

**Franchising, licensing, distribution, agency agreements:
Consumer protection act regulations at last**

As you may be aware the definition of a franchise agreement in terms of the Consumer Protection Act is fairly broad and this includes a full business concept franchise arrangement, as well as similar arrangements such as license, distribution and agency arrangements or contracts.

It is very important to note that in terms of the Act, there is no threshold whatsoever in relation to any franchise or similar agreement or arrangement. As a result any such agreement or arrangement falls within the Consumer Protection Act and its regulations.

There are fairly comprehensive provisions in the regulations as to what a “franchise agreement” should include and these are set out below.

Firstly, a franchise or similar agreement must reflect at the top of the first page, a statement to the effect that:

“A franchisee may cancel a franchise agreement without cost or penalty within 10(ten) business days after signing such agreement, by giving written notice to the franchisor.”

Secondly a franchise agreement must contain provisions which prevent the following:

- Unreasonable or overvaluation of fees, prices or other amounts;
- Conduct which is unnecessary or unreasonable in relation to risks to be incurred by one party;
- Conduct that it is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.

Thirdly a franchise agreement must also contain a clause in terms of which the franchisor is not entitled to any undisclosed direct or indirect benefit or compensation, unless this is disclosed in writing, together with an explanation thereof.

Fourthly a franchise agreement should contain numerous other provisions and we would like to highlight the following:

- A description of the goods or services which the franchisee is entitled to render or sell;
- Obligations of the franchisor;
- Obligations of the franchisee;
- A description of the business system;
- Direct or indirect consideration payable to the franchisor;
- Details of territorial rights, if granted;
- A description of the proposed site, premises or location;
- Details of the intellectual property licensed;
- Details of the master franchisee, if relevant ;
- Details of initial training and ongoing training and assistance;
- Terms and conditions relating to the duration, renewal, goodwill and assignment;
- Full details of any marketing fund including that the funds are deposited into a separate account, that any such funds are used for marketing and advertising purposes of the goods and services of the franchise system and that full financial statements of all receipts and expenses, will need to be provided.
- Any restrictions imposed on the franchisee;
- Full particulars of the financial obligations of the franchisee including the initial fee, working capital, royalties, total investment required and other amounts payable
- The effect of termination or expiration of the franchise
- If requested in writing, an explanation of terms or sections not understood

Although certain of the points are traditionally found in the average competently drafted franchise or similar agreement, franchisors, licensors, distributors and the like will now need to check and audit their agreements so as to ensure that they are compliant. The regulations may of course be updated from time to time and it will therefore be necessary to remain abreast with any such new or updated regulations. Further, if any written explanation of a term or section is given, this must be legally correct, failing which the franchisor risks being bound to an incorrect explanation.

Although international best practice has for many years dictated that competent disclosure should be given to franchisees, this has previously not been law in South Africa. The Franchise Association of South Africa has however for many years required for membership that franchisors should furnish franchisees with a competent agreement, a compliant disclosure document, as well as an operations manual. The CPA regulations also set out requirements in relation to disclosure documents which are required to be furnished to

franchisees, licenses, distributors or agents, at least fourteen days prior to the signing of such an agreement.

As a result the legal landscape for franchise and similar agreements⁷ has changed and steps should be taken as soon as possible, to ensure that the agreement and disclosure document, as well as all related requirements, are complied with.

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