



MARKET STUDY REPORT ON

**THE DEVELOPMENT OF THE FRANCHISING INDUSTRY AND
RECOMMENDATIONS FOR REGULATION IN NAMIBIA**

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Definitions

- (a) "**concerted practice**" means deliberate conjoint conduct between undertakings achieved through direct or indirect contact that replaces their independent actions.
- (b) "**franchise**" means a form of business operated as a result of an agreement or license between two parties which gives one party the right to market a product or service using the trade marks and business knowledge and system of the other party, subject to royalties or other consideration paid by the party being granted the right to operate the business.
- (c) "**franchisee**" means the party who acquires the rights from the franchisor to operate a business under the franchisor's trade mark and business model.
- (d) "**franchisor**" means the party who grants the rights to the franchisee to operate the franchised business under the franchisor's trade mark and business model.
- (e) "**horizontal relationship**" means a relationship between competitors or franchisees.
- (f) "**Intra-brand competition**" refers to competition by firms that compete to perform the same function, e.g. distribution in respect to the same brand, and hence "intra-brand".
- (g) "**Inter- brand**" refers to competition between brands.
- (h) "**IP**" means Intellectual Property.
- (i) "**master franchisee**" means a franchisee that is granted the right to appoint sub-franchisees for a specific territory to develop and manage a franchise network in that territory.
- (j) "**monopoly**" means a company or group having exclusive control over a commodity or service.¹
- (k) "**NACC**" means the Namibian Competition Commission and the Ministry of Industrialisation, Trade and SME Development.
- (l) "**operations manual**" means the manual provided by the franchisor to the franchisee consisting of practical guidelines and instructions on the business system to be adopted by the franchisee in operating the franchised business.
- (m) "**prohibited practice**" means "any conduct which appreciably restrains trade states".²

¹ Oxford University Press *The Oxford English Dictionary* 3ed (2010) at p145.

² BM Wood Franchise Review: *Franchising in Africa* at p 140. Available at www.dentons.com/~media/PDFs/Insights/2014/May/Franchise_Review_All.pdf

- (n) **“resale price maintenance”** means a vertical price agreement where an agreement is reached that a distributor will resell products sold to him by a supplier, at a particular price.
- (o) **“royalty”** means a once-off or recurring fee that is paid by the franchisee to the franchisor for the rights granted to carry on the franchised business.
- (p) **“undertaking”** means any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of persons or a trust in the production, supply or distribution of goods or the provision of any service.

EXECUTIVE SUMMARY

Introduction

The world over, franchising is seen as a vehicle for the establishment of sustainable development and job creation. Although there are many businesses in Namibia that shows potential for growth, the potential of the concept is underutilised. The Namibian Competition Commission (NACC) undertook a study in the franchising industry in Namibia. The focus of the study was to assess competitive and developmental issues in the franchising business model in Namibia as well as to benchmark how franchising is regulated in comparable jurisdictions. It further aims to identify anti-competitive practices in the franchising business model as well as to propose corrective measures and appropriate recommendations to the Government³, refer to **Annexure “A”** for the Terms of Reference.

The study was conducted in three phases, with phase one comprising of desktop review, phase two consisted of consultation with relevant stakeholders and the last phase culminated in this report. This report is the completion of phase one and phase two of the study wherein the findings of the study is captured. The first part of phase three was completed wherein the NaCC presented the draft findings to the Minister of Industrialisation, Trade and SME Development. Views emanating from this consultation are incorporated in the report. In addition, the NaCC hosted a stakeholder consultation on the final report with its stakeholders on the 3rd August 2017, wherein recommendations from this meeting are captured as **Annexure “K”** to the report.

The report is prepared along the lines of what is required in terms of the Terms of Reference and the Deliverables. The executive summary sets out the broad themes discussed in the report and briefly describes the nature of the inquiry and the possible recommendations. More in depth discussions, acknowledgements and quotations, are all dealt with in the body of the report. The executive summary briefly describes the franchising industry, benchmarked regulations and the recommendations of the report.

Usually, franchise legislation is introduced in a country as a result of evidence of widespread problems within the sector, the quality of current laws and legislative remedies relating to franchising, the strength and effectiveness of the law-enforcing agencies, as well as the mechanisms for contract enforcement that are applicable.⁴ The general view of the public towards regulation is

³ Ministry of Industrialisation, Trade and SME Development

⁴ Ofodile “Franchising Law”.

also considered.⁵ There is no common approach to the regulation of franchising. Countries follow different routes in this regard. When one considers the countries surveyed in this report, it appears that only those countries that have high levels of commitment to self-regulation, strong support of franchising industry bodies, stable economies, and well-functioning general laws are able to successfully regulate franchising without specific statutory regulation of franchising. It must also be kept in mind that self-regulation is dependent on a co-operative and pro-active industry and relies on an active, functioning and efficient industry association that can draft, maintain and enforce an industry code, educate industry members and the public, and implement self-regulation in general.

If a country cannot rely on self-regulation or general legislation, specific statutory regulation might be required in order to impose the force of law, address widespread and predominant problems that are associated with issues such as misrepresentation and non-disclosure, and to clarify ethical practices and conduct. Australia and South Africa are examples of countries that followed this route due to growing concerns that self-regulation and reliance on other laws was not effective in protecting franchisees and dealing with serious disputes. It has been suggested that contract law is often insufficient in regulating the modern franchise relationship and that franchising self-regulation is not adequately equipped to deal with many abuses that are occurring in an industry.⁶ Furthermore, it is well-known that franchise relationships are often characterized by unequal bargaining power and some lack financial resources.⁷

Recommendations for Namibia

Benefits of implementing franchising regulation

In 2016, research was conducted in Croatia in order to enquire whether the absence of franchising regulation represented an obstacle for the country's economic development and expansion.⁸ It was concluded that countries with specific franchising laws and/or legal regulation of franchising, generally have the highest number of franchise systems, the most franchise outlets and the franchising impact on the economy is greatest.⁹ The Franchise Regulatory Evaluation Data (FRED) Score is a method used to calculate the extent to which a country regulates franchising. It is calculated based on the following aspects: (1) pre-contractual duty to disclose information, (2)

⁵ Ministry of Economic Development Discussion Paper "Review of Franchising Regulation in New Zealand" (2008) 1 www.med.govt.nz (Accessed on 26 January 2017).

⁶ Erceg "Absence of regulation and franchising law" 394.

⁷ *Ibid.*

⁸ Erceg "Absence of regulation and franchising law" 392.

⁹ Erceg "Absence of regulation and franchising law" 400.

mandatory pre-contractual cooling-off period, (3) registration, and (4) other regulations applicable to franchising.¹⁰ Currently, it appears that there is no FRED score for Namibia. Since the first three above factors would not be applicable, the FRED score would most likely be very low for Namibia. If franchising is regulated by way of legislation, it would provide certainty and a clear framework for better understanding of the basic relationship between franchisors and franchisees.¹¹ This would also address abuses within the sector, promote enterprise development and contribute to the expansion of franchising and business in Namibia.

The proposed platform to implement regulation

It would be worthwhile to consider the approaches of countries such as Tunisia, South Africa and Brazil, especially as far as creating a legal and regulatory environment for franchising is concerned.¹² If Namibia were to implement such legislation, one could support the view of the African Development Bank that the South African model could be utilised as a strategic platform from which to develop and expand the use of franchising in Namibia.¹³ Problems relating to misrepresentation and non-disclosure were a particular area of concern and led to the disclosure requirements provided for in the Consumer Protection Act and its accompanying regulations (Regulations 2 and 3). The proposed regulation should also address some of the following issues:

- Pre-contractual disclosure of material issues.
- Possible terms to be included in a franchise agreement.
- Franchisees are often required to contribute to marketing funds, but some complain that franchisors do not apply the funds towards promotion of the franchise system and franchised businesses. Franchisors should have an obligation to manage such funds responsibly and there should be transparency regarding utilisation of the funds.
- Often, a franchisor requires franchisees to purchase all of their supplies from the franchisor or its nominated suppliers. If this requirement is not reasonable and justified, it could have a negative impact on franchisees' businesses.

¹⁰ M Abell "Which EU jurisdictions most heavily regulate franchising?" <https://www.twobirds.com> (Accessed 8 February 2017).

¹¹ African Development Bank Group "Enhancing development in Africa" http://www.afdb.org/fileadmin/uploads/afdb/documents/gene-documents/003_franchising.pdf (Accessed 27 January 2017).

¹² Ofodile "Franchising law".

¹³ African Development Bank Group "Enhancing development in Africa" http://www.afdb.org/fileadmin/uploads/afdb/documents/gene-documents/003_franchising.pdf (Accessed 27 January 2017).

- While such a requirement makes sense when it comes to branded products or quality control, franchisees should be allowed to purchase generic non-branded products from other suppliers, provided that quality is maintained. Some franchisees complain about a lack of support and training from franchisors and general non-performance by franchisors. Franchise agreements should stipulate franchisors' initial and ongoing obligations clearly. Franchise agreements should provide franchisees with cooling-off rights and regulate breach and termination in a clear manner.
- Provisions requiring reasonableness, equity and no unjust prices should be considered.
- Namibian Franchise Association: an effective and efficient Namibian Franchise Association be established, supported and maintained, to promote and develop ethical and best franchise practices in Namibia.

Considering future membership of the World Franchise Council

It is noted that the following countries (mentioned in this report) all have franchise associations that are members of the World Franchise Council: South Africa, Australia, Brazil, Canada, USA, Germany, New Zealand, United Kingdom, India and Egypt.¹⁴ If a franchise association in Namibia were to become a member of the World Franchise Council, it would have the benefit of being connected to other WFC member associations in the promotion of good professional conduct within the franchising sector. The association would also be obliged to ensure the promotion of the WFC Code of Ethics amongst its members within Namibia.¹⁵ Such membership would further enhance the development and protection of franchising within Namibia, along with potential legal regulations, if same were considered and implemented.

Creating the necessary legal and regulatory framework

- Strengthen existing IP legislation.
- Improve and expedite the trade mark registration processes.
- Create a regulatory framework to control franchising.
- Create certainty regarding competition law concerns

¹⁴ International Franchising Association: Members <http://franchise.org> (Accessed 2 February 2017).

¹⁵ World Franchise Council: <http://www.worldfranchisecouncil.net/> (Accessed on 26 January 2017).

It appears that most jurisdictions do not differentiate between franchising agreements and other distribution channels in the application of their competition law and policy.¹⁶ Furthermore, it is clear that there are many similarities in the way franchise agreements are dealt with in the different jurisdictions. For example, it is accepted that although vertical agreements are efficiency enhancing they can also have anti-competitive effects.¹⁷ It is also evident that in most of these jurisdictions, the use of the rule of reason is more prominent when dealing with franchise agreements.¹⁸

South Africa is likely to continue to treat RPM as a *per se* offence for certain prohibited practices, whereas in other countries the trend seems to indicate that RPM may be authorised when there are demonstrable public benefits.¹⁹ Recommended prices are acceptable to most competition authorities in that they communicate information (e.g. quality, brand image, etc.) to consumers and franchisees.

Distribution practices (including exclusive territories, dealings and bundling or tying of products) seem to be allowed under the rule of reason approach if the practice demonstrates clear pro-competitive benefits. Franchising agreements are not necessarily anticompetitive. They are used to establish a distribution network and this creates opportunities and benefits to both parties.²⁰

Therefore, any agreement that is necessary to support the essential features of the franchise relationship should not raise competition concerns.²¹ As such, it is suggested that franchise agreements should be welcomed in the Namibian economy.

¹⁶ *Idem* at 6.1.

¹⁷ *Idem* at 5.8.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Idem* at 6.2.

²¹ *Ibid.* For example, the protection of the know-how, protection of network reputation, or selective distribution clauses which are normally introduced for efficiency reasons.

Implementation framework

Recommendations	Approach	Action	Methodology	Implementing Agency
<p>1. That no special category under the Namibian Competition Act be created to regulate franchise agreements.</p>	<p>The suggested approach to franchise agreements is to regulate it under general legal principles, as one would do any other agreement. This approach would be in line with international best practice.</p>	<p>In order to give proper guidance and legal certainty, a practical guideline be developed to explain the application of the Namibian Competition Act to franchise agreements. This guideline should be compiled in laymen's terms and supplemented with examples to offer the necessary assistance to its readers.</p>	<p>The Namibian Competition Commission will develop and adopt this guideline as a policy document to provide guidance and legal certainty.</p> <p>A suggested framework of this guideline is as follows:</p> <ul style="list-style-type: none"> - Introduction - Purpose of practical guideline - Objectives of franchise agreements - Possible anti-competitive practices associated with franchise agreements - Price restrictions - The allocation of exclusive territories for the franchising businesses - Exclusive dealing - Refusal to supply - Tying of products - Non-competition provisions - Summary of comparative study - Conclusions 	<p>NACC</p>
<p>2. Government adopts a regulatory framework of co-regulation wherein the government sets a</p>	<p>Effective co-regulation is most successful where voluntary control and statutory</p>	<p>The development of a franchising policy to create a supportive legal and commercial framework in the</p>	<p>The study recommends that the Namibian Government implement legislation and that the South African model could be utilised as a strategic</p>	<p>MITSED NACC</p>

<p>regulatory framework which establishes certain policy objectives, having statutory backing.</p>	<p>recognition are complementary rather than mutually exclusive.</p>	<p>franchising industry in general and the automotive retail market. The policy would assist in reducing barriers to entry in the market, access to franchise brands, conduct of master licensees and the development of the local franchise industry.</p> <p>The enactment of the Consumer Protection Act to include a summary of franchising to protect franchisees that are largely exposed to unethical behaviour in Namibia.</p> <p>It is extremely important for processes such as the registration of trademarks and businesses which takes time to become effective. Regulations concerning Industrial Property Rights Act should be concluded and published as a matter of priority.</p> <p>The franchising industry develops a voluntary association that regulates the practices in the industry.</p>	<p>platform from which to develop and expand the use of franchising in Namibia.</p> <p>Consumer Protection legislation to include provisions pertaining to franchising</p> <p>The process of businesses and trademarks registration as well as Intellectual Property legislation needs to be strengthen and accelerated</p> <p>Government facilitate and support the development of an effective and efficient franchise association to promote and enforce adherence to best practice principles and ethics. This requirement can become part</p>	<p>MITSED NACC</p> <p>MITSED BIPA NACC</p> <p>MITSED NACC Stakeholders</p>
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			of the franchising policy.	
3. The need to develop financial support mechanisms to foster development of entrepreneurship and franchise concepts in Namibia.	Government and or industry to strategize on the development of a funding model that would accelerate the development of franchisors in Namibia.	The study recommends that government develop a funding model to offer direct funding support to supplement and assist the financial viability of franchise investment.	<p>The study recommends the establishment of the following:</p> <p>(a) Franchising Enterprise Fund</p> <p>The Fund should be leading catalyst for the development of micro, small and medium enterprises through funding and provision of support. Support could be in the form of collateral for entrepreneurs to qualify for funding from banking institutions, business plan support services and trade missions for sourcing of franchises.</p> <p>(b) Micro Franchisor Development Programme</p> <p>This programme would assist with the development and support of small and micro franchise businesses. The study found potential development areas for sound home grown sector in the lower end market (i.e. food outlets, cultural and traditional eateries, especially in smaller towns and villages) and in the provision of services such as shoe repairs, plumbing, electrical services and related trade services. These types of businesses would not require substantial capital and would present an</p>	<p>MITSED Development Bank SME Bank²² Commercial Banks</p> <p>MITSED Potential franchisors</p>

²² SME Bank is currently under liquidation

			opportunity to individuals to become entrepreneurs as well as start their own businesses.	
4. The need to develop initiatives designed to promote and support the development of franchising in Namibia.	Introduction of incentive schemes for encouraging local participation, local sourcing and the participation of Namibian entrepreneurs as master licensees. The study finds potential for franchising in Namibia, but appropriate business types should be identified. Furthermore, the study did not find any local successful franchised businesses. The proposed incentive schemes would therefore endorse the potential for the development of sustainable small businesses and creation of job opportunities.	Strategic sourcing needs to be adopted by identifying key industries that needs to be earmarked and focus on building collaborative long-term relationships with suppliers in order to improve quality of goods and services as well as drive down costs over time. Municipalities are encouraged to establish Franchise Development Initiatives that consist of exhibitions that attract franchisors and promoters of low cost business opportunities and a series of workshops that familiarise the local population with the concept of franchising.	Develop and facilitate the sourcing of products locally as well as reliable supply chains Offer training and development for prospective franchisors as well as to increase general awareness and understanding of franchising Facilitate franchise/ SME exhibitions and workshops for prospective franchisees	MITSED Association of Local Authorities in Namibia

CHAPTER 1

1. OVERVIEW OF THE FRANCHISE INDUSTRY AND PRACTISES OF REGULATION

1.1 Background

A franchise agreement is a contract in terms of which the franchisor grants to the franchisee's rights to do business and to deal in certain products or services using the franchisor's system, trademarks, copyright, know-how and other intellectual property. Different forms of franchise agreements can be identified, depending on the nature of the relationship between the parties, as well as the applicable rights within the agreement. There are various systems and formats of franchising. They range from business format franchising to trade name or product distribution franchising. In full business format franchising, a franchisor establishes a fully integrated relationship with its franchisees and provides a complete system for delivering the product or service and conducting the business. Whereas, in a business format franchise typically licenses are provided to the franchisee, a full business system including certain intellectual property, usually trademarks, copyright and know how. There is ideally initial and ongoing assistance from the franchisor. Variances of the business format franchise include conversion franchising, social franchising and micro franchising. A franchise network's brand creates certain expectations in consumers' minds. They react to name recognition and the familiar appearance of any outlet of a franchised business. Based on this, they expect to find the same levels of ambiance, quality, products and service. Franchisors expect the franchisees to adopt customer service excellence standards and to operate with the highest ethical standards. If any difficulties arise, there is a risk that the brand may be prejudiced to the detriment of the franchisor, other franchisees and the whole franchise system.

