectiveness of the Code;
- 3.1.7 The Code itself has a compulsory review mechanism, which the FIO is tasked to perform every three years after implementation to ascertain that the code is achieving its objects. Any amendments will be considered by the Board and be brought to the attention of the Commission, who will in turn submit to the Minister for further processing;

- 3.1.8 The Code provides for the FIO to promote awareness of the Code together with the functions of the FIO, this function is vital to ensure industry buy in and for the success of the implementation of the code; and
- 3.1.9 The Code affords for rigorous mechanisms to deal with complaints and allows FIO to perform its alternative dispute resolution function in line with the requirements of the CPA.
- 3.1.10 In view of the above, it is requested that the Code be published in **the dtic** website to solicit inputs.
- 3.1.11 The roadmap to follow is that following this consultation process, the codes will be reviewed and will be published in the Gazette for formal consultation, following which they will be submitted for final consideration by Minister.
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**ANNEXURE A**

**INDUSTRY CODE FOR THE FRANCHISE  
INDUSTRY OF SOUTH AFRICA**

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## 1. PREAMBLE

- (1) This Code and the office of the Franchise Industry Ombud has been formulated and accredited in accordance with section 82 of the Consumer Protection Act 2008 (Act No. 68 of 2008) and this Code is an Industry Code as defined in the Act.
- (2) This Code and the Franchise Industry Ombud has been established to provide a mechanism of alternate dispute resolution for disputes amongst Franchisees and Franchisors.

## PART A

## 2. INTERPRETATION

- (1) This Code must be interpreted in a manner which gives effect to the CPA and, in particular, the purposes set out in section 3 of the CPA.
- (2) Any term not defined in this Code will carry the meaning given to that term in the CPA, unless the context indicates otherwise.
- (3) All references to a singular noun will be deemed to include the plural and *vice versa*.
- (4) All section headings and arrangements contained in this Code are intended for reference purposes only and will not affect or be taken into account in the interpretation of any of the paragraphs or sections to which they relate.
- (5) This Code does not amend or repeal any right which a Consumer may have in law.
- (6) In the event of any conflict between this Code and the CPA or any other law, the CPA or such other law shall prevail over the provisions of this Code.

## 3. DEFINITIONS

In this Code, unless inconsistent or otherwise indicated by the context, the following words and expressions will have the meanings set out below:

- (1) “**Board**” means the board of directors appointed to the FIO in terms of the Memorandum of Incorporation of the FIO;
- (2) “**Day**” means any calendar day other than Saturday, Sunday or public holidays in the Republic of South Africa;
- (3) “**Code**” means this Industry Code accredited in terms of the CPA for the franchise industry, as amended from time to time;

- (4) “**Commission**” means the National Consumer Commission established in terms of the CPA;
- (5) “**Commissioner**” means the person appointed as National Consumer Commissioner in terms of section 87 of the CPA;
- (6) “**Complainant**” means a person or entity who has lodged a Complaint with the FIO;
- (7) “**Complaint**” means a complaint as described in section 18 of this Code;
- (8) “**Constitution**” means the Constitution of the Republic of South Africa, Act 108 of 1996;
- (9) “**Consumer**” carries the meaning set out in section 1 of the CPA;
- (10) “**CPA**” means the Consumer Protection Act 68 of 2008 as amended from time to time;
- (11) “**CPA Regulations**” means the regulations published under Government Notice R293 in Government Gazette 34180 of 1 April 2011, as amended from time to time;
- (12) “**Disclosure Document**” means the document referred to in regulation 3 of the CPA Regulations;
- (13) “**Dispute**” means the subject matter of a Complaint;
- (14) “**FASA**” means the Franchise Association of South Africa, a non-profit company incorporated in accordance with the company laws of South Africa and having registration number 1991/05946/08;
- (15) “**FIO**” means the Franchise Industry Ombud, an ombud scheme created in accordance with and accredited in terms of section 82(6) of the CPA;
- (16) “**Franchise Agreement**” carries the meaning set out in section 1 of the CPA and includes any agreement as defined in section 1 of the CPA which is supplementary to a Franchise Agreement;
- (17) “**Franchisee**” means any party or prospective party to a Franchise Agreement who, in terms of the Franchise Agreement, is entitled to or would become entitled to carry on business under a system or marketing plan substantially determined or controlled by the Franchisor or an associate of the Franchisor;
- (18) “**Franchisor**” means the counterparty to a Franchise Agreement with a Franchisee;
- (19) “**Goods**” carries the meaning set out in section 1 of the CPA;
- (20) “**Industry Code**” is a code within the meaning of section 82 of the CPA;
- (21) “**Memorandum of Incorporation**” means the memorandum of incorporation of the FIO in terms of the Companies Act 71 of 2008;