More often than not, newcomers to entrepreneurship choose the franchise route because they want to be in business for themselves but not by themselves. They are often happy to pay the initial and ongoing fees as long as they perceive value in return. Further, they are usually willingly to follow the guidelines contained in the Operations Manual, at least for a period. In return, franchisees expect full upfront disclosure, integrity, professionalism, top level training, a comprehensive operations manual, initial and ongoing support, aggressive marketing and brand building, good communication channels, a climate that fosters constructive criticism and an opportunity to be heard.

From a franchisee's perspective there are a number of advantages to franchising. These include that instead of having to start a business from scratch, with all the attendant uncertainties, a franchisee receives a "business in a box" ready to be operated from day one. Typical benefits include access to extensive initial training and set up support, the use of a proven operating system and the right to use an established trade mark, which should assist in reaching the breakeven point quicker. Ongoing benefits include that the franchisee is kept abreast of developments in the market. The franchisees have access to group promotions and purchasing arrangements. Further, access to likeminded individuals who operate in the same business sector, but who are not direct competitors can be invaluable. A franchise, as a member of an established network, also has a definite resale value for the franchised business. The disadvantages to franchisees can include the payment of unreasonable initial and ongoing fees. A further disadvantage is the need to uphold high standards and the pressure and costs involved in this. At the same time this will of course assist with the sustainability of the business and protect the specific franchise business from non-compliance and poor standards by other franchisees in the same franchise system. A weak franchisor can stifle development of the brand. Strict compliance can also be a disadvantage, were it, for example, does not allow for local tastes which could be preferential and add value to the franchise system. At the same time, as mentioned above, consumers are often seeking the same or similar products and use franchised outlets for that very reason. Controlled independence, providing a certain degree of freedom to, for example, meet localised demand can improve sales. Advantages from a franchisor's perspective can include the ability to rapidly expand the business and its footprint, with a reduced capital requirement. Economies of scale and enhanced operational efficiencies, as well as reduced pressure on head office resources are further advantages. There can certainly also be enhanced forward planning capability. The disadvantages can include a reduced per unit profitability, substantial initial investment and ongoing franchisee support. Other disadvantages include a large or sufficient market, restrictions on freedom to act speedily and also under-performing franchisees. Typical franchise structures include the appointing of master franchisees in a country such as Namibia. The master franchisee then stands, in that country, in the place of the franchisor. The master franchisee should then also strive towards best and ethical practices.

A franchise is not a pure distributorship or dealership because a dealer can usually buy and sell products or services from anyone and to anyone and it is not obliged to comply with the franchisor's business system nor to trade under a franchisor's trademarks. In addition, there are distinct differences between franchising and agency agreements. In an Agency Agreement, the Principal grants the Agent the rights to distribute goods in a region under the Agent's own name and not that of the Principal. The Agent is also not required to follow a specific business system and is usually not

allowed to do business under a principal's name and trademarks. Multilevel marketing is also known as "Network Marketing" which is a form of direct selling in terms of which distributors work as independent participants to sell products. Distributors usually generate a commission from their own sales as well as from the sales of those whom they recruit. Usually this is a legitimate form of selling products. However, multilevel marketing has the potential for the "up line" to take advantage of "down line", to the latter's detriment. In contrast, pyramid schemes use the classic organisational characteristics of the "up line" recruiting the "down line", but also include extreme moral hazards. In South Africa, the Consumer Protection Act ("CPA") describes a pyramid scheme as any arrangement, agreement, practice or scheme that depends primarily on the recruitment of new members to derive compensation, rather than from the sale of any goods or services in order to generate money. The CPA directly prohibits pyramid schemes.

The study mainly used desktop research in relation to the Namibian franchise industry, the identification of franchise systems operating in Namibia and the preparation and forwarding of questionnaires to members and service providers to the franchise industry in Namibia. The project team identified possible parties to participate in the study, which included franchises and similar businesses, training and tertiary institutions, audit firms, banks, business organisations, business brokers, SME's, chambers of commerce and businesses that showed franchising potential. The team sent emails and questionnaires to possible participants of the study, accompanied by a confirmatory letter received from the NACC. Questions for the interviews were formulated by considering questions that were posed to South African businesses in a recent franchise survey, questions received from the NACC, as well as questions specific to the Namibian Franchising Landscape and also in relation to what would assist with the support and development of Franchising in Namibia. Interviews were conducted on 6 – 8 February 2017, in Windhoek, Walvis Bay and Swakopmund. They were identified based on the size of the business communities situated in these areas. The information received during the interviews were incorporated into this report and used for the further recommendations.

An important aspect considered in the franchising market is the issue of regulation. In this respect statutory vs self-regulation is considered. Self - regulation of franchising focuses on how the business relationship between a franchisor and a franchisee is controlled and governed. There is no uniform practice amongst countries. There are certain countries that explicitly regulate franchising through legislation (statutory regulation), while in other countries franchising is regulated by industry bodies that monitor conduct and compliance (Self-Regulation). Some countries have been able to achieve a system of co-regulation, where the franchising industry and Government work

together in regulating the industry. Regardless of whether there is legislation that regulates franchising specifically, most countries have general legislation which can play a role in the regulation of franchising. The advantages of statutory regulation include the setting out of acceptable and unacceptable norms of conduct. This creates certainty in the industry and prescribes minimum standards of behaviour. Further, pre-contractual disclosure gives prospective franchisees material information so as to place them in a position to make an informed decision before concluding an agreement. The disadvantages of statutory regulation could include rigid, restrictive and unnecessary burdens. It is essential to utilise competent franchising expertise, so as to, as far as possible, avoid creating legal uncertainties and unnecessary enforcement and compliance costs. Self-regulation occurs when a specific industry body assumes responsibility for prescribing its own rules and conduct. Self-regulation provide a balance between no regulation at all and rigid governmental controls. Industry codes of conduct are more flexible than regulation by statute and can be easily revised as voluntary Standards of Conduct. In addition, industry expertise often holds superior knowledge of what would be appropriate. A code of conduct developed and constantly updated by a Self-Regulatory body can be valuable, as the parties to a code are expected to comply with the spirit of the code rather than with the strict letter of the law. Dispute resolution options, such as Mediation and Arbitration are often supported. One of the biggest disadvantages of self-regulation is that membership of industry bodies or associations is often voluntary and complaints often relate to non-members over whom such associations have no authority. Further, industry bodies often lack funding, effective enforcement mechanisms and capacity to promote their interests. Co-Regulation occurs when Industry and Government work together to regulate a particular business sector. The Government sets a regulatory frame work which establishes certain policy objectives, having statutory backing. The practical implementation of those measures can be left to the industry to develop and to administer its own system of regulation. Effective co-regulation often occurs when voluntary control and statutory recognition are complementary rather than mutually exclusive.

1.2 Franchising in Namibia

Regarding the legal and regulatory frame work in Namibia, there are various intellectual property related acts including in respect of copyright, trademarks, patents and designs. Various international protocols, conventions, policies and agreements have been entered into by the Namibian Government. Although certain of the Intellectual Property Acts are somewhat outdated, a level of protection is available, as set out in the report. A new Industrial Property Act of 2012 has been

enacted. This will in many respects bring Namibian intellectual property law substantially up to date. It is however understood that the Regulations are yet to be finalised.

It is encouraging to note that Namibia's Ministry of Industrialisation, Trade and SME Development has established the Business and Intellectual Property Authority (BIPA) that will eventually become a fully-fledged state owned agency. BIPA's purpose is to function as a central point or one stop centre for the registration, administration and protection of business and intellectual property rights. A multi-stakeholders workshop, held during 2016, consisted of representatives of WIPO (The World Intellectual Property Organisation), the Ministry of Industrialisation, Trade and SME development, BIPO and German Cooperation, identified the absence of a national IP policy framework as a barrier for the achievement of development goals and objectives, policy coherence and guidance on the integration of IP international and sectoral development policies, exploitation of IP assets, provisional support and promotion of local creative and innovative fields, prevention of loss of valuable assets and benefit sharing in relation to traditional knowledge. It appears that a lack of institutional management of intellectual property is a major barrier for the advancement of intellectual property and business development in Namibia. In modern and knowledge based economies, intellectual property and human capital play an important role for business. An increasing share of the market value of businesses appears to derive from their intellectual assets. Businesses managing these assets more actively enhance their contribution to the economy and creation of employment. As companies focus on innovation, they start to exploit the intellectual property in a wide variety of ways, not only incorporating protected inventions into new products, processes and services, but also licensing them to other entities. The protection of intangible assets is a key building block of modern and knowledge based economies. The knowhow, expertise and IP within a business have become as important if not more important than other economic resources. Within this context of the importance of intellectual property being created within companies, it also becomes crucial to protect these innovations. IP allows a creator or inventor to benefit from the invention, facilitates a return on the investment, contributes to the wellbeing and development of society and supports the creation of employment. IP is an umbrella term used to describe intangible assets created by the human mind that attain economic value once the conceptual assets are rendered into tangible form. The law recognises and protects various forms of IP including trademarks, patents, copyright, designs; know how, trade secrets, performances, plant breeders and others. Below follows a brief discussion of the link between franchising and the different forms of intellectual property.

Franchises are in essence business systems where the intellectual property of the franchisor is licensed for use, under very specific conditions and performance criteria to franchisees in return for the payment of royalties. The IP licensed to franchisees generally includes trademarks, copyright and know how, as well as promotional material, business systems, marketing systems and confidential information.

1.2.1 Trade marks

The purpose of a trade mark is to distinguish goods and services of one enterprise from goods and services of other enterprises. If the trade mark is less descriptive of the nature of the business or the kind, quality or any of the characteristics of the goods, a stronger monopoly will be obtained. Whilst common law rights can be acquired through the use, promotion and exposure of a trade mark, the advantages of registration are substantial. The benefits may be summarised as follows: A registered mark provides the exclusive right to use promote and expose the mark in the country of interest. It protects graphic design elements and the corporate identity. A registered trade mark protects the investment in the trade mark and provides protectable rights for a substantive income stream. A trade mark owner, by being in a position to offer statutory protection of a registration, is more likely to attract licensees and other forms of commercial interest and activity. A registered trade mark provides protection that covers the entire country of interest. It also provides umbrella rights for protecting trading names company names and domain names. If a trade mark has been filed, the Proprietor can claim priority for a period of six months in other jurisdictions, in terms of the Paris Convention. A trade mark registration acts as a deterrent to potential infringers. A trade mark registration provides an easy remedy (the action for infringement) whereby third parties may be restrained from using the same or confusingly similar marks. A registered trade mark can assist against counterfeit goods and it can be recorded at customs. It is more difficult to enforce rights if a business does not have registered trade mark protection, as an acquired reputation in the trade mark would have to be shown. An important business tool, related to trade marks, is brand valuations. The value of a brand can be used, for example, to obtain finance and generate additional income. Some of the major breakthroughs for SMEs within recent times relate to businesses that acquired significant brand value opposed to physical or tangible assets.

1.2.2 Copyright

Copyright is a creature of statute which means that it is a right created by law. For copyright to exist, certain basic conditions have to be met, such as the work needs to be one of the recognized copyright protectable works. In Namibia, literary works, musical works, artistic works, sound recordings, cinematograph films, broadcasts, published editions and programmes carrying signals

are all recognised as works of copyright. The layout of a store-front or interior, as an artistic work, the content of client listings and other documentation, being literary works, can be subject to copyright. Some of the basic requirements for copyright protection are that the work needs to be reduced to material form and it has to be original. Copyright ownership provides the owner with exclusive rights to reproduce the work in any manner or form and to distribute, export, import, sell, hire and communicate the work to the public. Furthermore, copyright can last for 50 years, even after the death of the copyright owner. The WIPO SME division points out that: "If the innovative ideas, creative designs and powerful brands of your SME are not legally protected, then these may be used by other enterprises without limitation".

However, "when they are protected by IP rights, they acquire concrete value for your enterprise as they may become property rights which cannot be commercialised without your authorisation". Commercialisation is the process of bringing intellectual property to the market, in order to be exploited. The appropriate use of IP may contribute to bringing high rates of return on capital, which is crucial in order to attract capital investors. Not only does an intellectual property right serve as legal assets, but also as a financial instrument. It therefore performs a dual function of protecting a valuable income stream and attracting possible investment. Essentially the effective creation and or acquisition, management, exploitation and commercialisation of valuable IP assets, are key cornerstones upon which successful businesses are built and developed today. Intellectual property assets can give a business a competitive edge in an increasing competitive business environment. It is therefore extremely important for processes such as the registration of trademarks, which take many years to be processed, dealt with and registered by the Namibian Trade Marks Registry to be substantially expedited.

With regards to competition Legislation relating to Franchise Agreements the purpose of the Competition Act is to enhance the promotion and safe guarding of competition in Namibia. The Namibian Competition Act aims to promote growth and inclusivity in the Namibian economy by promoting a greater spread of ownership, creating an equitable opportunity for small undertakings to participate in the Namibian economy, promoting employment and by providing consumers with competitive prices and product choices. Franchising can certainly assist with the achievement of these objectives. However, franchising may also in certain scenarios appear to be anti-competitive and restrict competition. The general approach adopted in the Competition Act is that of traditional anti-trust prohibitions in relation to restrictive conduct. These include "Agreements" or "Concerted Practice" between firms in a horizontal or vertical relationship which have the object or effect of substantially lessening competition in the market. It is therefore clear that Namibia generally

follows the effects based “rule of reason” approach, which is in line with the approach followed in Australia, Canada, Japan, the United Kingdom and the United States of America, European Union (insert member states), Egypt and the rest of Africa under Comesa. The potentially restrictive practices include price fixing, division or allocation of markets, collusive tendering, minimum resale price maintenance, limiting or controlling production and bundling or tying of products.

1. 3 Overview of franchising development in other countries

1.3.1 Franchising in South Africa

According to research carried out in 2016, the franchise sector is made up of over 757 franchise systems, which operate a combined total of more than 35 000 business outlets or business units, most of which are owned and operated by franchisees. The sector also offers direct employment to more than 329 000 people. This excludes a number of other franchise systems such as motor vehicle and equipment dealerships, motor vehicle and equipment rental, fuel and service stations, hotels and a number of other businesses, which are essentially also franchise systems but not traditionally viewed as such. Without the foregoing, which make a substantial contribution to the South African economy, franchising contributes about 12% to GDP. Fortunately there is a growing realisation among members of South Africa’s national or local governments and relevant NGOs, that franchising offers massive potential for the development of sustainable small businesses and creation of job opportunities. There is also substantial potential in the realms of social and micro franchising, which are attractive because of market needs and reduced set up costs. Franchising in South Africa is currently regulated by common law and legislation as set out in the CPA, including particularly Regulations 2 and 3 thereof. Regulation 2 sets out what should be dealt with and included in a franchise agreement and Regulation 3 sets out what should be included in a Disclosure Document which should be given to a prospective franchisee, at least 14 days prior to the signature of a franchise agreement. Copies of Regulations 2 and 3 are set out in **Annexure “G”**. The CPA was introduced in South Africa on or about 1 April 2011. It provides consumer type protection to franchisees, including rights such as equality, choice, information, honest dealing, fair value, good quality, safety, privacy, fair and responsible marketing and supplier accountability. Franchisors may not engage in unconscionable conduct when dealing with franchisees. This includes coercion, undue influence, pressure, duress or harassment, unfair tactics or any similar conduct. Franchisors may furthermore not charge marketing or any other franchise related fees at a price which is unjust. Further, the terms of the franchise agreement must be fair, just and reasonable. As mentioned above, pre-contractual disclosure must be provided to a prospective franchisee at least 14 days prior to the signature of the franchise agreement. Regulation 3 of the CPA sets out what must be dealt

with and included in a franchise agreement. This includes certain specific provisions to minimise risks to franchisees. Dispute resolution has traditionally been provided for in the franchise agreement, and usually includes primarily Arbitration and court proceedings. An additional and complimentary robust alternative dispute resolution process is set to be launched by way of a Franchise Industry Code, see attached draft in **Annexure “H”**. In terms of this code, either party to a franchise agreement may lodge a complaint with the Ombudsman, who will then essentially robustly mediate between the parties and make every effort to explore resolution.

Over the years there was a growing concern that the common law and self-regulation through the Franchise Association of South Africa (“FASA”), was insufficient to protect the interests of franchisees. FASA is a voluntary membership Franchise Industry Association. The difficulty was often that non-members were acting unethically and bringing Franchising into disrepute. FASA requires that its members operate in accordance with FASA’s Code of Ethics and business practices which promote, encourage and require ethical Franchising and best franchising practices. FASA has been the guiding force of franchising in South Africa and the growth and stability of the sector is largely attributed to the work that FASA has done over the years to promote ethical franchising and best practices. FASA was established in 1979 and represents the interests of the franchise sector in relation to the government, commerce and the general public. FASA’s main aim is to safeguard the upholding of ethics in franchising and to promote the advancement of the concept with a view to creating opportunities for the establishment of sustainable SMEs and job creation. Over the years FASA has evolved into the most powerful franchise association on the African continent and ensures, through its membership of the world Franchise Council, that South Africa’s voice is heard worldwide. More recently, the World Franchise Council has mandated FASA to establish the Pan African Franchise Association (“PAFF”). FASA has accepted this task with gusto, but up to now the uptake of established franchised associations in other African Countries has been slow. In the interim FASA is willing to provide guidance to assist the associations and or groups of people who wish to establish franchise associations on the African continent. FASA’s key activities include working with the government, including but not limited to the department of Small Business Development, the Department of Trade and Industry and the Department of Finance. It also promotes and arranges exhibitions and public events such as the International Franchise Expo which is to be known as the Franchise Business Festival in future. It also disseminates franchise related information on an ongoing basis and provides a dispute resolution service including assisting with Arbitration and providing a mediation service. FASA also annually presents awards for excellence in franchising.

The South African Competition Act also presented challenges to franchising in South Africa including in relation to resale price maintenance, exclusive dealings, exclusive territories, bundling or tying of products, abusive dominance and regarding intellectual property aspects. This created uncertainty, which has subsequently been addressed by the publication of a Memorandum by the South African Competition Authorities as a guideline in relation to competition matters, as they affect franchising. This has been of substantial assistance. It is recommended that Namibia also prepare a similar policy or document in accordance with the needs in Namibia.

The Small Enterprise Finance Agency (commonly known as SEFA) was established on 1 April 2012. The vision of this Agency is to be the leading catalyst for the development of sustainable survivalist, micro, small and medium enterprises through funding and the provision of support. The South African National Empowerment Fund (NEF) was established in 1998. Its role is to support broad based black economic empowerment including in relation to SMEs. A Jobs Fund has also been established, which is a government initiative that was launched by the Minister of Finance in June 2011. Its objective is to co-finance projects by public, private and non-governmental organisations, which have the potential to significantly contribute to job creation. This involves the use of public money to catalyse innovation and investment on behalf of a range of economic stakeholders in activities that contribute directly to enhance employment creation in South Africa. The Jobs Fund has been working closely with the franchise industry. The main assessment criteria for the Jobs Fund include the establishment of successful businesses to create sustainable jobs within 2 – 3 years after funding has been received. The applicant must primarily be able to match the funding received on a 1-1 ratio. Only applicants (franchisors or intermediaries) who passed the initial hurdles are invited by the Jobs Fund to complete the full application. A Micro Franchisor Development Programme has also been established to assist with the development and support for small and micro franchised businesses.

1.3.2 Overview of franchise activity in other countries

The report includes a review of franchise activity in selected countries around the world including the business and legal aspects thereof. The legal aspects include franchising and related law, as well as Competition Law. With regard to franchising regulations, we have included countries with franchise specific legislation such as Australia, Brazil, Canada, the United States of America and Tunisia. Countries which rely on self-regulation and/or generic legislation including Germany, the United Kingdom and New Zealand. African countries using sundry provisions to regulate franchising include Kenya, Egypt, Morocco, Nigeria, Uganda, Ethiopia and Angola. Lebanon has also briefly been

included, as well as Botswana and Rwanda. The aim was to highlight aspects which were considered useful in formulating a strategy for the promotion of franchising in Namibia. The report considered the IFA who was formed in 1960 and is the world's oldest and largest organisation representing franchising globally. Its mission statement includes protection, enhancement and promotion of franchising worldwide. The Code of Ethics of the IFA is intended to establish a framework for the implementation of best practices in the franchise relationships of IFA members. The Code represents ideals to which all IFA members agree to subscribe in the franchise relationships. The values outlined in the Code are strongly based on moral and ethical principles. The values include: (1) trust, truth and honesty; (2) mutual respect and reward; (3) open and frequent communication; (4) compliance with law; and (5) the use of internal dispute resolution. In addition, a discussion is centred on the development of the World Franchise Council (WFC). The WFC is an entity that unites franchise associations around the world. The IFA is a member of the WFC and only recognises franchise associations that are part of the Council. The mission of the WFC is to support the development and protection of franchising, and to promote a collective understanding of best practices in fair and ethical franchising. The following countries are members of the WFC: South Africa, Australia, Brazil, Canada, United States of America, Germany, New Zealand, United Kingdom, India, Lebanon and Egypt. These countries therefore have the benefit of being connected to the WFC member associations in the promotion of good professional conduct within the franchising sector globally. Furthermore, each of the WFC's National Franchise Associations must ensure the promotion of the WFC Code of Ethics in their respective countries. The WFC's Code of Ethics requires franchisors to provide all necessary information to the prospective franchisee, no less than 7 days before signature, taking into account respective commitments and responsibilities. The information must be objective, verifiable and devoid of misrepresentation. Selection of franchisees must not be based on discrimination. The franchisor must further provide information openly and truthfully to the franchisee regarding experience, training and financial means. The Code encourages professional advice, dissemination of information about other franchisees and transparency. The franchisor must develop and maintain technical expertise and operational know how that supports the franchise relationship. A franchisor must give notice to a franchisee if there is non-performance of the franchisee's obligations, to allow an opportunity for the fulfilment or correction thereof. A franchisee must not compete with the network by appropriating know how provided by the franchisor. The franchisee has a duty to provide the franchisor with operational information. Both parties must be committed to cooperation, respectful mutual obligations, resolving conflicts through mediation and executing responsibilities in the interests of consumers.

Further, the franchise agreement must define the respective rights and obligations of the parties, be equitable, allow a return on investment for the franchisee, specify conditions of sales or transfer, as well as any renewal and termination. It must respect the laws enforced of the country in which the contract is executed. With regard to termination, the Code provides that the provisions should protect the franchisor's know how through appropriate non-compete restrictions on the franchisees.

1.4 Findings emanating from the Franchise Survey

Franchised businesses are ubiquitous in Namibia. On closer examination it is noted that many operate as master licensees or franchisees of foreign franchisors. The bulk of these concepts originate from South Africa. We were unable to locate any locally developed franchise concepts.

1.4.1 Bankers

In compliance with local banking legislation, the Namibian branches of South African banks operate relatively independently. Although they make their own lending decisions, they are happy to fund the establishment of franchises originating from South Africa, provided that their head office recommends it. This can be seen as yet another important benefit of "importing" well-developed foreign brands and business systems.

However, although the representatives of the major banks appear to have a reasonable grasp of the potential advantages of franchising, they are nevertheless reluctant to grant funding to franchisees of relatively unknown brands. In such instances, they apply standard assessment criteria. This means that they expect loan applications to have the required merit including that there is security for payment. This may disqualify many otherwise deserving applicants from obtaining funding. Bankers contend that the markets differ in certain respects. For example, not all products and services that are successful in South Africa are equally successful in Namibia. They add that some foreign-based franchisors neither provide the necessary level of support to their franchisees to ensure optimal operations nor do they exercise sufficient control. This, combined with high rentals in retail centres, may derail new franchisees. They may run out of capital before they reach profitability.

Asked what they thought about SME support structures and possible legislative interventions, bankers expressed the opinion that as matters stand, government does not adequately support the SME sector. They further believe that the introduction of legislation that controls the franchise sector would be beneficial as long as it does not stifle entrepreneurship. South Africa's Consumer Protection Act was cited as an example of useful legislation, particularly for smaller businesses.

The bankers advised, inter alia, that the banking industry is very regulated, further that there has been a down turn in their economy, business has been slower and the effects of a serious drought has also had a negative effect. They advised that contributors to struggling or failing businesses include under performance, non-compliance with the franchise system, insufficient financial planning and budgeting and lack of resources. The banks are generally of the view that if there is good merit to providing a loan and where appropriate security is provided, a loan should be granted in accordance with usual prudent banking practice. It would also be of assistance if franchisors “sold” the franchise concept and franchised businesses to the banks in advance. This would assist with the facilitation of loans for franchisees. Another reason for franchise failures are insufficient working capital on the part of the franchisee. In many instances the franchised business has been a good business. The franchisee does however need to have resources to keep the business afloat until it becomes profitable over time. In essence therefore they are often successful businesses but the franchisees do not have sufficient working capital to develop them. Another reason for the failure of franchise businesses has been non-compliance by the franchisee of the franchise system. However, although the fast food sector is fairly saturated, there are numerous other types of industries where franchised businesses can be introduced.

1.4.2 Accountants

Accountants appear to have a good grasp and understanding of franchising. Their views include that compliance with the business system is critical for the sustainability of the franchised business. Basic business planning, including financial planning and the execution thereof, as well as business continuity planning and supply chain management, are important. Whilst most franchisors provide good initial support and training, certain franchisors offer little ongoing support. Consideration should also be given to education and training regarding franchising, as well as to a functioning franchise association, and to legislation similar to that of the South African CPA. Steps should be taken to develop and facilitate the sourcing of products locally, and the development of reliable supply chains, where possible and appropriate.

1.4.3 Organised Business

Statements made by representatives of organised business essentially reflect what has been said elsewhere. One of them added that the Namibian SME Bank seems to lack familiarity with the concept of franchising. Asked what government could do to address this, the interviewees suggested the following:

Introduction of programmes designed to popularise and enhance the knowledge of franchising;

Easier access to funding for qualified franchisees of approved franchisors;

A speeding-up of the business registration process;

The removal of legal and statutory restrictions that impede the operation of businesses according to free enterprise principles.

With regard to the use of marketing funds in Namibia, there should be consultations with Namibian franchisees, as Namibia is not the same as South Africa. Currently, most products are sourced and transported from South Africa. Instead, local sourcing should be encouraged, provided the quality is good and the supply chain reliable. Where there are no local products, consideration should be given to the development thereof.

There is a Namibian Retail Charter to develop local suppliers and this should be followed wherever possible.

There should be support from Government regarding SME's particularly in relation to low risk viable business ventures with strong potential. It appears that the support from Government with regard to the development of franchising has been very poor. Goods arrive in Namibia with substantial additional charges leading to costs for Namibian consumers being far higher than in South Africa.

Consideration should be given to a review of logistics, transport and the supply of goods from South Africa to Namibia so as to enhance efficiencies wherever possible.

Consideration should also be given to levies and taxes, which all add up. Further, where there is VAT and levies such as for fruit and vegetables, and agriculture, this should be channelled back to support the businesses in those industries. Execution in the Government is a concern. It appears that there are little resources, little money and not much support, development and progress regarding the development and support for SME's.

1.4.4 SME facilitators

We met with consultants that focus on developing small and medium sized businesses. The input received during the meeting mirrored what came up in other interviews. It appeared that some franchises are successful, while others falter. Namibia is a unique market and some international brands are not suitable to the local environment. It is very important for a business to be able to attract customers and it seems that some business battle with this. The consultants were of the view that there is potential for franchising in Namibia, but appropriate business types should be identified. They suggested businesses that provide services such as plumbing and repairs.

1.4.5 The media

As matters stand, Namibia's media largely ignore franchising. In fact, the only references to franchising we could find presented the concept in a negative light. It appears that this approach is largely based on a lack of understanding of the concept and the potential it holds for the development of Namibia's economy. This assumption is backed up by an actual experience. We conducted an exploratory interview with the publisher of a long-established coastal newspaper and explained the basic principles of franchising. The interview ended with an undertaking that the newspaper would publish a series of five introductory articles on franchising. We also secured agreement in principle from the chairman of the local chapter of the Chamber of Commerce to publish articles on franchising in future editions of their newsletter, which is promising.

1.4.6 South African Franchisors

-The comments received from South African franchisors operating in Namibia include the following:

-It is difficult for foreigners to open up and set up franchises in Namibia.

-It is difficult to obtain finance. The government could assist with finance in various ways.

- The logistics and transportation of components, products and the like to Namibia do take time, cause delays, add costs and attract import duties and various levies.

-The Government should assist and support franchisees and the franchise industry.

-Efforts should be made to increase awareness and understanding of franchising.

-Access to Government officials in Namibia is fairly difficult.

-It has been difficult to visit and get trainers into Namibia. They have been blocked or delayed and steps should be taken to make access to, meeting with and providing training to Namibian franchisees, easier.

-There are many franchise systems in South Africa which would do well in Namibia. Steps should be taken to review what businesses are needed and/or would do well in Namibia and any such businesses or franchise systems should be encouraged to invest and expand into Namibia.

-Steps should be taken to introduce and adapting successful South African franchised businesses into Namibia.

-South African franchised businesses are generally cheaper than other international franchised businesses. Although there are differences, Namibia is fairly similar to South Africa in many

respects. South African franchisors are keen to expand into and do well in Namibia. Government incentives such as financial, tax and other incentives including incentives and funding for franchisees should be considered, so as to assist with the development and support of franchising in Namibia.

1.4.7 Franchisees

The comments received from franchisees are reflected above.

1.4.7.1 The Status of Enterprise Development and Job Creation in Namibia

Annexure “B” is a list of franchises and possible franchises which were identified. The study found that there are varying levels of interest in entrepreneurship in Namibia with a few success stories that may be well suited as locally developed franchise concepts. The research could not find any local successful franchised businesses although certain businesses indicated potential.

1.4.7.2 Observations regarding a Regulatory Framework for Franchising in Namibia

In 2016, research was conducted in Croatia in order to enquire whether the absence of franchising regulation represented an obstacle for the country’s economic development and expansion. It was concluded that countries with specific franchising laws and or legal regulation of franchising, generally have the highest number of franchise systems, the most franchise outlets and the franchising impact on the economy is greatest. The Franchise Regulatory Evaluation Data (FRED) Score is a method used to calculate the extent to which a country regulates franchising. It is calculated based on the following aspects: (1) pre-contractual duty to disclose information, (2) mandatory pre-contractual cooling-off period, (3) registration, and (4) other regulations applicable to franchising. Currently, it appears that there is no FRED score for Namibia. Since the first three above factors would not be applicable, the FRED score would most likely be very low for Namibia. If franchising is regulated by way of legislation, it would provide certainty and a clear framework for better understanding of the basic relationship between franchisors and franchisees. This would also address any abuses within the sector, promote enterprise development and contribute to the expansion of franchising and business in Namibia. It would be worthwhile to consider the approaches of countries such as Tunisia, South Africa and Brazil, especially as far as creating a legal and regulatory environment for franchising is concerned. If Namibia were to implement such legislation, the South African model could be considered as a strategic platform from which to develop and expand the use of franchising in Namibia. This model could be build around the following central themes:

1.4.7.3 Pre-contractual disclosure of material issues

-Franchisors should have an *obligation to manage marketing funds responsibly* and there should be transparency regarding utilisation of the funds in Namibia.

-Franchisees should be allowed to *purchase generic non-branded products from local or other suppliers*, provided that quality is maintained and the supply chain is reliable.

-*Pricing of products* should always be reasonable and not unjust.

-Franchisors should be required to clearly *set out their initial and ongoing support and obligations* in the franchise agreement.

-Franchise agreements should provide franchisees with *cooling-off rights and regulate breach and termination in a clear manner*.

-*Aspects such as those included in Regulations 2 and 3 of the South African CPA*, should be considered. These regulations are attached as **Annexure "G"**.

-*An effective and efficient Namibian Franchise Association* should be established, supported and maintained to promote and develop ethical and best franchise practices in Namibia.

-*Future membership of the World Franchise Council should be considered*. If a franchise association in Namibia were to become a member of the World Franchise Council, it would have the benefit of being connected to other WFC member associations in the promotion of good professional conduct within the franchising sector. The association would also be obliged to ensure the promotion of the WFC Code of Ethics amongst its members within Namibia. Such membership would further enhance the development and protection of franchising within Namibia, along with potential legal regulations, if same were considered and implemented.