- (22) “**Minister**” means the Minister defined in section 1 of the CPA;
- (23) “**Ombud**” means the person appointed as ombud in terms of section 11(1) of this Code;
- (24) “**Parties**” means the parties to a Complaint;
- (25) “**Respondent**” means any person or entity about whom a Complaint is lodged with the FIO;
- (26) “**Response**” means the response provided by a Respondent in terms of section 21 of this Code; and
- (27) “**Services**” carries the meaning set out in section 1 of the CPA.

#### **4. APPLICATION**

This Code will take effect on the date determined by the Minister.

### **PART B**

#### **5. CONSTITUTION OF THE BOARD OF THE FIO**

- (1) The Board will consist of at least four and not more than eight persons appointed in accordance with the Memorandum of Incorporation and the Companies Act 71 of 2008.
- (2) FASA may appoint two persons to serve on the Board.
- (3) Franchisors as a group may nominate and appoint three persons to serve on the Board.
- (4) Franchisees as a group, excluding prospective parties to Franchise Agreements, may nominate and appoint three persons to serve on the Board.
- (5) Any Franchisor or Franchisee (excluding prospective parties to a Franchise Agreement) who has paid to the FIO all levies owed to it in terms of section 10(1)(a) may attend the annual general meeting of the FIO and, at such meeting, nominate and vote for a director as contemplated in subsections (3) and (4).
- (6) Any decision of the Board will not be invalid or ineffective as a result of such decision having been taken while a vacancy existed on the Board.

#### **6. POWERS, DUTIES AND FUNCTIONS OF THE BOARD**

- (1) The Board must:
  - (a) determine the Ombud's remuneration, allowances, benefits and other terms and conditions of employment;
  - (b) determine the level of any contribution which is to be levied on Franchisees or Franchisors in terms of section 10(1)(a) of this Code;
  - (c) determine the financial year for the FIO;
  - (d) appoint an accounting officer and auditor;
  - (e) approve the annual financial statements of the FIO;
  - (f) consider and approve, in advance of each financial year, an operating budget for the FIO for the following financial year; and
  - (g) ensure that the FIO is sufficiently resourced to perform the functions in this Code.
- (2) In determining the contribution referred to in section 10(1)(a) of this Code, the Board must have regard to the following:
  - (a) the number of Franchisees and Franchisors in the market;
  - (b) the relative market share of Franchisees and Franchisors in the market;
  - (c) the nature of any Franchisee and Franchisor including the sector in which the Franchisor or Franchisee conducts business;
  - (d) the annual turnover of Franchisees and Franchisors;
  - (e) the length of time for which the Franchisor or Franchisee has conducted business under the franchise system;
  - (f) the number of Complaints which are anticipated in any forthcoming year;
  - (g) the number of Complaints received concerning a particular Franchisor or Franchisee in the previous year;
  - (h) the anticipated operational costs of the FIO for any forthcoming year; and
  - (i) any other factor.

## **7. THE FIO**

- (1) The FIO is a non-profit company as defined in the Companies Act 71 of 2008 established in accordance with Schedule 1 of this Code.

- (2) The FIO must exercise the powers and discharge the functions assigned to it in terms of this Code.
- (3) The FIO will be governed by the Board in accordance with the provisions of this Code and the Memorandum of Incorporation.
- (4) The objective of the FIO is to create the infrastructure and administrative capacity for and to facilitate and administer the resolution of Disputes as provided for in this Code.

## **8. THE FUNCTIONS OF THE FIO**

- (1) The FIO must carry out the functions and exercise the powers assigned to it by or in terms of this Code.
- (2) All employees and officers of the FIO must, in the discharge of their functions, act independently, objectively, openly and honestly.
- (3) The FIO must:
  - (a) exercise the functions assigned to it under this Code in the most cost-efficient and effective manner and in accordance with the values and principles in section 195 of the Constitution;
  - (b) adopt and implement a system for receiving, tracking, processing and reporting on Complaints in accordance with this Code;
  - (c) from time to time recommend to the Ombud time periods which will be applicable to all the steps contemplated in Part C of this Code, in so far as such time periods are not already prescribed;
  - (d) comply with all time periods set by the Ombud in terms of section 12(4);
  - (e) provide Parties, on request, with accurate updates as to the status of Complaints to which they are party;
  - (f) deposit all funds received by it in an account opened with a bank registered under the Banks Act 94 of 1990;
  - (g) comply with the requirements of the King Code of Governance Principles 2009 as updated or amended from time to time;
  - (h) comply with all applicable legislative and regulatory requirements;
  - (i) use all funds received for the discharge of expenses incurred:
    - (i) in fulfilling all legislative and regulatory requirements applicable to the FIO;and