1.4.7.4 Regulation of the Franchising industry

- Strengthen existing IP legislation

-Improve and expedite Trade Mark registration processes

-Create a regulatory framework to control franchising

-Create certainty regarding competition law concerns.

Franchise education and training

-General awareness and understanding of franchising

-Offer a development programme for prospective franchisors

-Develop a formal qualification for franchise professionals.

Create support mechanisms

-Facilitate access to funding

-Introduce incentive schemes

Encourage the activities of the NFA.

-Promote entrepreneurship

-Offer introductory workshops for prospective franchisees

-Facilitate franchise / SME exhibitions

The following proven implementation strategies are recommended:

-Create a supportive legal and commercial framework

-Monitor and keep up with international trends

-Attract viable foreign brands and business systems (skills transfer)

-Foster the development of Namibian franchise concepts

-Enforce adherence to best practice principles and ethics.

CHAPTER TWO

2. METHODOLOGY OF THE STUDY

2.1 Background

Franchising has become the fastest growing way of doing business in just about every country in the world and Namibia is no exception (Mendelsohn, 2005)²³. The economic impact of franchising as per Hoffman & Preble (2001)²⁴ are increases in output, its potential for job creation; entrepreneurship and SME development; positive balance of payments adjustment; increase in tax base; economic modernisation; transfer of technology and business methods as well as acquisition of dynamic capabilities and skills of the labour force. Franchising development injects expertise and training in various industries and skills. However, there are various concerns and challenges that the sector faces especially in smaller economies such as ours. Some common concerns and challenges are lack of regulation, control of the sector by certain companies, restrictions in franchising contracts that impede on competition and access to franchise opportunity, perceived promotion of dominance of certain franchise models amongst others. Franchising as per the OECD is defined as a “special type of vertical relationship between two firms usually referred to as the ‘franchisor’ and ‘franchisee’”. The two firms generally establish a contractual relationship where the franchisor sells a proven product, trademark or business method and ancillary services to the individual franchisee in return for a stream of royalties and other payments. The contractual relationship may cover such matters as product prices, advertising, location, type of distribution outlets, geographic area, etc”.

The attraction factor associated with franchising as per the International Franchising Association is the provision of an established product or service which may already enjoy widespread brand-name recognition. This gives the franchisee the benefits of a pre-sold customer base which would on average take years to establish. In addition, due to the franchisee`s associated proven product/s and method/s, its apparent to increases the likelihood of business success and offer consumers the attraction of a certain level of quality and consistency. The flip side however is that franchising is not completely independent. Franchisees are required to operate their businesses according to the

²³https://books.google.com.na/books?id=v_RandLSSDAC&printsec=frontcover&source=gbs_ge_summary_r&ad=0#v=onepage&q&f=false

²⁴<https://books.google.com.na/books?id=tyeA7U8m11UC&pg=PA28&lpg=PA28&dq=Hoffman+and+Preble+2001&source=bl&ots=Npyi6xvRLM&sig=P50ZEb2dF11oI-kvRL-CS1tFXl4&hl=en&sa=X&ved=0ahUKewjR3PfeprJJAhVDPRQKHRicAZ8Q6AEINjAF#v=onepage&q=Hoffman%20and%20Preble%202001&f=false>

procedures and restrictions set forth by the franchisor in the franchisee agreement. These restrictions usually include the products or services which can be offered, pricing and geographic territory.

Franchising may be anti-competitive and restrict competition. Franchising agreements fall under the scope of competition law and consequently the Namibian Competition Act No. 2 of 2003 (“the NaCC Act of 2003”) under provisions dealing with agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings and are typically considered using the ‘rule of reason’²⁵ approach. The relevant provisions in this regard are in section 23 of the NaCC Act of 2003 which speaks to:

“(1) Agreements between undertakings, decisions by associations of undertakings or concerted practices by undertakings which have as their object or effect the prevention or substantial lessening of competition in trade in any goods or services in Namibia, or a part of Namibia, are prohibited, unless they are exempt in accordance with the provisions of Part III of this Chapter.

(2) Agreements and concerted practices contemplated in subsection (1), include agreements concluded between -

(a) parties in a horizontal relationship, being undertakings trading in competition; or

(b) parties in a vertical relationship, being an undertaking and its suppliers or customers or both.

(3) Without prejudice to the generality of the provisions of subsection (1) that subsection applies in particular to any agreement, decision or concerted practice which –

(a) directly or indirectly fixes purchase or selling prices or any other trading conditions;

(b) divides markets by allocating customers, suppliers, areas or specific types of goods or services;

(c) involves collusive tendering;

(d) involves a practice of minimum resale price maintenance;

²⁵ The Rule of reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited.

(e) limits or controls production, market outlets or access, technical development or investment;

(f) applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(g) makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.”

As well as section 28(1) which speaks to determination of exemptions, saying that the Commission may grant the applied for exemption, or refuse to grant the exemption, or *“issue a certificate of clearance stating that in its opinion, on the basis of the facts in its possession, the agreement, decision or concerted practice or the category of agreements, decisions or concerted practices does not constitute an infringement of the Part I prohibition”*. The Commission may therefore grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy why the particular restrictive agreement or practice ought to be excluded from the Part I prohibition.

It is therefore important that lawmakers understand the franchise business model and the impact that certain laws can have on the economy. Literature reveals that the lack of law directly applicable to franchising in many countries may lead to uncompetitive practices. However, according to Pengilley (1985)²⁶, countries such as the United States, Australia, and the Province of Alberta in Canada have various requirements primarily based on pre-disclosure, a concept similar to that of a company prospectus.

The MITSED required the NaCC to undertake a study on the franchising business model in order to inform and guide the development of the policy on franchising in Namibia. The MITSED and the Commission have identified particular practices which are considered to be of concern to parties operating in franchising, potential entrants and general consumers.

2.2 Problem statement and justification of the study

In Namibia, franchising occur in many industries including health, financial intermediation, real estate and business services, hotels and restaurants, wholesale and retail trade, repairs. Over the

²⁶ <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1196&context=njilb>

years, several concerns have been raised with the Commission, and the MITSED in respect of alleged anticompetitive conduct and abuse of dominance in the franchising market. These include:

1. Contractual obligations in the business service industry²⁷ that are anti-competitive and limit access as well as market penetration;
2. Exclusive dealing and anti-competitive contractual obligations in the retail sector (i.e. fast food, automotive etc.)

2.3 Objectives of the study

The purpose of the study is to analyse the application of franchising in Namibia, the dynamics of its operation as well as to carry out a comparative benchmark of how franchising is regulated in other jurisdictions in order to:

- Understand the features in the franchising business model which might lead to the lessening, distortion or prevention of competition in the market.
- Understand the competition dynamics between local franchisees and foreign owners in respect of the access to franchise licensing agreements.
- Outline the economic role played by the franchising business model in terms of employment and value addition, entrepreneurship development, skills development and economic linkages of the identified sectors to the rest of the economy.
- Identify anti-competitive practices in franchising agreements operational in Namibia as per the Competition Act and therefore implement corrective measures as mandated through the Act
- Furthermore, the study will look to establish if there are any policies governing franchising agreements in Namibia and establish their impact on competition in the market. It will also seek to establish the impact of franchising on overall economic activities.
- Recommend policy intervention for the development of the franchising industry in Namibia
- Provide appropriate recommendations to the Government in terms of the most effective framework to support the franchising sector to aid policy development.

²⁷ Business service describes work that supports a business but does not produce a tangible commodity (i.e. Information technology).

2.4 Scope of the Study

For the purpose of this study, the franchising includes all undertakings²⁸ operating on the franchising business model. It involves firms of all sizes, locally and foreign owned operating in all sectors.

2.5 Data Collection Methods

To carry out the mandate as set out in the heading Terms of Reference and Deliverables the following approaches were used:

(a) Desk-based research

The study report examined the current status of franchising in many different countries, including Namibia. Because of proximity and the close economic ties that exist between Namibia and South Africa, Chapter 4 of this report is devoted to franchising in South Africa. Findings pertaining to many other countries are based on a combination of web searches, literature searches and email exchanges with individuals known to us and resident in one of the target countries. Chapter 5 addresses the comparative study. The approach to the status of franchising in Namibia is outlined in paragraph 0 below. The resulting findings are presented in Chapter 6. The countries considered for the comparative study mentioned above were selected using the following criteria: Countries with franchise-specific legislation; countries that rely on self-regulation and/or generic legislation to regulate franchising; countries that regulate franchising through other means, for example technology transfer legislation, the application of agency laws, consumer protection laws or through registration with a statutory body; countries where there is franchised-related activities, but no substantial legal or statutory framework.

(b) Field-based research

As a starting point, a database of companies, organisations and individuals was identified as potential role players in the franchise sector. An email communication followed in which the purpose of the research was explained and potential respondents were asked to kindly complete and return an attached questionnaire. An introductory letter issued by the NACC was enclosed. For examples of these documents see **Annexures "C1"** and **"C2"** and **"D"**.

²⁸ Undertaking is any business carried on for gain or reward by an individual, a body corporate, an unincorporated body of person or a trust in the production, supply or distribution of goods or the provision of any services.

The responses received to the first mailing were disappointing. Efforts were doubled and a follow-up campaign consisting of a combination of emails and phone calls was carried out. This initiative secured the team face-to-face meetings with an excellent cross section of role players in franchising and related sectors. During early February 2017, a team of the appointed consultancy, and the NACC conducted interviews in Windhoek, Walvis Bay and Swakopmund. This process acquainted the team with the views of franchisees, franchisors, prospective franchisors and individuals active in related business sectors. More specifically, the latter group included bankers, accountants and representatives of trade organisations. During these interviews, it became clear why responses to our questionnaires were slow in forthcoming. Most of the respondents we had targeted were willing to complete the questionnaire and some had even done so in preparation for their meetings with us, but they were reluctant to submit them because of confidentiality concerns. To put the minds of our respondents at ease, while still obtaining the information we needed, we had no choice but to promise confidentiality. We therefore had to extract the information our respondents provided and arrange it in such a way that it cannot be traced back to individual respondents. The researchers do not perceive this as a setback. In fact, the consistency of the responses indicates that the findings are representative of the franchise scene in Namibia and will be of great practical value going forward. We envisage that the information will be used in the formulation of initiatives intended to optimise franchising role in the future growth of the Namibian economy. Recommendations of the study are provided in Chapter 7. The report also discusses the application of competition law to franchising by exploring the relevant competition law framework in certain comparable foreign jurisdictions. In so doing, it provides guidance on the extent of regulation required in franchising agreements, as well as giving effect to one of the stated purpose in the Namibian Competition Act (Act No 2 of 2003) (“the Namibian Competition Act”), namely to “expand opportunities for Namibian participation in world markets while recognising the role of foreign competition in Namibia.” In particular, the South African Franchising Notice “The application of certain provisions of the Competition Act 89 of 1998, as amended, to franchise agreements” (“the South African Franchising Notice”, **Annexure “F”**), as adapted for the Namibian competition laws and economy, will inform the report. In executing the above, the Namibian Competition Act will be analysed from a competition law perspective and, thereafter, a comparative study of the following countries will be performed: Australia, Canada, Japan, the United Kingdom, the United States of America (“USA”), the directives of the European Union (“EU”) as applied in certain Member States, Egypt, South Africa and the rest of Africa under the Common Market for Eastern and Southern Africa (“COMESA”).

In conclusion, recommendations will be proposed for the regulation of franchising agreements which are best suited for the Namibian economy in light of the comparative study.

(c) Framework of the report

A framework was developed in line with the Terms of Reference and Deliverables of the study. As per the terms of reference, a thematic framework was adopted for the analysis and recommendations. These terms cover, *inter alia*, the following key characteristics: whether it is necessary to have franchising regulations in Namibia; licensing agreements and their impact on competition for Namibia; what is the most effective framework to support franchising in Namibia; what is the potential for Namibian franchising, conclusion and recommendations.²⁹ This culminated in the development of the following main themes that forms of the thread and discussion areas of the report namely a consideration of possible regulatory framework; competition aspects of franchising; international comparisons of legislation and government initiatives; recommendations for job creation, learning and training and entrepreneurship. The work programme for the study report was structured in various stages. In stage one the methodology and design of the report is discussed and this include the identification of key issue and the development of a framework around the deliverables from the TOR. In stage 2, desktop research of literature and the preparation of questions for interviews, as well as the arrangement of meetings. Stage 3 consisted of the compilation of information, articles and related franchise information, for business, competition and regulatory content. Stage 4 interviews scheduled in Namibia to obtain more information on the franchising landscape. Stage 5 sees the production of interim report, which consisting of preliminary regulatory, competition, business and related franchising comments. Processing information received from interviews. A meeting was held with the Minister for consolidation and Phase 6 a final report is prepared for recommendation to the Board of Commissioners.

2.6 Analysis methodology of the study

By compiling information, which ranged from responses received during interviews, desktop research of literature to country specific comparisons, the aim was to suggest possible solutions and recommendations to the NACC so as to stimulate the economic climate open up possible boundaries that hinder the development of franchising and make recommendations regarding a sustainable regulatory framework. The project team assessed the Namibian position, insofar as it relates to franchising, the economic climate and regulatory framework. The information was supplemented by international franchise comparisons.

²⁹ *Franchising Terms of Reference*, Namibian Competition Commission. Page 7 (2016).

2.6.1 Business, regulatory and competition aspects

For a consideration of business, regulatory and competition aspects, the following elements were included in the report namely theoretical analysis; a study of the different approaches internationally; a study of the regulatory framework of various countries; a study of the legal and business landscape of various countries.

To conduct substantive comparisons, the team attempted to evaluate developed and more emerging markets, with specific regard to their best practices and legislative developments.

2.6.2 Interviews

The project team identified possible parties to participate in the study, from desktop research, which included franchises, non-conventional franchises, training and tertiary institutions, audit firms, banks, business organisations, business brokers, SMEs, Chambers of Commerce and businesses that showed franchising potential. The team sent emails and questionnaires to possible participants of the study, with a confirmatory letter received from the NACC. Questions for the interviews were compiled by considering questions that were posed to South African businesses in a recent franchise study, questions received from the NACC, as well as questions specific to the Namibian franchising landscape. Interviews were held on 6-8 February 2017, in Windhoek, Walvisbay and Swakopmund. These places were identified based on the size of the business communities situated in these areas. The information obtained in the interviews was incorporated in the report, and used for further recommendations.

2.7 Conclusion

The report is reflective of the views of a broad based sample including the franchisors, franchisees, entrepreneurs and financial institutions in Namibia.

CHAPTER THREE

3. CONCEPTUAL FRAMEWORK OF THE FRANCHISING MODEL

Chapter three gives a description of the concept of franchising, the advantages and disadvantage thereof as well as common franchising models. The aim of the chapter is to provide a conceptual framework of the concepts and the legislation governing these concepts.

3.1 The concept of franchising

A franchisor usually uses franchising to grow its brand and expand the presence of the franchisor's goods or services in a country, region or the world. It is a proven business technique in terms of which the franchisor allows franchisees to use the business system developed by the franchisor in order to conduct the franchised business on their own, but using the franchisor's brand and methods. It also creates a channel through which the franchisor can distribute its goods or provide its services to consumers.³⁰ A franchise agreement can be defined as a contract in terms of which the franchisor grants the franchisee the rights to do business and deal in certain products or services using the franchisor's system, trademarks, copyright, know-how and other intellectual property.³¹ Different forms of franchise agreements can be identified depending on the nature of the relationship between the parties, as well as the applicable rights within the agreement. A franchise agreement is essentially a contract or a license agreement between two parties which gives one party (the franchisee) the right to market a product or a service using the trademarks of the other party (the franchisor).³² Different forms of franchise agreements can be identified depending on the applicable rights pertaining to the agreement. A recent article titled "UNDERSTANDING IMPORTANT LEGAL ASPECTS OF FRANCHISING" is attached as **Annexure "J"**.

³⁰ AC Selden *et al An Introduction to Franchising* 3 ed (2008) 1.

³¹ Woker *Franchise Relationship* 14.

³² Woker *Franchise Relationship* 14.

3.2 A brief history of franchising

The word “franchise” has its roots in Old French meaning “privilege” or “freedom”.³³ The United States of America is often mentioned as the birthplace of franchising.³⁴ However, it has been suggested that basic franchise-related business can be traced as far back as 200 BC when a businessman created a chain-store concept for distribution of food throughout China.³⁵ In the Middle Ages, medieval lords allowed certain citizens to operate ferries, host markets and partake in business, all of which essentially amounted to an exclusive practice of commercial endeavours.³⁶ It was only in the 1850s that the distribution concept of franchising, as we know it today, formally emerged.³⁷ In 1851, in the United States, the Singer Sewing Machine Company began granting distribution franchises for their sewing machines under franchise contracts that have been described as the “forerunners of modern franchise agreements”.³⁸ In the 1880s, exclusive franchises were granted to streetcar companies and utilities for water, sewerage, gas and later electricity.³⁹ After the Second World War, in the 1950s and 1960s, franchising began to develop rapidly and gained real prominence.⁴⁰ This was because the concept appealed to soldiers who were keen to make up for time lost during the war and were looking for business opportunities.⁴¹ A number of other factors contributed to this development, which include rising disposable incomes, urbanisation, demand for goods and services, and rising consumer mobility.⁴² The growth of franchising slowed down in the 1970s and the excitement surrounding it subsided.⁴³ Problems and abuse arose, misrepresentation was rife, franchisors terminated contracts arbitrarily and generally there were increased franchisee failures. This highlighted the need for regulation and led to the development of legislation and self-regulation relating to franchising.⁴⁴ The need for franchising regulation continues to be significant, since many of the benefits as well as abuses associated with franchising in the past, are still prevalent today.

³³ A Rogerson “The History and Regulation of Franchising” www.rogersonbusinessservices.com (Accessed on 31 January 2017).

³⁴ Woker *Franchise Relationship* 10.

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ K Illetschko *SA Guide to Franchising* (2001).

³⁸ Rogerson “History and Regulation”.

³⁹ *Ibid.*

⁴⁰ Illetschko “SA Guide to Franchising”.

⁴¹ *Ibid.*

⁴² Woker *Franchise Relationship* 10.

⁴³ *Ibid.*

⁴⁴ Rogerson “History and Regulation”.

3.3 Definition of franchising

Franchising can be defined from two different perspectives, the business owner's definition and the legal definition found in legislation.⁴⁵ The business owner's definition partly defines franchising as "a method of market expansion utilized by a successful business entity" which essentially describes the franchisee as an extension of the franchisor's business rather than as a separate entity.⁴⁶ Such definition emphasises the relationship between the parties and importance of the franchisor and franchisee maintaining a strong and harmonious relationship to ensure that ultimately business success is an outcome for both parties.⁴⁷ The legal definition differs in different jurisdictions but generally three essential elements are consistently included.⁴⁸ Firstly, a recognised trade mark is necessary for the franchisee to use in its business, under a license agreement, for a certain period of time. Secondly, the franchise is based on a system or marketing plan determined or controlled by the franchisor. The franchisor will generally share knowledge, expertise and ongoing assistance to the franchisee. Thirdly, a payment of consideration is made by the franchisee to the franchisor which is widely defined and can include franchisee fees, royalties, advertising fees or even the purchase of specific inventory in some instances.⁴⁹

3.4 Statutory versus Self Regulation

The regulation of franchising focuses on how the business relationship between a franchisor and a franchisee is controlled and governed.⁵⁰ There is no uniform practice among countries.⁵¹ There are certain countries that explicitly regulate franchising through legislation (statutory regulation), while in other countries franchising is regulated by industry bodies that monitor conduct and compliance (self-regulation). Some countries have been able to achieve a system of co-regulation where the franchising industry and government work together in regulating the industry.⁵² Whether or not there is legislation that regulates franchising specifically, most countries have general legislation which can play a role in the regulation of franchising too.⁵³ The aim of this review is to discuss the franchising model encountered in a number of countries, focussing on the key features, benefits and hindrances that stem from both statutory regulation and self-regulation. General legislation will be

⁴⁵ Woker *Franchise Relationship* 17.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ Abell *Franchise Law Review* 10.

⁵⁰ T Woker *The Franchise Relationship under South African Law* (2012) 56.

⁵¹ M Abell *The Franchise Law Review* 2 ed (2015) 8.

⁵² Woker *Franchise Relationship* 67.

⁵³ Abell *Franchise Law Review* 8.

mentioned too, where relevant. The various approaches adopted by foreign jurisdictions, as well as the circumstances and rationale behind such approaches will be discussed. Australia, Brazil, Canada, USA and Tunisia will be considered in the analysis of countries that have formally regulated franchising through legislation. Developed, industrialised countries (such as Germany, the Great Britain and New Zealand) as well as emerging economies (such as India) will be considered in the spectrum of countries that do not have franchise-specific laws. In these instances, franchising is generally regulated through self-regulation and/or general legislation. The nature and scope of franchising regulations in certain African countries will be examined as well. The purpose of the review is to provide assistance, guidelines and recommendations in ultimately considering whether franchise regulations need to be introduced in Namibia. Franchising parties can essentially regulate their relationship by entering into a franchise contract. As mentioned, this relationship may be subject to statute, or a self-regulatory body, and/or general laws such as contract law and consumer law. One of the biggest challenges in regulating franchising is aiming to achieve a balance in ensuring protection of franchisees while at the same time recognising that franchisors have the primary responsibility of protecting their brand.⁵⁴ Franchising regulation to a large extent focuses on the rights of individual franchisees, since there is often a power imbalance between the parties. The aim of regulating franchising should be to ensure franchisee protection, while not unnecessarily impeding the development of franchising as a business model.⁵⁵ The following distinctions between statutory and self-regulation will illustrate how this imbalance of power in the franchisor-franchisee relationship can sometimes occur, in addition to other factors.

3.4.1 Statutory regulation

Statutory regulation involves the imposition of a government's standards backed by sanctions for non-compliance. Legislation is introduced by the state when businesses are unable to control themselves or consumers and competitors lack the resources or drive to challenge abuses.⁵⁶ Legislation can be implemented to address situations of monopoly abuse and when business industries are engaging in unwanted behaviour. Often, legislation may create a regulatory agency that is responsible for monitoring conduct and ensuring compliance.⁵⁷ In respect of the statutory regulation of franchising, franchise laws around the globe typically cover one or more of the following topics: (1) pre-contractual disclosure; (2) rules governing offering and sale of franchises; (3)

⁵⁴ Naude and Eiselen *Consumer Protection Act* 7-12.

⁵⁵ UE Ofodile "Franchising Law: Does Nigeria need one? Do other countries have them?"

www.nigerianfranchise.org/images/NiFA_Newsletter_03_05_14.pdf (accessed on 6 January 2017).

⁵⁶ Woker *Franchise Relationship* 64.

⁵⁷ *Ibid.*

registration requirements⁵⁸; (4) requirements relating to the contents of franchise agreements; (5) post-sale relationship between the parties; and (6) dispute settlement.⁵⁹ The strongest argument for implementing statutory regulation would be the fact that there are often abuses associated with franchising that only the force of law and regulations can clarify and address.⁶⁰ Legislation represents public policy and aims to clarify acceptable and unacceptable norms of conduct.⁶¹ The uncertainty that is inherent in the implementation of institutions could be addressed by responsive regulators who have a foundational point of reference within the law, providing clarity and improving the quality of law.⁶² Furthermore, the adoption of franchise-specific legislation would create certainty in the industry, prescribe minimum standards of behaviour and would be subject to public scrutiny.⁶³ A pre-contractual disclosure document gives prospective franchisees extensive information about the franchisor and franchise network. It purports to ensure that franchisees make an informed decision before concluding an agreement.⁶⁴ Statutory regulations may have the following disadvantages. Legislation can be rigid, restrictive and sometimes can create unnecessary burdens.⁶⁵ This could discourage investors and franchisors by serving as a barrier to entry, and thus make a country an unattractive place to do business.⁶⁶ On the other hand, there is also the risk that franchisors can find loopholes within the legislation and thus comply with the letter of the law, but not with the spirit.⁶⁷ Furthermore, enforcement authorities may find it challenging to apply complex legislation to business practices, especially in respect of franchising, which requires the necessary expertise.⁶⁸ Legislation can also potentially lull franchisees into a false sense of security in that they neglect to perform necessary due diligence.⁶⁹ New laws can also create new uncertainties that can lead to frequent litigation. Enforcement is costly and compliance costs can be significant.⁷⁰

⁵⁸ It is important to note that, in addition to specific franchise registration requirements, sector-specific registrations may often apply to a franchisee due to the industry involved.

⁵⁹ Ofodile "Franchising law".

⁶⁰ A Erceg "Is absence of regulation and franchising law obstacle for franchising expansion in Croatia – Comparison with other countries" (2016) *16th International Scientific Conference on Economic and Social Development* 392 at 394.

⁶¹ Woker *Franchise Relationship* 65.

⁶² P Grajzl and P Murrell *Allocating lawmaking powers: Self-regulation vs government regulation* (2007) 35 *Journal of Comparative Economics* 520 at 521.

⁶³ Woker *Franchise Relationship* 65.

⁶⁴ Abell *Franchise Law Review* 17.

⁶⁵ Ofodile "Franchising law".

⁶⁶ *Ibid.*

⁶⁷ Woker *Franchise Relationship* 66.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ Ofodile "Franchising law".

3.4.2 Self-regulation

Self-regulation is one of the ways in which the relationship between franchisors and franchisees can be controlled. It occurs when a specific industry body assumes responsibility for prescribing its own rules and conduct.⁷¹ It could also be described as the delegation of regulation to an agency that represents the entities or individuals whose activities fall within the agency's field.⁷² In self-regulation, businesses endeavour to exercise efficient regulation by setting standards of conduct, providing the means for recognising unacceptable conduct, and to provide incentives to encourage compliance by introducing penalties and rewards.⁷³ For the effective functioning of self-regulation, there must be an industry body that develops a code of conduct and has the capacity to monitor and enforce compliance.⁷⁴ The following are some of the advantages of self-regulation. Self-regulation can provide a balance between no regulation at all and rigid government controls. Industry codes of conduct are more flexible than regulation by statute and can be easily revised as voluntary standards of conduct.⁷⁵ Problems can be addressed more efficiently and timeously. Procedural court problems are avoided, and enforcing a code within a self-regulatory process results in lower transaction costs.⁷⁶ The distribution of regulatory control rights means the regulating industry gains the right to set rules that may have the same effect as the law.⁷⁷ Furthermore, it has been suggested that the quality of law is actually improved because there is enhanced responsiveness of regulators to the uncertainty that is inherent in the self-regulation process.⁷⁸ In addition, industry experts hold superior knowledge of the regulatory issues at stake, especially in identifying abuses and providing solutions, as opposed to government officials who may not understand the industry.⁷⁹ A code of conduct developed and constantly updated by a self-regulatory body is valuable because parties to a code are expected to comply with the spirit of the code rather than with the strict letter of the law.⁸⁰ Many members within the franchising sector support the view that franchising should rely primarily on self-regulation because it encourages conflict-resolution procedures.⁸¹ Dispute resolution

⁷¹ Woker *Franchise Relationship* 57.

⁷² Grajzl and Murrell *Allocating lawmaking powers* 521.

⁷³ Woker *Franchise Relationship* 57.

⁷⁴ *Ibid.*

⁷⁵ JY Adler "The Ethics of Franchising: How Codes of Ethics compare and what to consider in deciding whether to subscribe to them" (2009) 29 *Franchise Law Journal* 74 at 75.

⁷⁶ Grajzl and Murrell *Allocating lawmaking powers* 521.

⁷⁷ Grajzl and Murrell *Allocating lawmaking powers* 522.

⁷⁸ *Ibid.*

⁷⁹ Woker *Franchise Relationship* 58.

⁸⁰ *Ibid.*

⁸¹ Adler "Ethics of Franchising" 75.

techniques, such as mediation and arbitration, are often supported.⁸² In contrast self regulation has the following disadvantages. The biggest difficulty with self-regulation is that membership of industry bodies/associations is voluntary and while complaints often relate to non-members over whom such associations have no authority.⁸³ Potential efficiency disadvantages under the self-regulation can also stem from the fact that industry role-players regulate themselves.⁸⁴ Industry bodies often lack funding, effective enforcement mechanisms and capacity to promote their interests.⁸⁵ In charging membership fees, costs will often be passed on to members and therefore small business members can be at a competitive disadvantage to their large counterparts.⁸⁶ Members' interests are not always protected and acceptable business practices, according to a particular code, cannot be enforced on non-members.⁸⁷ Self-regulation can be insufficient in protecting the interests of franchisees due to many possible abuses in the franchisor-franchisee relationship.⁸⁸

3.4.3 Co-Regulation

Co-regulation occurs where industry and government work together to regulate a particular business sector. The government sets a regulatory framework which establishes certain policy objectives, having statutory backing.⁸⁹ The practical implementation of those measures is then left to industry to develop and administer its own system of regulation.⁹⁰ Effective co-regulation occurs when voluntary control and statutory recognition are complementary rather than mutually exclusive. The approach entails disputes being resolved at industry level and if there is failure to reach a solution, such matters are then escalated to some form of state regulation.⁹¹

3.5 Franchise types and formats

(a) Trade name or product distribution franchising:

This type of franchise arises when the franchisor manufactures and distributes tangible products through franchisees and a franchise system.⁹² The franchisee is licensed to act as a non-exclusive or exclusive authorised dealer for such products, allowing use of the franchisor's name and trade

⁸² *Ibid.*

⁸³ Woker *Franchise Relationship* 60.

⁸⁴ Grajzl and Murrell *Allocating lawmaking powers* 521.

⁸⁵ Woker *Franchise Relationship* 60.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ Erceg "Absence of regulation and franchising law" 394.

⁸⁹ Woker *Franchise Relationship* 67.

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² Selden *et al Introduction to Franchising* 2.

marks.⁹³ This type of franchising may be found not only in instances where the franchisor itself manufactures the product, but also where it has products produced for its account by a third party, or acts merely as a distributor of products whether or not it actually handles the physical distribution of them.⁹⁴ Product distribution franchises closely mimic supplier-dealer franchises. The difference is in the degree of the relationship.⁹⁵ In a product distribution franchise, the franchisee may handle the franchisor's products on an exclusive or semi-exclusive basis, whereas with a supplier-dealer relationship, several products are often handled, which can include competing products.⁹⁶ In a product distribution franchise, the franchisee is closely associated with the franchisor's brand name and receives more services from the franchisor than a dealer would from its supplier.⁹⁷ Examples of product distribution franchises include motor vehicle and parts dealers, petrol service stations, chain hardware stores and soft drink bottling companies.⁹⁸

(b) Business format franchising

Business format franchising is similar to trade name or product distribution franchising. However, in this model, franchisors establish a fully integrated relationship with their franchisees and provide a complete system for delivering the product or service and conducting the business.⁹⁹ A business format franchise thus typically entails a recognised trade mark combined with proven business methodology which is supported by operational controls and continuous assistance.¹⁰⁰ Provision of business information, know-how, training and marketing assistance is provided to the franchisees.¹⁰¹ The business structure provides a detailed plan that explains how to do most things "from scratch".¹⁰² Consistent replications of the franchisor's successful business concept, as well as brand recognition, are the primary goals under this format.¹⁰³ Standard examples include fast food outlets, convenience stores, franchised hotels and quick printing shops.¹⁰⁴ The African Development Bank

⁹³ Woker *Franchise Relationship* 14.

⁹⁴ Selden *et al Introduction to Franchising* 2.

⁹⁵ M Seid & D Thomas *Franchising for Dummies* (2007) 16.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ Woker *Franchise Relationship* 14.

⁹⁹ Seid & Thomas *Franchising for Dummies* 16.

¹⁰⁰ Woker *Franchise Relationship* 16.

¹⁰¹ Woker *Franchise Relationship* 15.

¹⁰² Seid & Thomas *Franchising for Dummies* 16.

¹⁰³ Woker *Franchise Relationship* 15.

¹⁰⁴ *Ibid.*

has endorsed business format franchising as the form of franchising that should be encouraged due to a successful record of promoting small and medium-sized enterprises.¹⁰⁵

3.6 Legitimate variants of a business format franchise

(a) Conversion franchising

Conversion franchising is a system in which an already existing independent outlet is converted into a franchise which allows the independent outlet to use a franchise system's name, trademarks and operating system.¹⁰⁶ The outlet receives a corporate image make-over and the new franchisee and his/her staff will be trained in the franchisor's business methods.¹⁰⁷ Successful integration of a new unit into the franchising network relies to a large extent on the franchisor's determination to insist on standardisation from the start and the franchisee's ability to implement this.¹⁰⁸

(b) Social franchising

Social franchising refers to the application of commercial franchising methods and concepts to achieve socially beneficial outcomes, rather than profit-making goals.¹⁰⁹ Social franchising involves more control and involvement from the "parent entity" than a licensing agreement or cooperation would entail, but slightly less control than that of a central organisation that wholly owns a franchise.¹¹⁰ Social franchising is geared towards achievement of social goals but should not be confused with charity.¹¹¹ On the contrary, for such a programme to be sustainable, it must operate according to sound commercial principles.¹¹² There are various reasons why a social enterprise would adopt the approach of social franchising.¹¹³ The primary reason would be to promote social objectives. Further reasons include the ability to share learning in a mutually efficient manner, fostering local ownership, promoting a common identity, and the development of social missions in a unified manner.¹¹⁴ At the founding stage of such a franchise, grants and donor funding would be necessary to drive the franchise, but dependency on such assistance should ideally be reduced until eventually the franchisee become self-sufficient.¹¹⁵ Social franchising has been defined by the International Centre for Social Franchising ("ICSF") as a method of reproducing a successful social

¹⁰⁵ African Development Bank Group 'African Development Report 2000' (2000).