- (ii) in the performance of its duties;
- (j) maintain performance measurement criteria in terms of which the performance by the FIO of its duties in terms of this Code can be objectively assessed;
- (k) use the criteria in subsection (j) to assess the performance of the FIO on at least an annual basis;
- (l) adopt a conflict of interest policy which includes at least the following:
  - (i) definitions of what constitutes a conflict of interest;
  - (ii) provisions for identifying, avoiding and mitigating conflicts of interest;
  - (iii) procedures for the disclosing and recording of interests which any employee of the FIO may hold which has the potential to influence the objectivity of the FIO in the performance of its functions; and
  - (iv) provisions for the giving, receiving and registration of gifts, gratuities and other benefits;
- (m) produce an annual report summarising the activities of the FIO in the year under review including:
  - (i) the number of Complaints received;
  - (ii) the number of Complaints resolved;
  - (iii) the average time taken for the resolution of Complaints;
  - (iv) the number of Complaints rejected;
  - (v) the number of Complaints settled by the Parties;
  - (vi) the number of Complaints resolved by the Ombud;
  - (vii) the number of Complaints closed within the meaning of section 70(2) of the CPA;
  - (viii) a summary of the Disputes and the numbers of each kind or category of Dispute;
  - (ix) the number and types of contraventions of the CPA determined to have taken place;
  - (x) the sources of funding received by the FIO;
  - (xi) the operating budget of the FIO for the previous and forthcoming years;

- (xii) a summary of the expenditure of the FIO for the year under review relative to the budget;
  - (xiii) the previous annual financial statements as approved by the auditors; and
  - (xiv) the outcome of the most recent performance assessment of the FIO;
- (n) determine the manner in which any contribution or fee set by the Board is to be collected and paid;
- (o) ensure that annual financial statements consisting of an income and expenditure account and balance sheet for each financial year is prepared by a firm of auditors appointed by the Board within such time following the end of the financial year as may be determined by the Board;
- (p) provide the Board with copies of the annual financial statements within seven days of their completion; and
- (q) ensure that all expenditure remains within the limits of any budget approved by the Board from time to time.
- (4) The FIO may:
- (a) invest funds which are not required for immediate use;
  - (b) open bank and other accounts;
  - (c) make recommendations to the Commission regarding amendments to the Code and Memorandum of Incorporation;
  - (d) engage the services of an interpreter where required for the expeditious and just resolution of a Dispute;
  - (e) take legal action for the recovery of any contribution or money owing to the FIO;
  - (f) promote awareness of this Code and of the FIO and its functions;
  - (g) enter into an agreement with any person for the performance of any specific act or function or the rendering of specific services;
  - (h) liaise with any consumer protection authority, franchise industry association or regulatory authority on matters of common interest and, without limiting the generality of this power, may monitor, require necessary information from, exchange information with, and receive information from, any such authority or association pertaining to –
    - (i) matters of common interest; or
    - (ii) a specific Complaint or Dispute;

- (i) negotiate agreements with any regulatory authority -
  - (i) to co-ordinate and harmonise the exercise of jurisdiction over matters within the franchise sector;
  - (ii) to ensure the consistent application of the principles of this Code and the CPA;
  - (iii) participate in the proceedings of any regulatory authority; and
  - (iv) advise or receive advice from any regulatory authority;
- (j) hire, purchase or otherwise acquire property, and let, sell or otherwise dispose of property so purchased or acquired;
- (k) insure the FIO against any loss, damage, risk or liability;
- (l) employ persons to assist the Ombud and perform the functions of the FIO;
- (m) determine their terms of appointment and, subject to such conditions as may be determined by the Ombud, delegate or assign to any employee any function vesting in the Ombud;
- (n) obtain such professional advice as may reasonably be required;
- (o) report, in any manner it considers convenient, summaries of findings which, in the opinion of the FIO, would be of interest to Franchisees or Franchisors; and
- (p) in general, do anything which is necessary or expedient for the achievement of the objectives of the FIO.

## **9. THE ACCOUNTING AUTHORITY OF THE FIO**

The accounting authority is responsible for the due, proper and diligent implementation of financial management systems and controls including ensuring that proper accounting records are kept itemising:

- (1) all income and expenditure of the FIO;
- (2) all revenue collected by the FIO; and
- (3) all assets and the discharge of all liabilities of the FIO.