¹⁰⁶ K Illetschko *How to franchise your business* 6 ed (2012).

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ N Temple "The Social Franchising Manual" (2011) *Social enterprise Coalition* 1 at 3.

www.socialenterprise.org.uk (Accessed on 31 January 2017).

¹¹⁰ *Ibid.*

¹¹¹ Illetschko *How to franchise your business*.

¹¹² *Ibid.*

¹¹³ Temple "Social Franchising" 6.

¹¹⁴ *Ibid.*

¹¹⁵ Illetschko *How to franchise your business*.

purpose, organisation or project in a new region or for a new beneficiary group.¹¹⁶ The ICSF's stated aim is to "replicate successful social impact solutions to achieve scale".¹¹⁷ The ICSF works with a range of countries including the US, UK, Australia, Zambia, Tanzania, South Africa, Malawi, Kenya, India, Mexico and Nicaragua.¹¹⁸ The following are examples of social franchises: a franchise system in terms of which franchisees can operate primary health care services and clinics, or a branded franchise network that offers livestock services through franchisees.¹¹⁹ In other parts of the world, social franchising has been used to good effect to bring essential services to the poorest of the poor. Experience has shown that the private sector can deliver them more efficiently and cost-effectively than government-operated structures. A good example is primary healthcare. The only problem is that the target population is typically unable to pay market-related prices. It follows that either government or donor organisations need to cover the shortfall. This can be justified because accessibility to essential services is enhanced and pressure on existing government-operated structures is reduced.

(c) Micro franchising

This is essentially a business format franchise that applies characteristics of traditional franchising to small businesses, primarily in the developing world. It is adapted to meet the needs of micro-entrepreneurs who usually operate in impoverished areas.¹²⁰ Development issues such as health, sanitation and energy are usually targeted. Over the past few years, micro-franchising has made strong inroads.¹²¹ Micro franchise concepts operate along the same principles as ordinary franchises but on a very small scale. An example is the distribution of airtime to end-users living in outlying areas. Neither micro franchisors nor their micro franchisees are likely to get rich, the concept enable tens of thousands of micro entrepreneurs the world over to operate viable small businesses. The profits these micro franchises generate enable their owners to feed their families and themselves.

3.7 Legitimate expectations of the parties¹²²

Franchising is all about working together towards a common goal. On the face of it, this is the building of the brand for mutual financial gain. Unfortunately, human nature being what it is, matters tend to become a little more complex. There can be no doubt that both the franchisor and

¹¹⁶ International Centre of Social Franchising <http://www.the-icsf.org/about/> (Accessed on 1 February 2017).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ Illetschko *How to franchise your business*.

¹²¹ *Ibid.*

¹²² K Illetschko, *Principles of Franchising*, 2015, Absa Franchising, Johannesburg

the franchisees in the network will want to build wealth for themselves and their families to enjoy but there is a strong chance that the two parties will have different visions for their businesses. For example: The franchisor may want the brand to dominate the landscape of every city and town. The franchisor might be willing to do just about anything to realise this dream, including cutting profits to the bone to “buy” market share. Franchisees on the other hand are generally more concerned with short-term profitability. They are hesitant to take risks that may or may not pay off. These divergent standpoints could create friction. To reduce the potential for this to happen, the franchise relationship must be transparent. Open communication from the outset reduces the likelihood of either party becoming disillusioned with the other at a later stage.

3.8 Expectations of the franchisor

(a) Upholding of standards

Having developed a successful concept and honed it to perfection, the franchisor will expect the franchisee to follow the network’s standards to the letter. This makes perfect sense. After all, the concept has proven to be effective so why tinker with it? There is another point to consider. The network’s brand creates certain expectations in consumers’ minds. They react to name recognition and the familiar appearance of any outlet of a franchised network. Based on this, consumers expect to find the same levels of ambience, quality and service as they have experienced in the past. One franchisee’s failure to live up to these expectations could damage brand perceptions. Lastly, the other franchisees in the network have made a substantial investment into the brand. They perceive the franchisor to be the guardian of the brand. Would the franchisor tolerate deviations from the norm by one or more members of the network it could damage the brand and reduce the value of this investment? Consequently, unless the franchisor acts decisively against offending franchisees, other franchisees could claim breach of contractual obligations by the franchisor. This does not mean that franchisees are expected to behave like robots, content to follow the instructions that are contained in the operations manual without ever raising questions. The secret lies in how this is managed and dealt with. If a franchisee develops a product that would complement the network’s existing range or finds a better way to carry out some existing process or procedure, they should communicate this to head office through the appropriate channels. Forward-looking franchisors will eagerly absorb feedback from franchisees because they know that franchisees are interacting with consumers all the time. They will test the merits of the idea the franchisee has put forward. Should it stand up to scrutiny, they will incorporate it into the system.

(b) Shared vision

Most franchisors dream of developing their brands into international icons in their field. They expect their franchisees to share this dream and make it their own. Unfortunately, some franchisees seem content to earn a just-above average income. They fail to exploit the true potential of their allocated territory, thus opening the doors for the competitors to fill the resulting vacuum. Prospective franchisees should realise that mediocre people will generally not be happy as franchisees.

(c) Willingness to become part of the team

By joining a franchised network, franchisees join a family of likeminded people. Working together can create a strong bond. To maximise its potential, franchisees need to be proud of the brand they represent and act accordingly. They should also work well with customers, franchisor representatives, suppliers and other franchisees within the network.

Enthusiastic participation in group programmes is another requirement. This applies to training sessions, product promotions, joint marketing drives, group purchasing initiatives, group meetings, social events or any other activity the franchisor initiates on behalf of the network.

Experience has shown that close cooperation among all members of a franchised network creates the momentum that propels the brand into a leadership position and keeps it there.

(d) Customer service excellence

Franchisors expect their franchisees to adopt customer service excellence as the cornerstone of their existence. Unless every franchisee in the network lives up to this noble goal the brand and franchise system can be prejudicial.

(e) Highest ethical standards

Franchisors expect their franchisees to meet their financial obligations on time all the time. They also expect total honesty from their franchisees. For example, the insidious practice of “skimming”, sometimes practiced by dishonest franchisees, is a sure-fire way of eroding the trust that constitutes an essential component of the franchisor / franchisee relationship.

(f) Expectations of the franchisee

More often than not, newcomers to entrepreneurship choose the franchise route because they want to be in a business for themselves but not by themselves. They are quite happy to pay the initial and upfront fees prescribed by the franchise agreement as long as they receive perceived value in return.

And they willingly follow the guidelines contained in the operations manual as long as they are relevant, practical and up to date. In return, they expect the following from their franchisor:

(g) Full disclosure

The franchisee will want to know the realistic potential of a trading site. For example, if in the franchisor's experience it takes an average of 10 months to reach the all-important break-even point, the franchisee does not want to be given projections that show this period to be 5 months. Nor will the franchisee want to be told that it will cost N\$1 million to set up the new store when N\$1,500 000.00 is much closer to the mark. Should the store be a resale, or a store has failed at this location in the past, the franchisee will want to know the real reasons for the failure.

(h) Integrity

Franchisees expect, and are entitled to be treated with integrity. It starts at the selection stage. If a prospect appears unsuited for a specific franchise they should be told so.

(i) Professionalism

Franchisees expect the highest level of professionalism from their franchisor. If a franchisor recommends a specific equipment package or enters into supply arrangements on behalf of the network, franchisees expect that he has considered the pros and cons carefully, with franchisees' interests top of mind. That every item works as expected and that satisfactory arrangements for ongoing support are in place. Franchisees expect the franchisor to negotiate tangible financial benefits on their behalf. Should the franchisor be a key supplier, franchisees expect to be granted terms and conditions that are at least as good as, preferably better than those available to their independent competitors.

(j) Cutting edge training

Franchisees know that the better trained they are, the better equipped they will be to meet and exceed their customers' expectations. This will help them to build market share quickly and reach the all-important turning point of "break-even" sooner. They therefore expect initial training that is tailored to their real needs and delivered in a manner that is conducive to effective learning.

3.9 Developing a comprehensive operations manual

Having been advised that the operations manual is the "bible of the business", franchisees will expect it to cover all mutual aspects of operations. They also expect the material to be arranged in such a way that solutions to every-day problems can easily be found. There should also be regular updating of the manual to ensure its ongoing relevance and usefulness.

3.10 Broadest possible operational support

Comprehensive assistance during the period after start-up, offered enthusiastically, will go a long way towards cementing the franchisor / franchisee relationship. Even after the initial learning has been mastered, franchisees will continue to expect their franchisor to provide assistance if and when the need arises.

3.11 Aggressive marketing and brand building

Marketing efforts must rank among the franchisor's prime obligations. In addition to advertising campaigns, this should include market research and product development. All these activities, performed diligently, will result in tangible benefits for franchisees and go a long way towards developing and maintaining harmonious franchisor / franchisee relations.

3.12 Communication channels

Franchisees dislike it when they experience problems but cannot reach anyone who has the knowledge and / or authority to offer an immediate solution. Being unable to resolve an issue impacts negatively on the franchisee's reputation and can cost them customers.

Franchisees expect a system to be in place that is capable of taking care of all foreseeable problem-solving needs promptly and efficiently. They also want to be kept informed of new developments affecting the brand before the public gets to hear about them. It can be unsettling for a franchisee, to be told by a prospective customer about new developments affecting the brand they don't know about.

3.13 A climate that fosters constructive criticism

Being in direct contact with customers, franchisees are in an excellent position to provide feedback on end-user responses to marketing campaigns or the introduction of new products and services. They are also well-placed to uncover shortcomings in systems and procedures. They expect their feedback to be taken seriously. This would include an earnest effort to evaluate the merits of the feedback. Should a franchisee's proposal pass the evaluation phase and be incorporated into the network's systems, appropriate recognition should be given.

3.14 Providing input

Franchisees like to provide input regarding the way the brand is managed and how their advertising contributions are spent. In the interest of good franchisor / franchisee relations, consultation should be, where possible, included as a first step. The issuing of binding directives should be dealt with correctly and applied in instances where the franchisor is absolutely convinced that the introduction of a controversial measure is absolutely necessary.

3.15 Formal representation

This is the formalisation of the consultation process across the network, usually in larger franchise systems. As soon as a network has reached a size that makes regular monthly or quarterly round table discussions with all franchisees impractical, the introduction of a franchisee representative body should be considered. It will go a long way towards satisfying franchisees' desire to provide input. Franchisee Councils, Advisory Councils, Marketing Committees, and the like, impacts positively on franchisor / franchisee relations, provided it is managed properly.

3.16 Peer interaction

To operate a small business can be a lonely and challenging occupation. As a result, most franchisees enjoy interacting with their peers. It can be in a formal setting, such as during annual conferences, or informal, based on need. However, franchisees' main focus will always be the operation of their own businesses. If they take time off, for example to attend an annual network event, they expect to receive value. For example, a thoughtfully arranged core programme that includes presentations on the release of new products and outlines the marketing plans for the forthcoming year, supplemented by a keynote speaker who deals with a topical subject in an informative and entertaining way, is almost certain to meet expectations. It is in order to end proceedings with a good party, but this should generally not be the main focus of the event.

3.17 Practical considerations

Although franchising offers many advantages, it should not come as a surprise to learn that it has disadvantages as well. This sub-Chapter examines the pros and cons of franchising seen from the respective stakeholders' viewpoints.

(a) Seen from the franchisee's viewpoint

(i) Advantages

Instead of having to start a business from scratch with all the attendant uncertainties, a franchisee receives a 'business in a box', ready to be operated from day one. Typical benefits of launching a start-up under a franchise include initial benefits such as access to extensive initial training and set-up support; introduction to valuable trade contacts; the use of a proven operating system which will be documented in one or more volumes of the network's operations manual; The right to trade under the established trade mark; because at least some members of the target market will know the brand and will look forward to doing business with it at the new location, the period to reaching break-even will be reduced. Furthermore the advantage of ongoing benefits such as ongoing support offered by the franchisor sees to it that the franchisee keeps abreast of developments in the market including market intelligence and product development. Franchisors also offer ongoing training, consulting and mentoring services; franchisees have access to group promotions and purchasing arrangements; peer support and being a member of an established network and usually has a definite resale value. Indeed, the franchisor may even have a prospective buyer on its database.

(ii) Disadvantages

There are disadvantages, but when compared to the impressive list of advantages franchising offers, they tend to pale into insignificance. However, investing in a franchise is a serious undertaking so it is important that prospective franchisees take note of issues they might perceive as negatives before committing themselves. Some of the disadvantages are:

Initial and ongoing fees

A franchise is a commercial arrangement, with both parties having a profit motive in mind. Initial and ongoing fees are therefore payable. The amounts payable should be reasonable and be in return for value received.

It is noteworthy that in many instances, savings arising from access to group deals reduce the amount of franchise fees payable or even create a surplus in the franchisee's hands. This depends on the industry sector and the franchisor's network's terms and conditions. This information should be contained in the disclosure document.

The need to uphold standards

Because every franchisor wants to protect the image of the brand, she will not permit franchisees to save money by cut corners during the set-up stage. For example, specifications for the type and quality of materials used in the setting-up of the business will be rigid. It follows that set-up costs

could be higher than if sub-standard materials were used, but at what cost? Quality materials are bound to last longer and quality enhances the business's image. As a result, break-even should be reached sooner.

Weak franchisors

Underfinanced or unprofessional franchisors could stifle the development of the brand and with it the development of the franchisee's business. A thorough evaluation of the franchise opportunity is so important.

The need for compliance

Some individuals resent the fact that as franchisees, they are forced to operate within a relatively rigid framework. Unfortunately, there is no way around that. Should the requirement to follow the franchisor's tried and tested systems create problems for an individual then investing in a franchise may not be the best choice for them. However, as competition for good prospects increases, many networks are adapting their approach to compliance to accommodate entrepreneurial types to some degree. They grant franchisees 'controlled independence' – a certain degree of freedom within the framework of laid-down standards, so as to, for example, accommodate and meet local standards.

(b) Seen from the franchisor's viewpoint

(i) Advantages

A profitable business that is ready for expansion will derive significant benefits by choosing franchising as the preferred mode for expansion. Some examples follow but this list is by no means exhaustive.

Reduced capital requirement

The establishment of additional branches is funded by franchisees who are also responsible for the management of their businesses. The franchisor is responsible only for the development of the franchise package. Costs arising include professional fees, research costs and the cost of marketing the franchise. The franchisor must also make provision for shortfalls in cost recoupment for franchisee recruitment, training and set-up assistance, especially during the early stages after franchising begins. These costs can be substantial.

Accelerated expansion

Because franchisees fund new units and take responsibility for their management, the rate of expansion can be faster than would otherwise be likely. Consider, too, that because the franchisee

is a separate legal entity, the cost of setting up new outlets and attendant funding requirements are not reflected on the franchisor's balance sheet. This allows the franchisor to raise capital for brand-building.

Economies of scale

Because of the rapid pace of expansion a franchise programme makes possible and the reputation of the brand, the franchisor can expect to be offered special deals by landlords and suppliers.

Enhanced operational efficiencies

Companies that have converted their existing branches to franchises in the past have observed an almost instant increase in operational efficiencies. The reason for this is that owners of outlets are usually more diligent in controlling costs than salaried managers. Turnover also often increases due to owner operators.

Reduced pressure on head office resources

This goes hand in hand with the previous paragraph. Because a franchisee owns the outlet and is responsible for its management, the need for crisis management interventions by head office personnel tends to become the exception rather than the rule.

Enhanced forward-planning capability

Because franchisees take responsibility for achieving agreed budgets, network-wide forward-planning becomes more accurate and the resulting income stream becomes more predictable.

(i) Disadvantages

There are a few disadvantages, but when compared to the impressive list of advantages franchising offers, they tend to become less important. However, expanding a business via the franchise route is a serious undertaking that cannot easily be reversed. It is important, therefore, that a prospective franchisor is aware of possible negatives before taking this big step. Competent planning and implementation is essential.

Reduced per-unit profitability

Per unit income in the form of royalty fees is likely to be less than the profits generated by well-managed businesses. This has to be weighed up against the advantages of reduced business risk, quicker market penetration, the use of a valuable brand and system, the likelihood of qualifying for bulk purchasing benefits and lower operating costs.

Substantial initial investment

Although franchisees pay an upfront fee and are responsible for unit establishment costs, a new franchisor will encounter substantial initial costs as explained earlier. Allowance must also be made for the cost of training and supporting the franchisee during the set-up stage. Depending on the industry sector, and assuming that the franchise roll-out progresses as planned, the initial investment can usually be recouped over a period of 3 to 5 years. It follows that expectation should be realistic and some patience is required.

Cost of ongoing franchisee support

Franchisees will typically pay an ongoing management services fee linked to sales levels. During the initial years after start-up, this can create a deficit for the franchisor because:

A comprehensive franchisee support infrastructure must be in place from day one, failing which the franchise programme may never reach its true potential. However, the network will only have a small number of franchisees to begin with, all of which are new and require extensive support. At the same time, income from franchise fees will be low because the new franchisees are all busy building market share. As the network grows and franchisees' sales pick up the situation should stabilise. If managed correctly, operating a network of franchisees can become highly profitable over time.

The need for a large market

Because of relatively high initial and ongoing costs, franchising should be seen as a numbers game. Sectors where expansion potential is limited are not suited to franchising. Generally speaking and depending on the industry, unless potential exists for the establishment of at least 15–20 units over a relatively short period, franchising may not make commercial sense.

Restrictions on the freedom to act speedily

Although the franchisor will have contractually secured the right to determine strategy, franchisees' expectations need to be taken into account. After all, franchisees are investors and directly affected by the franchisor's decisions. It is good franchise practice to seek their input and try to reach consensus before controversial decisions are implemented but this could limit the franchisor's ability to respond quickly to opportunities.

Underperforming franchisees

Should a branch manager underperform, corrective measures can be implemented speedily. When it comes to dealing with an underperforming franchisee, it becomes more complex because the franchisee is the owner of the business. Careful franchisee selection is therefore very important. Of course, a well-drafted franchise agreement is a powerful instrument in the hands of the franchisor but in the interest of network-wide franchisee relations, termination should rarely be considered as a first step to be applied against an underperforming franchisee. Most professional franchisors offer extensive support before considering termination.

3.18 Commonly used franchise agreement structures

3.18.1 Master franchise agreements

A master franchise arrangement occurs when a franchisor licenses an entire defined territory to a “master franchisee” that in turn has the right and responsibility to appoint sub-franchisees to develop that territory.¹²³ Although the master franchisee might conduct the franchised business itself, it usually focusses rather on development and management of the franchise network. Typically, a royalty is paid from each sub-franchisee to the master franchisee which is often shared in some way with the franchisor.¹²⁴ The arrangement allows the franchisor to delegate control of franchising activities in a certain region to a person or entity (the master franchisee) who in turn finds franchisees and supervises those franchisees, as well as the local network.¹²⁵ This assists the franchisor to manage a territory, ensure quality and maintain a local presence in the area.

3.18.2 Systems that are not franchising

Some agreements or arrangements are sometimes confused with franchising, but cannot be classified as franchising. Firstly, a franchise is not a partnership or a joint venture because there is no common ownership of the business and neither party is responsible for the other’s debts or liabilities.¹²⁶ The franchisee essentially runs an independent business under the system provided by the franchisor.¹²⁷ A franchise is also not a pure distributorship or dealership because a dealer can

¹²³ JF Brown “Pyramid Schemes and Franchise systems” (2012)
<https://indyfranchiselaw.com/pyramid-schemes-and-franchise-systems/> (Accessed on 2 February 2017).

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ IFE “What franchising is not” <http://ife.co.za/franchising-not/> (Accessed on 2 February 2017).

¹²⁷ *Ibid.*

usually buy and sell products or services from anyone and to anyone, it is not obliged to comply with the franchisor's system and does not have the rights to trade under a franchisor's trade marks.¹²⁸ Agency agreements should not be confused with franchise agreements. In an agency agreement, the principal grants the agent the rights to distribute goods in a region under the agent's own name and not that of the principal.¹²⁹ The agent is not required to follow a specific business system and is not allowed to do business under a franchisor's name and trademarks.¹³⁰

3.18.3 Pyramid Schemes, Multi-level Marketing and Franchising

It is necessary to discuss the core differences between pyramid schemes, multi-level marketing and franchising so that there is clear understanding of the nature, ethics, legality and relational equality pertaining to each respectively.

Multilevel marketing is known as "network marketing", which is a form of direct selling whereby distributors work as independent participants to sell products.¹³¹ Distributors usually generate a commission from their own sales as well as from the sales of those whom they recruit.¹³² Usually, this is a legitimate form of selling products.¹³³ Unfortunately, multilevel marketing has the potential for the 'upline' to take advantage of the 'downline', in a similar way to that of a pyramid scheme.¹³⁴ Many multilevel marketing programs are in fact simply disguised as pyramid schemes.¹³⁵ Pyramid schemes use the classic organisational characteristic of the upline recruiting the downline, but also include extreme moral hazards.¹³⁶ In South Africa, the Consumer Protection Act¹³⁷ (CPA) describes a pyramid scheme as any arrangement, agreement, practice or scheme that depends primarily on the recruitment of new members to derive compensation, rather than from the sale of any goods or services, in order to generate money.¹³⁸ There may be a product involved, but it is usually a by-product and not the main source of income for the scheme.¹³⁹ The CPA strictly prohibits pyramid schemes and provides that no person may directly or indirectly promote, or knowingly join, enter or

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ IFE "What franchising is not".

¹³¹ T Naude and S Eiselen *Commentary on the Consumer Protection Act (2014)* 43-8.

¹³² J Beasley *Distinguishing Pyramid Schemes and Multilevel marketing* (BBusSci thesis, University of Minnesota, 2012) 3.

¹³³ Naude and Eiselen *Consumer Protection Act* 43-8.

¹³⁴ Beasley *Pyramid Schemes* 3.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*

¹³⁷ Act 68 of 2008.

¹³⁸ Section 43(4).

¹³⁹ Beasley *Pyramid Schemes* 7.

participate in a pyramid scheme, or cause anyone else to.¹⁴⁰ A pyramid scheme generally starts off with promoters who invite potential investors to join their organisation. Investors are convinced by the promoters that the approach of making a payment to a promoter and recruiting other members to make further payments down the line, will be the “route to great wealth”.¹⁴¹ The promise of future returns is thus used to lure participants.¹⁴² However, pyramid schemes are not sustainable because in order to survive, there is a need for a constant supply of new investors to satisfy the needs of existing investors.¹⁴³ The up line continues to make profits, but the down lines are left unprotected and unable to make returns.¹⁴⁴ Multi-level marketing schemes are sometimes compared to franchise models due to the interaction between participants.¹⁴⁵ A franchise structure could potentially fall within a prohibited multi-level market structure, if a franchisor, or someone holding a master franchise, sublicenses the rights of the franchise to several tiers of sub-franchisees.¹⁴⁶ It is thus acknowledged that both models can have moral hazard and potential abuses based on the upline or franchisor’s ability to benefit, despite the effects on the down line or franchisee.¹⁴⁷ However, the moral hazards of franchising have largely been resolved through increased regulations.¹⁴⁸ Furthermore, a legitimate franchise system involves the sale of real products or the provision of proper services, which have significant value to those who purchase them.¹⁴⁹ Of utmost importance and significance is to note that the profits for franchisees come from the sale of the products or services, and not primarily through the sale of new franchises or distributorships.¹⁵⁰

3.19 Conclusion

Franchising is a people business. People rely on two-way communication. Whether you are an established franchisor or franchisee or are headed in either direction, as long as you keep this simple fact in mind, franchisor / franchisee relations are unlikely to create problems. The relationship should therefore be managed on an ongoing basis in a constructive manner.

¹⁴⁰ Section 43(2)(b).

¹⁴¹ Naude and Eiselen *Consumer Protection Act* 43-7.

¹⁴² Beasley *Pyramid Schemes* 3.

¹⁴³ Naude and Eiselen *Consumer Protection Act* 43-8.

¹⁴⁴ Beasley *Pyramid Schemes* 3.

¹⁴⁵ Beasley *Pyramid Schemes* 4.

¹⁴⁶ R Hare *et al* “Getting the Deal Through: Franchise 2014” (2014) *Law Business Research* 146 at 149.

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ JF Brown “Pyramid Schemes and Franchise systems” (2012)

<https://indyfranchiselaw.com/pyramid-schemes-and-franchise-systems/> (Accessed on 2 February 2017).

¹⁵⁰ *Ibid.*

CHAPTER FOUR

4. FRANCHISING IN SOUTH AFRICA

4.1 Introduction

Franchising is well-established in South Africa and operates according to international best practice. Although not immune to the headwinds that buffeted the economy during the recent economic downturn, franchised brands were able to cope significantly better than their independent counterparts. In this Chapter, we trace the history of franchising, examine legal aspects, explain the role of the Franchise Association of South Africa and introduce government initiatives designed to propel franchising forward.

4.2 History and current activities

Franchising in South Africa can be traced back to the 1960s. Although international brands played a role in the development of franchising in South Africa, their influence, when measured by the number of concepts they represent, was not as great as in other countries where franchising was introduced predominately under master licence arrangements originating from the USA. Some of South Africa's leading franchise concepts¹⁵¹

(q) Steers, now part of Famous Brands Ltd.

The first franchise on record in South Africa is a steakhouse concept known as Steers Steakhouses. The brand continues to exist, albeit no longer as a steakhouse but as a purveyor of flame grilled burgers. In keeping with changes in consumer demands, the focus is on take-aways and deliveries.

Founder George Halamandaris, a Greek immigrant, opened the first Steers steakhouse in Johannesburg in 1962. Franchising commenced in 1965. Because franchising was in its infancy in the 1960s, processes including franchisee selection and support could at best be described as rudimentary. Anecdotal evidence suggests that just about anyone who could make the necessary investment was accepted as a franchisee.

¹⁵¹ K Illitschko, *Franchising in South Africa, the past, the present and the future*, commissioned by FBDS Franchise Business Development Services, Lagos, Nigeria on instruction by UKAid (unless otherwise indicated.)

Moreover, there was no master plan for the development of the Steers brand. While the brand was still in its infancy, George saw fit to tinker with several other concepts, some more successful than others. Among them were Milky Lane, an ice cream and milkshake concept, Black Steer, a steakhouse concept, and Burger Ranch. It is safe to assume that the latter two concepts competed head-on with Steers but at that time this didn't seem to worry anyone unduly.

Steers eventually evolved into Famous Brands and listed on the Johannesburg Stock Exchange (JSE) in November 1994. Its market capitalisation was a modest R25 million back then but two decades later, the company has become Africa's largest branded food services franchisor and holds a firm position among the top 100 performers on the JSE. The company now operates about 2,600 restaurants that trade under 25 different brands including Steers, Wimpy and Tasha's. Restaurants are located in South Africa, the rest of Africa and several overseas countries.

(b) Wimpy

Although Wimpy is now part of Famous Brands, its history warrants a separate mention. Wimpy set up shop in Durban in 1967. Originally an UK-based concept, Wimpy South Africa soon evolved into a quintessentially South African concept loved by all. The rapidly growing chain was purchased by South African investors during the sanctions era, eventually morphed into Pleasure Foods Limited and was subsequently taken over by Famous Brands.

(c) Spur

Spur started trading as a steakhouse in 1967 and commenced franchising in 1971. The chain is listed on the JSE and has developed a reputation among investors for consistent performance. It operates multiple brands including five sit-down family restaurant brands that operate under the names Spur Steak Ranches, Panarottis Pizza and Pasta, John Dory's Fish, Grill and Sushi, The Hussar Grill and Casa Bella respectively. The Group also owns the convenience chain brands Captain Dorego's, Roco Mamas and Spur Grill & Co.

Spur has 564 outlets located in South Africa, other parts of Africa, Mauritius and Australia.

(d) Pick n Pay

Pick n Pay is a major retailer with focus on grocery items and household goods. The company was founded by Raymond Ackerman in 1967 and started franchising in the 1990s. It is listed on the JSE and now operates a total of 1076 stores, 433 of which are franchised. The bulk of the stores are

located in South Africa but the group also made inroads into other countries throughout Africa. A foray into Australia was unsuccessful and was eventually abandoned.¹⁵²

(e) Chicken Licken

This company started trading in 1982. It now operates over 200 stores spread over four African countries and is extremely popular among certain members of its target market.

(f) Nando's

At the end of 2016 there were 1094 Nando's in operation across the world.¹⁵³ Although the brand originates from South Africa, the South African operation can no longer claim to have the most Nando's branches. Based on population figures, Australia is the country with the highest Nando's / inhabitant ratio in the world. This country has one Nando's for every 85,000 Australians. The top five countries in the Nando's stable arranged by number of branches are:

United Kingdom:	339;
Australia:	264;
South Africa:	259;
Malaysia:	56; and
Canada:	30.

(g) Taste Holdings

Taste Holdings evolved from a chain of pizza outlets that was established in 2000 and traded under the name of Scooters. The company listed on the JSE in 2006 and has since grown into a large multi-brand manager and franchisor with focus on fast food and upmarket retail. Its brand portfolio includes Domino's, Starbucks, Scooters, St Elmos, Zebro's, The Fish & Chip Co, Maxi's, NWJ, Arthur Kaplan and World's Finest Watches. During the most recent reporting period, annual group turnover exceeded R1 billion for the first time.

(h) Yum International South Africa

The main brand of Yum International active in South Africa is KFC, introduced above. The only other Yum brand represented in South Africa is Pizza Hut. Pizza Hut exited South Africa during the sanctions era but returned recently. They have slated plans to make strong inroads into the market.

¹⁵² Company results www.privateclient.co.za/company-results-may-2014-pick-n-pay (accessed 17 February 2017)

¹⁵³ Rate your Nandos – Nando's statistics "www.rateyournandos.com/nandos-statistics" (accessed 17 February 2017)

(i) McDonald's

McDonald's arrived in South Africa in 1995. The company is a model franchisor whose training of franchisees and their staff has set standards others aspire to. McDonald's South Africa operate over 200 restaurants located in all 9 South African provinces. The company's 10,000+ employees serve more than 8 million customers each month.

4.3 Evaluation on franchising of foreign brands

Around 90% of franchise opportunities on offer in South Africa are homegrown. It is safe to say that this is the result of the economic sanctions the world imposed on South Africa during the period from the late 1970s to the early 1990s. The sanctions were intended to bring the much-hated Apartheid regime to its knees and they certainly accomplished that. However, the move also had unintended consequences as well. For example, because they were unable to attract foreign brands to our shores, South African entrepreneurs had no option but to develop their own concepts and they did so successfully. Some of these local brands have developed into super brands of international standing, with Nando's, introduced above, a good example. Although foreign brands never dominated South Africa's franchise scene by number of concepts, they did play and continue to play an important role in the orderly development of franchising. Following the relatively recent arrival of several high-profile brands including Burger King, Starbucks, Dominos Pizza and Dunkin Donuts, expectations are that this trend will accelerate in future. It is fuelled by the reality that as a growing number of foreign brands mature, their home markets become saturated. To continue on a growth trajectory, they are virtually forced to expand internationally. Due to the state of the world economy, Africa has become a desirable destination because Africa's middle-class is growing exponentially. This is increasingly making Africa an attractive destination for consumer brands. Because first world and third world economies co-exist in South Africa, the country is seen as an attractive testing ground and a convenient springboard into the rest of Africa. South Africa welcomes this because it injects some excitement into the market, brings with it valuable know-how and creates much needed jobs. In this context, it is worth mentioning that especially but not only concepts originating from the USA have excellent training programmes; which are a boost for the economy as a whole.

4.4 Food sector dominance in franchising

Far too many people are under the impression that franchising is primarily about food and restaurants. It is true that restaurants and fast food outlets dominated the South African franchise scene during the early years; however their dominance was relatively short-lived. In December 1978, MBA student Sandor Donner compiled *An Overview of Franchising*¹⁵⁴ His list of franchised brands active at that time contained a reasonable mix of industry sectors as figure 2 shows.

Table 1: Outline of food franchises in South Africa

Franchises on offer in South Africa in 1978				
Name of franchisor	Country of origin	First franchise	Business sector	Where are they now? (Status 2015*)
Putt-Putt	USA	1965	Entertainment	Discontinued operations
Steer Steakhouse	Local	1965	Restaurant	Now a QSR franchise
Wimpy	UK	1967	QSR	Locally owned, franchising
Manpower	USA	1968	Personnel	No longer franchising
Holiday Inn	USA	1969	Lodging	Continues as a franchise
Spur	Local	1971	Restaurant	Super franchisor
KFC	USA	1971	QSR	Super franchisor
MinitPrint Centres	Local	1971	Fast printing	Continues as a franchise
Captain Dorego	Local	1972	QSR	Continues as a franchise
Juicy Lucy	Local	1973	QSR	Continues as a franchise
Yankee Kitchens	Local	1973	QSR	Discontinued operations
Econowash	Local	1975	Laundries	No longer franchising
Mike's Kitchen	Local	1976	Restaurant	Continues as a franchise
Hillrand Brokers	Local	1976	Brokerage	Discontinued operations
Pizza Inn	USA	1977	Restaurant	Withdrew, re-entered 2014
Video Rent	Local	1977	Entertainment	Discontinued operations
Swiss Miss	Local	1977	Retail	Discontinued operations
Exhaust Shoppe	Local	1978	Automotive	Discontinued operations
Purple Cow	Local	1978	Ice cream	Discontinued operations

*** This information was added by Kurt Illetschko at the end of 2015**

The diversification of franchising has since gained momentum, with FASA's franchise directory which is published annually, listing opportunities in 12 different sectors.¹⁵⁵ For details see figure 3.