## **10. FUNDING OF THE FIO**

- (1) The FIO shall be financed from:
  - (a) contributions levied on Franchisees and Franchisors;

- (b) income derived from the investment or deposit of surplus money; and
  - (c) money accruing from any other source.
- (2) Any contribution which is to be imposed on Franchisees or Franchisors in terms of subsection (1)(a):
- (a) shall be determined by the Board, in consultation with any franchise industry body representing five or more Franchisors and/or Franchisees from five or more franchises;
  - (b) may be expressed as a formula, the outcome of which varies between different Franchisees and Franchisors; and
  - (c) must be published on the FIO website at least two months in advance of the date on which such contribution will become payable.
- (3) The Board must provide Franchisees and Franchisors with an effective opportunity to comment on and make representations in regard to any contribution which the Board intends imposing on any person in terms of section 10(1)(a).
- (4) Funds standing to the credit of the FIO at the end of any financial year, as well as any invested funds, must be carried forward to the following financial year.

## 11. THE OMBUD

- (1) The Board must, by way of a majority vote, appoint from amongst those persons nominated in terms of subsections (2) and (3) a suitably qualified person in terms of subsection (9) as Ombud in accordance with this section.
- (2) The Board must advertise the position of Ombud and invite nominations and applications for the position of Ombud in any manner it considers fit, provided that advertisements inviting persons to apply for the position of Ombud must be placed in at least two national newspapers as well as the Government Gazette.
- (3) The Board must evaluate, consider and shortlist the applicants and nominees for the position of Ombud in any manner it considers fit and may constitute a committee of persons nominated by it for this purpose.
- (4) The Ombud will be appointed for a term not exceeding five years.
- (5) A person may be reappointed as Ombud at any time before or after the expiry of his or her term as Ombud.
- (6) The Ombud may be removed from office only:
  - (a) in the event of incapacity, gross incompetence or gross misconduct; and

- (b) in terms of a fair administrative process conducted by a person appointed by the Minister of Trade and Industry for that purpose.
- (7) If the Ombud is, for any reason, whether through absence or otherwise, unable to perform his or her functions the Board must appoint a person to temporarily perform the functions of the Ombud.
- (8) When appointing a temporary Ombud in terms of subsection (7) or extending the term of an Ombud following the expiry of an initial term, the Board need not follow the provisions of subsections (2) and (3).
- (9) Every Ombud appointed by the Board must:
  - (a) be a fit and proper person;
  - (b) be a South African citizen;
  - (c) have at least ten years of experience in dispute resolution;
  - (d) be legally qualified;
  - (e) not have been convicted of any offence involving dishonesty;
  - (f) not be an unrehabilitated insolvent; and
  - (g) not hold any direct or indirect interest in any franchise after the date of her or his appointment as Ombud.

## **12. POWERS, DUTIES AND FUNCTIONS OF THE OMBUD**

- (1) The Ombud must exercise the functions assigned to her or him under this Code in the most cost-efficient and effective manner and in accordance with the values and principles in section 195 of the Constitution.
- (2) The Ombud must act independently, objectively, openly and honestly.
- (3) The Ombud must declare in writing to the Board any actual or perceived conflict of interest which may exist or arise after or at the time of his or her appointment, including, but not limited to, instances where a family member is in the permanent employ of, or has a financial interest in a franchise.
- (4) The Ombud bears final responsibility for the effective resolution of all Complaints and the formulation and approval of the FIO's dispute resolution and complaints-handling procedures, including approval of any time periods for the resolution and handling of disputes recommended to him or her by the Board in terms of section 8(3)(c).
- (5) The Ombud must comply with all time periods applicable to him or her.



- (6) In resolving Disputes the Ombud may have regard to international developments in the field of consumer protection or franchise law.

### **13. THE INDEPENDENCE OF THE OMBUD AND THE FIO**

The Ombud and any other employee of the FIO may not:

- (1) engage in any activity that may undermine the integrity or independence of the FIO;
- (2) participate in the resolution of any Dispute concerning a matter in which that person has any direct or indirect financial interest or any personal interest;
- (3) make private use of or profit from any information obtained as a result of performing official functions within the FIO; or
- (4) divulge any information referred to in subsection (3) to any third party, except as required as part of that person's official function within the FIO.

### **14. LIABILITY AND COMPELLABILITY**

- (1) The FIO and its employees, including the Ombud and the Board, will not be liable for any losses or damage suffered by any person or entity as a result of any action taken in good faith in terms of this Code.
- (2) Save where a court orders otherwise, no person or entity discharging any function assigned to them under this Code in relation to the resolution of a Dispute may be subpoenaed to testify in any proceedings in relation to the subject matter of the Dispute.

### **15. COOPERATION WITH THE FIO**

- (1) Parties must provide the FIO with any relevant information within their possession which is requested by the FIO and which is reasonably required by the FIO for the purposes of resolving a Dispute.
- (2) No person may influence or seek to influence, interfere with or attempt to interfere with, obstruct or attempt to obstruct, or in any other way hamper or attempt to hamper the FIO in the exercise and discharge of its functions.

## **PART C**

### **16. JURISDICTION**

- (1) The FIO has jurisdiction over the following Disputes:

- (a) any Dispute by a Franchisor or a Franchisee and arising from:
    - (i) a Franchise Agreement or Disclosure Document, including Disputes relating to the interpretation, breach, cancellation and termination of a Franchise Agreement and payments of money which are alleged to be owing in terms of or arising from a Franchise Agreement;
    - (ii) the supply of any Goods or Services or failure to supply Goods or Service in terms of a Franchise Agreement; or
    - (iii) any solicitation of any offer to enter into a Franchise Agreement;
  - (b) any Dispute concerning the applicability or interpretation of this Code;
  - (c) any Dispute relating to the jurisdiction of the FIO; and
  - (d) any Dispute which would otherwise be outside of the jurisdiction of the FIO where the Parties agree to submit a Dispute to the FIO for resolution and the FIO agrees to take cognisance of the Dispute.
- (2) The FIO does not have jurisdiction over any Dispute which falls within the jurisdiction of an accredited industry ombud as defined in section 82(6) of the CPA.
- (3) A Complainant may:
- (a) seek damages in any Complaint; or
  - (b) reserve a request for damages for another forum notwithstanding that the basis for any such alleged damages arises from the facts and/or the relief set out in a Complaint.
- (4) In the event of any uncertainty as to whether or not a Complainant seeks damages in a Complaint, the FIO may seek clarification from the Complainant in this regard.
- (5) Where a Franchise Agreement contains a dispute resolution clause which provides for dispute resolution other than in terms of this Code, that clause shall govern the resolution of any dispute falling within the terms of such clause provided that:
- (a) the clause complies with and gives effect to the CPA; and
  - (b) the applicability of the CPA is not excluded from the resolution of the dispute.
- (6) Where a dispute which falls within subsection (1) is referred by any party to that dispute to a court or to any dispute resolution process, tribunal or forum other than the FIO, any party to that dispute may notify the FIO of the fact of the dispute and may include in that notification a summary of the dispute, the names and contact details of all parties to the dispute and the details of the court, dispute resolution agent, tribunal or forum to which the dispute has been referred.

- (7) Any party to a dispute referred to in subsection (5) must provide the FIO, on request, with the name and contact details of the dispute resolution agent to whom the dispute has been referred, copies of all pleadings relating to the dispute and a copy of any award given in resolution of the dispute.

## **17. COMPLAINTS PROCESS**

- (1) The FIO and the Ombud must make every reasonable effort to resolve all Complaints informally, cost-effectively and expeditiously.
- (2) The FIO and the Ombud may, at any stage in the resolution of a Dispute, consult with or take advice from any person whom the FIO or Ombud reasonably considers to be suitably qualified to assist it in resolving the Dispute.
- (3) All communications between Parties and the FIO, including the Ombud, in regard to any Complaint or Dispute must be in writing unless the FIO or Ombud directs otherwise.
- (4) Notwithstanding any other provision of this Part C the Ombud may, at the request of a Party, receive information or documents from a Party on a confidential basis and may treat such information or documentation confidentially, and the Ombud will not be disqualified from facilitating the resolution of a dispute merely because he or she has received information from a Party which has not been disclosed to other affected Parties.
- (5) The law of prescription and the law relating to matters which are pending or have already been adjudicated on in another forum or before any person shall apply to disputes in terms of this Code.
- (6) All information (including settlement offers) provided by Parties pursuant to Part C of this Code will be deemed to have been provided on a confidential and without prejudice basis and may not be disclosed to any other party, including any member of the media, or used in any subsequent arbitration or litigation without the prior consent of the Party who provided such information, save to the extent that disclosure may be required in order to protect or pursue a legal right or to enforce or challenge a recommendation of the Ombud which has been accepted by the Parties.
- (7) No Party shall disclose the nature of any Dispute or Complaint to the media from the date on which the Complaint is filed with the FIO to the date on which the Complaint is resolved, withdrawn or closed.
- (8) Notwithstanding anything contained in this section, the FIO and the Ombud may report contraventions of the CPA to FASA, any franchise industry body and the Commission.

## **18. FILING A COMPLAINT**

- (1) Any Franchisor or Franchisee who has any dispute concerning a matter in section 16(1) of this Code may file a Complaint with the FIO.
- (2) Complaints must be submitted using the form prescribed by the FIO from time to time, which form will be published on the FIO's website, and must be delivered to the FIO at the address or contact details provided by the FIO.
- (3) Every Complaint must:
  - (a) identify the Complainant and provide contact details, including a telephone number and physical address, of the Complainant;
  - (b) identify the party against whom relief is sought, together with all known contact information of that party;
  - (c) identify the relief sought by the Complainant;
  - (d) set out the basis for any urgency in the event that the Complainant contends that the Complaint should be dealt with on an expedited or urgent basis, as well as the time periods which the Complainant seeks to have applied to the resolution of the Dispute;
  - (e) contain a summary of the facts giving rise to the Dispute and the reasons why the relief sought is considered by the Complainant to be appropriate in the circumstances;
  - (f) include copies of all documents on which reliance is placed for the relief sought including, if applicable, any Franchise Agreement or Disclosure Document;
  - (g) contain a statement by the Complainant that the Respondent has been notified of the Dispute and that the Dispute has not been resolved within a period of ten days or, alternatively, an explanation as to why such a statement cannot be made; and
  - (h) contain any other information which the Complainant considers necessary for a proper resolution of the Complaint.

## **19. RECEIPT OF COMPLAINTS**

- (1) The FIO must:
  - (a) assign each Complaint received by it with a unique identifying number or code; and
  - (b) acknowledge receipt of each Complaint and provide the Complainant with the number or code assigned to the Complaint.
- (2) The Ombud may reject any Complaint which:

- (a) lacks any of the information set out in section 18(3) above;
  - (b) does not fall within section 16(1) above;
  - (c) on the facts set out in the Complaint does not disclose an entitlement to the relief sought by the Complainant; or
  - (d) appears to be frivolous or vexatious.
- (3) Any Complaint not rejected in terms of subsection (2) is accepted and must be further dealt with in terms of section 20 of this Code.
- (4) When a Complaint is rejected in terms of subsection (2) the FIO must:
- (a) advise the Complainant of the rejection of the Complaint and the reasons therefor; and
  - (b) afford the Complainant an opportunity to supplement the Complaint or to make submissions directed at persuading the Ombud to accept the Complaint.
- (5) If a Complainant fails to respond within the period of time afforded by the FIO in terms of subsection (4)(b), the Complaint will be deemed to be closed.
- (6) If a Complainant responds within the period of time afforded by the FIO in terms of subsection (4)(b):
- (a) the Ombud must, after considering any response received, either finally reject the Complaint or accept the Complaint and proceed in accordance with section 20 below; and
  - (b) the FIO must advise the Complainant of the decision taken by the Ombud in terms of subsection (6)(a).

## **20. NOTIFICATION OF RESPONDENT**

The FIO must notify the Respondent of every Complaint not rejected and:

- (1) provide the Respondent with a copy of the Complaint;
- (2) provide the Respondent with a copy of any supplement to a Complaint or submissions made by a Complainant in terms of section 19(4) above;
- (3) notify the Respondent that they have 15 days, or such longer period as the Ombud might afford, within which to submit a Response.

## 21. THE RESPONSE TO A COMPLAINT

- (1) A Response to a Complaint may include any facts, documents or submissions which the Respondent considers necessary for the resolution of the Dispute including, but not limited to:
  - (a) a statement as to whether or not the Respondent agrees with the facts as set out in the Complaint and, if not, what the Respondent considers the correct facts to be;
  - (b) any additional facts not raised by the Complainant but considered by the Respondent to be relevant to the Dispute;
  - (c) a statement by the Respondent as to whether the Claimant is entitled to the relief sought and, if not, the reasons for denying that the Claimant is entitled to such relief;
  - (d) any steps which the Respondent is willing to take, offer or implement, if any, in resolution of the Complaint;
  - (e) a summary of any steps already taken or implemented by the Respondent in response to the Complaint;
  - (f) details concerning any previous attempts made by the Respondent to resolve the Dispute and the details, if any, of why resolution could not be achieved; and
  - (g) details of any enquiries or investigations undertaken by the Respondent pursuant to the Complaint.
- (2) A Respondent may, in any Response:
  - (a) contend that the Complaint has prescribed;
  - (b) object to the jurisdiction of the FIO; or
  - (c) contend that the Dispute has been determined by another forum or is pending before another forum.
- (3) If, in the light of the Response, the Ombud is of the view that the Complaint should be dismissed:
  - (a) on any ground referred to in subsection (2);
  - (b) on the grounds that the Complainant does not appear to be entitled to the relief sought;
  - (c) because a proper case has not been made out for the relief sought; or
  - (d) on any other ground

the FIO must advise the Parties of the Ombud's view and the reasons for that view and must further advise the Complainant that unless he, she or it is able to provide further information within ten days or such further period as the Ombud may allow to counter the view taken by the Ombud, the Complaint will be closed.

- (4) If no further information is provided in terms of subsection (3) the Complaint will be deemed to be closed and the FIO is to advise the Parties accordingly.
- (5) If further information is provided in terms of subsection (3), the Ombud must, after having considered such information, either:
  - (a) close the Complaint; or
  - (b) take any of the steps in section 22 below.

## **22. RESOLUTION OF DISPUTES**

- (1) The Ombud may, after receipt of a Response, request from any Party any document, information or record which he or she reasonably considers would be of assistance in resolving the Dispute.
- (2) The Ombud may ask any person who he or she reasonably considers to have information which may be assistance in resolving the Dispute to provide such information in writing or orally.
- (3) If oral evidence is, in the opinion of the Ombud, necessary:
  - (a) the FIO shall request the parties to attend a hearing on not less than 10 days prior notice; and
  - (b) any Party shall, with the permission of the Ombud, be entitled to be represented by any person of their choice, including a legal representative, and to make submissions and cross examine the witnesses at the hearing.
- (4) The Ombud may seek clarification or comment from any Party on any information received by the Ombud in terms of this section.
- (5) The Ombud may at any stage provide the Parties with his or her view of the Dispute and recommend a basis on which he or she proposes the Dispute be resolved.
- (6) If the Parties accept the recommendation of the Ombud, that recommendation will be recorded in writing by the Ombud and the Parties will be required to implement the terms as recorded.
- (7) If the Parties are unwilling to accept the recommendation of the Ombud, the Ombud may close the Complaint as contemplated in section 70(2) of the CPA or take any other step provided for in this Code.

### **23. TERMINATION BY THE OMBUD**

In addition to the Ombud's power to close a Complaint in terms of this Code, the Ombud may at any time close a Complaint within the meaning of section 70(2) of the CPA if:

- (1) the Ombud reasonably believes that the Complaint is being pursued in an unreasonable, frivolous, vexatious, offensive, threatening or abusive manner;
- (2) the Complainant fails to co-operate with the FIO or the Ombud;
- (3) the Complaint does not allege any facts which, if true, would constitute grounds for the relief sought;
- (4) the Complaint lacks substantive merit;
- (5) the Complaint has previously served before the Ombud; or
- (6) the Complaint is referred to any court or any other forum or tribunal or dispute resolution process.

### **24. WITHDRAWAL OF COMPLAINTS**

- (1) If the Parties resolve a Dispute at any time after a Complaint has been filed, the Complainant must, within five days of resolving the Complaint, notify the FIO that the Complaint has been resolved.
- (2) A Complainant may withdraw a Complaint at any time, on written notice to the other Parties and the FIO.

### **25. EXTENSION OF TIME**

- (1) Any deadline referred to in this part of the Code may be extended either before or after the expiry of such deadline either:
  - (a) by agreement between the Parties and with the consent of the Ombud; or
  - (b) by the Ombud on the application of any Party.
- (2) Unless a deadline is extended in the manner provided for in subsection (1) a Party will be barred from taking any step after the time permitted for such step in this part of the Code.

## **PART D**



## 26. REVIEWS OF THIS CODE

- (1) The FIO must review this Code and its implementation for the purposes of ascertaining whether any amendments should be effected to the Code and whether the Code is achieving its identified objectives and is operating effectively and as intended.
- (2) The first such review contemplated in subsection (1) shall take place not less than three years after the date on which this Code takes effect and subsequent reviews must be conducted not later than three years after any prior review.
- (3) The FIO shall notify the Commission, FASA and any franchise industry association of any intended review of the Code and of any proposed amendments to the Code and in such notice shall invite written representations to be made to it in regard to that review or any proposed amendments within a period of not less than sixty days.
- (4) In addition to the notice contemplated in subsection (3), the FIO must give notice generally of any intended review of the Code or any proposed amendments to the Code and invite written representations to be made to it concerning such review or amendments within a period of not less than sixty days.
- (5) The notice required by subsection (4) must be published in the Government Gazette, at least two national newspapers and two other publications which might reasonably be expected to be read by Franchisees and Franchisors.
- (6) The FIO may take any additional steps it considers appropriate to bring a review or proposed amendments to the Code to the attention of Franchisees and Franchisors and to receive and consider representations made pursuant to such notices.
- (7) In undertaking a review of this Code, the FIO must consider all representations received by it within any allowed comment period, all annual reports produced since any prior review of the Code, the report of the prior review of the Code and any other information which the FIO considers relevant.
- (8) The FIO must compile a report of its review which report must summarise all representations received by it and all information considered by it in performing the review, as well as its recommendations in regard to the representations received and the reasons for such recommendations.
- (9) A copy of the report referred to in subsection (8) must be provided to the Board and to the Commission together with any applicable recommendation in terms of section 82(3) of the CPA.
- (10) The Commission shall be entitled to request and receive from the FIO a copy of any written representation made to the FIO pursuant to this section.
- (11) Notwithstanding any other provision of this section, any person may make written representations to the FIO at any time proposing amendments to or additions to this

Code, although the FIO will not be obliged to consider any such representation prior to any review of this Code.

## **27. INDUSTRY AWARENESS**

Franchisors are required to:

- (1) include in all Disclosure Documents and Franchise Agreements provided to Franchisees after this Code takes effect, a notice stating that they are bound by the provisions of this Code and undertaking to comply with the provisions of this Code;
- (2) include in all Disclosure Documents and Franchise Agreements provided to Franchisees after this Code takes effect, a notice advising Franchisees that they are entitled to refer any Dispute to the FIO, and providing the Franchisee with the contact details of the FIO; and
- (3) ensure that a copy of this Code is made available on request to any potential Franchisee from whom an offer to enter into a Franchise Agreement is being solicited and to any Franchisee with whom a Franchise Agreement has been concluded.

## **28. REPORTING TO THE COMMISSION**

In addition to any other reports or information which the FIO is required to provide to the Commission in terms of this Code, the FIO is required to:

- (1) provide copies of the annual financial statements of the FIO to the Commission and the Minister on request;
- (2) provide the Commission with any information which the Commission may request and which is reasonably related to the exercise of the Commission's functions in terms of section 82(7) of the CPA.

## SCHEDULE 1

### THE ESTABLISHMENT OF THE FIO

- (1) FASA, has caused to be incorporated or has acquired an incorporated entity which will be known as the Franchise Industry Ombud or the FIO.
- (2) FASA has overseen the drafting of a Memorandum of Incorporation for the FIO which accords with the provisions of the Companies Act of 2008 and provides for the constitution and governance of the FIO in the manner provided for in this Code. The Memorandum of Incorporation has been provided to the Commission with this Code and the Commission will be asked to publish the Memorandum of Incorporation with this Code, when soliciting comment on the Code, or to make it available to those who wish to inspect it.
- (3) FASA has appointed four persons to serve as the initial directors of the FIO ('the Interim Board').
- (4) Following the accreditation of this Code by the Minister, the Interim Board must:
  - (a) as soon as reasonably possible, take all reasonable and necessary steps to bring about the constitution of a Board in accordance with section 5 of this Code;
  - (b) ensure that the FIO complies with all legislative requirements pending the constitution of the Board in terms of section 5 of the Code; and
  - (c) take all reasonable and necessary steps to fulfil the requirements of subsections 4(a) and (b) including facilitating, through FASA or by any other means, nominations for and elections to the Board by Franchisors and Franchisees as provided for in section 5.
- (5) Any member of the Interim Board not appointed to the Board must resign as a director upon the constitution of the Board.
- (6) In order to fund the FIO, FASA will loan to the FIO, interest-free, such operating capital as the Interim Board may request and as FASA may in its discretion agree to advance, in tranches and at dates determined by FASA. The Interim Board must agree in writing with FASA to repayment terms for such loans, which agreements will bind the FIO. FASA will not insist on any repayment of any loan made to the FIO under this subclause until a date not earlier than one year after the constitution of the Board.
- (7) Nothing which is contained in subclause (6) above will prevent the Interim Board from borrowing operating capital from any other source.
- (8) On a date, not earlier than one year after the constitution of the Board, FASA may demand payment from the FIO of any costs reasonably incurred by it in giving effect to this schedule.