Figure 1: Business sector offering franchise opportunities in South Africa.

Business sectors offering franchise opportunities
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¹⁵⁴ S Donner *An Overview of Franchising in South Africa*, 1978, The Graduate School of Business, University of Cape Town

¹⁵⁵ G Osso, Franchise Manual 2016, FASA Johannesburg

Arranged in alphabetical order – status 2016	
Agriculture, mining and manufacturing	Health, beauty and body culture
Automotive products and services	Personal services
Bakeries	Pub concepts
Business to business services	Real estate services
Childcare, education and training	Retailing and direct marketing
Fast food and restaurant concepts	

4.5 The size of South Africa's franchise sector¹⁵⁶

According to research conducted during 2016, the franchise sector is made up of over 757 franchised systems which operate a combined total of more than 35 000 business units, most owned and operated by franchisees. The sector also offers direct employment to more than 329 000 people. This makes the franchise sector an important employer, especially in a country where unemployment ranks among the top social concerns. It should be noted that franchise statistics in South Africa generally exclude the fuel retail and automotive sectors, as well as various others because the dominant players in this field prefer not to be described as franchisees. It appears that this move was prompted by legal obligation concerns associated with the Consumer Protection Act.

4.6 The lure of international markets

One drawback of the economic sanctions period was the inability of South Africa-based franchises to enter foreign markets. After sanctions were removed, local brands started to explore options abroad. Aware of the responsibilities linked to international franchising, the bulk of South Africa's franchisors were reluctant to leave the continent they know. Initially, the focus was on neighbouring states. This was only natural because of cultural similarities, close proximity to the support office and simplified customs issues. A move into the rest of Africa and other parts of the world followed, tentatively at first but showing a consistent upward trend.

4.6.1 The untapped potential of franchising

Already, franchising contributes about 12% to GDP in South Africa. This is substantial but when compared to franchising share of economic activity in other countries, a potential certainty exists. Fortunately, there is a growing realisation among members of South Africa's national and local government and relevant NGOs that there are many opportunities. Indeed, franchising offers massive potential for the development of sustainable small businesses and the creation of job

¹⁵⁶ Unless otherwise stated, numbers are taken from research commissioned by FASA with sponsorship provided by Sanlam. The research was carried out by Margaret Constantaras of Research IQ in 2016 based on 2015 figures.

opportunities. In fact, franchising potential goes well beyond the opportunities traditional franchise formats offer. With South Africa being a developing economy, there is real scope for growth including particularly, in the realms of social and micro franchising because of market needs and set-up costs.

4.7 Franchise related laws and legislation

Franchising in South Africa is regulated by legislation in terms of the Consumer Protection Act (“CPA”). The Franchising Association of South Africa (“FASA”) also implements self-regulation, through FASA’s Code of Ethics, although this is limited to FASA members. A Franchise Industry Ombud is also being established pursuant to the CPA, and it will apply a Code of Conduct focussed on franchising specifically. Initially it will primarily be an alternative dispute resolution mechanism. Over the years, there was a growing concern that the common law and self-regulation was insufficient to protect the interests of franchisees.¹⁵⁷ As a result, the government chose to regulate franchising within the ambit of the CPA. Franchisees are now regarded as consumers under this legislation. The CPA is in the nature of a consumer “bill of rights”.

The CPA¹⁵⁸ provides a substantive definition of “franchising”, which entails three essential elements that must be present in order for a system to be classified as a franchise. Firstly, the franchisee’s business must be associated with the franchisor’s trade mark, trade name, logos, advertising or other commercial symbols. Secondly, the franchisor must grant the franchisee the right to engage in the business of offering, selling or distributing goods or services under a marketing plan or system determined or controlled by the franchisor. Lastly, the franchisee must pay fees to the franchisor for the rights granted to the franchisee. The definition draws on very similar concepts as those found in legislation and codes of conduct in other jurisdictions.¹⁵⁹ The above definition does not provide for any exclusion. It has thus been suggested that the approach in other jurisdictions, to include specific exclusions, should be considered when determining whether a particular business is a true franchise or not.¹⁶⁰

4.8 The role of the Franchise Association of South Africa

The Franchise Association of South Africa (FASA) is a voluntary membership trade association. It represents the interests of franchisors, franchisees and professional firms that service the needs of

¹⁵⁷ Naude and Eiselen. *Consumer Protection Act* 7-11.

¹⁵⁸ Section 1.

¹⁵⁹ Naude and Eiselen *Consumer Protection Act* -9.

¹⁶⁰ Naude and Eiselen *Consumer Protection Act* -13.

the franchise sector. FASA also acts as a resource in that it disseminates information on franchising to the media and members of the general public. FASA's main aim is to safeguard the upholding of ethics in franchising and to promote the advancement of the concept with a view to create opportunities for the establishment of sustainable SMEs and job creation.

4.8.1 Vision and Mission¹⁶¹

- 4.8.1 FASA's primary role is to define the business of franchising and ensure that all parties adhere to the franchise business principles adopted and accepted internationally. With franchising universally categorised as one of the most successful business formats, FASA's role is to continually promote the advantages of franchising to entrepreneurs, prospective franchisees and to the public at large. Based in Bedfordview, Johannesburg, FASA and its staff serve the needs of both the public and the franchise community.
- 4.8.2 FASA has been the guiding force of franchising in South Africa and the growth and stability of the sector is largely due to the work that FASA has done over the years to promote ethical franchising. Those who are members of FASA have voluntarily made a commitment to abide by the ethical standards laid down by FASA and the international franchise community long before this became a legal requirement. That in itself is an indication of their commitment to operating a sound and ethical business.
- 4.8.3 South Africa's culture of entrepreneurship has always been alive in some form or another, whether it is in the formal business sector or in the informal sector which is alive with entrepreneurs who start small street businesses in order to survive. Over the past twelve years, entrepreneurship has become the focus of not only the business community but also of government who, through its funding agencies, is promoting small business and in particular franchising as the ideal way to develop entrepreneurship, tackle unemployment and ultimately grow the economy. FASA, together with funding agencies and the banks, is making a concerted effort to put in place initiatives to make funds available to emerging entrepreneurs.
- 4.8.4 FASA's Vision and Mission of promoting self-employment and sustainable small business development is increasingly bearing fruit. There are ongoing efforts, consultation and initiatives with government and the business community at large to stimulate new business concepts, encourage entrepreneurship, create jobs and play a meaningful part in the skills development of all South Africans.

¹⁶¹FASA's vision and mission taken off the FASA website www.fasa.co.za (Accessed 20th February 2017)

4.9 FASA’s history

4.9.1.1 Established in 1979, FASA represents the interests of the franchise sector vis-à-vis government, commerce and the general public. Over the years, FASA has evolved into the most powerful franchise association on the African continent and ensures, through its membership of the World Franchise Council (WFC), that South Africa’s voice is heard world-wide.

4.9.1.2 More recently, the WFC has mandated FASA to establish the Pan African Franchise Federation (PAFF). FASA has accepted this task with gusto but up to now, uptake by established franchise associations in other African countries has been disappointingly slow. However, efforts to bring this initiative to fruition and create a united platform for the African continent’s franchise community are ongoing and will continue until a formal and sustainable structure is in place. In the interim, FASA is always willing to provide guidance to sister associations and /or groups of people who wish to establish a franchise association on the African continent.

4.9.2 FASA’s governance structure

A Council elected by FASA’s members from within the membership oversees the organisation’s affairs. This Council appoints an Executive Committee (Exco) from amongst its membership to set policy and oversee operations. Exco in turn elects a chairman and a deputy chairman. The day-to-day activities of FASA’s secretariat are controlled by its Executive Director.

4.9.3 About membership of FASA

Membership of FASA is voluntary and although FASA engages with anyone who has a legitimate interest in franchising, admission to certain membership categories is subject to an evaluation process requiring, for example, a compliant franchise agreement and disclosure document and an operations manual. This is deemed necessary because membership of FASA conveys the promise of ethical franchising. Figure 4 provides details.

Table 2: Overview of membership criteria of FASA

FASA’s Membership Criteria			
Membership category	Admission criteria		
	Stringent	Basic	None

Franchisor (full member)	X		
Franchisor (preliminary member)	X		
Franchisee			X
Service provider to the franchise sector		X	
Individual membership			X
Product supplier to the franchise sector			X

4.9.4 FASA's key activities

4.9.4.1 Government relations

FASA works closely with various government structures, especially but not only with the Department of Small Business Development, the Department of Trade and Industry and the Department of Finance, to facilitate a close fit between these bodies' interventions designed to promote small business development and the real needs of the franchise sector.

4.9.4.2 Exhibitions and other public events

FASA promotes franchising by arranging public events including the annual International Franchise Exhibition (IFE), in future to be known as the Franchise Business Festival (FBF). FASA also arranges and/or endorses other suitable activities, including those of an educational nature. For example, an Internet-based franchise course is currently in preparation.

4.9.4.3 Dissemination of information

Substantial and current information on franchising is made available through FASA's web site and a range of print publications including the Franchise Manual. Originally presented under the title FASA Directory, this annual publication has been published since 1985. It informs the public about franchising in general and the franchise opportunities and services offered by FASA members in particular. In the interest of completeness, the manual also lists companies that are known to offer franchises but are not members of FASA. However, listings of non-members are clearly identified as such.

4.9.4.4 Dispute resolution service

Although it is the aim of franchise arrangements to create win/win outcomes for franchisors and their franchisees, it would be unrealistic to deny that on occasion, differences of opinion between the parties do arise. In such instances, FASA assumes the role of facilitator and has a proud history of resolving disputes between franchisor members and their franchisees before the parties enter into costly litigation proceedings.

4.9.4.5 The FASA awards for excellence in franchising

These awards, presented annually since 1990, enable FASA's members and their guests to meet in a congenial setting and honour their sector's top achievers. They are fiercely contested and create valuable publicity not only for the winners but also for the franchise sector itself.

4.9.4.6 The FASA Code of Ethics

No piece of writing could express FASA's aims and objectives better than its Code of Ethics. A copy is enclosed as Annexure "E".

FASA is a self-regulatory body established by the franchising sector and aims to regulate the industry in order to promote ethical standards amongst its members. Membership is voluntary and FASA has jurisdiction over its members only.¹⁶²

When considering the FASA Code of Ethics, it can be seen that many of its provisions have been incorporated or mirrored in the regulations that were issued under the CPA. However, the CPA regulations apply to all franchisors, regardless of whether they are FASA members or not.¹⁶³

The effect of the CPA in regulating franchising

4.10 Franchisees as consumers

4.10.1 Many jurisdictions are of the view that small businesses should be subject to consumer protection legislation.¹⁶⁴ Start-up entrepreneurs may lack experience, financial resources and may thus be prone to exploitation in their business activities with larger entities.¹⁶⁵ As a result, much of the protection provided to consumers has been extended to franchisees under the CPA. Such protections include equality, choice, information, honest dealing, fair value, good quality, safety, privacy, fair and responsible marketing and supplier accountability.¹⁶⁶

4.10.2 In terms of the right to equality, franchisees have the right to not be unfairly discriminated against when accessing goods and services from their franchisors, irrespective of gender, race, socio-economic status or geographic location.¹⁶⁷ The CPA¹⁶⁸ provides that franchisees have the right to choose their suppliers. In this respect, franchisors may not bundle their goods together and insist that franchisees can only have certain products and services on

¹⁶² Abell *Franchise Law Review* 524.

¹⁶³ Woker *Franchise Relationship* 61.

¹⁶⁴ Naude and Eiselen *Consumer Protection Act* -14.

¹⁶⁵ *Ibid.*

¹⁶⁶ Abell *Franchise Law Review* 533.

¹⁶⁷ Naude and Eiselen *Consumer Protection Act* -16.

¹⁶⁸ Section 13.

condition that other goods and services are purchased.¹⁶⁹ Such agreements, classified as tying arrangements or exclusive dealing contracts, are contrary to the CPA unless certain conditions are met.¹⁷⁰ In addition to choosing suppliers, franchisees have the right to choose and examine the products which they have ordered from their franchisors.¹⁷¹ If such products are defective or unsafe upon receipt, a franchisee has the right to return such goods.¹⁷²

4.10.3 In terms of the right to disclosure and information, which will be discussed in further detail below, franchisees have the right to be informed if goods are reconditioned or are grey market goods.¹⁷³ Franchisees are also entitled to accurate product labelling and trade descriptions.¹⁷⁴ In light thereof, it is evident that the CPA places a strong onus on franchisors to refrain from misrepresentation.

4.10.4 General standards and requirements relating to the marketing of goods or services are elaborated on in detail in the CPA.¹⁷⁵ Importantly, a franchisor is prohibited from marketing a franchise in a manner that is misleading, fraudulent or deceptive in any way.¹⁷⁶ This applies to the nature, properties, advantages or uses of the franchise, the manner in or conditions on which the franchise may be supplied and the price at which the franchise or any goods may be supplied.¹⁷⁷

4.10.5 The right to fair and honest dealing provides that franchisors may not engage in unconscionable conduct when dealing with franchisees.¹⁷⁸ This includes coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct.¹⁷⁹

4.10.6 Franchisors may furthermore not charge marketing or any other franchise-related fees at a price which is unjust.¹⁸⁰ In addition, terms within the franchise agreement must be fair, just and reasonable.¹⁸¹ A franchise agreement will be regarded as unjust if it is excessively one-

¹⁶⁹ Naude and Eiselen *Consumer Protection Act* -16.

¹⁷⁰ *Ibid.*

¹⁷¹ Section 18.

¹⁷² Section 20.

¹⁷³ Naude and Eiselen *Consumer Protection Act* -18.

¹⁷⁴ *Ibid.*

¹⁷⁵ ss29-39.

¹⁷⁶ Section 29.

¹⁷⁷ *Ibid.*

¹⁷⁸ Section 40.

¹⁷⁹ Naude and Eiselen *Consumer Protection Act* -20.

¹⁸⁰ Section 48(1)(a)(i).

¹⁸¹ Section 48(1)(a)(ii).

sided in favour of the franchisor, possesses terms that are so adverse to a franchisee as to be inequitable, was based on misrepresentation, and contained terms which should have been drawn to the franchisee's attention and which were not.¹⁸² There are several prohibited terms which cannot be included in agreements, the list of which is commonly referred to as a "black list".¹⁸³ Two examples are terms which would have the general effect of defeating the purpose of the CPA, as well as terms which would directly or indirectly purport to waive or deprive franchisees of rights which they have under the Act.¹⁸⁴

4.10.7 South Africa's CPA specifically defines a franchisee as a "consumer" to the extent applicable in certain arrangements which must be regarded as transactions between a supplier and a consumer.¹⁸⁵ Such arrangements include any advertisement for the sale of franchises; an offer which a franchisor makes to a franchisee; contracts concluded between the franchisor and the franchisee, and the supply of any goods or the provision of any services to a franchisee in terms of a franchise agreement.¹⁸⁶

4.10.8 It is important to note that the CPA¹⁸⁷ covers all franchise agreements, regardless of the annual turnover or asset value of the franchisee.

Requirements of the franchise agreement

4.10.9 The CPA¹⁸⁸ provides that a franchise agreement must be in writing and signed by or on behalf of the franchisee. It must include any prescribed information, or address any prescribed categories of information.¹⁸⁹

4.10.10 According to Regulation 2(3), such prescribed information includes *inter alia*, a description of the goods, the franchise system and premises, details of the intellectual property being licensed to the franchisee, the parties' obligations, franchisee payments, territorial rights, transfer rights, particulars of the franchisor's ongoing assistance, duration and renewal terms, advertising contributions, effect of termination or expiration, franchisor's details, particulars of any restrictions and the full particulars of the financial obligations of the franchisee.

¹⁸² Naude and Eiselen *Consumer Protection Act* -20.

¹⁸³ Naude and Eiselen *Consumer Protection Act* -25.

¹⁸⁴ *Ibid.*

¹⁸⁵ Section 5(6)(b) to (e).

¹⁸⁶ *Ibid.*

¹⁸⁷ Section 5(7).

¹⁸⁸ Section 7(1)(a).

¹⁸⁹ Section 7(1)(b).

4.10.11 Information provided in the franchise agreement must also comply with the CPA's requirement¹⁹⁰ of being in plain and understandable language. Such requirement purports to ensure that the average consumer with minimal experience as a franchisee would be able to understand the content, significance and importance of the contract.¹⁹¹

4.10.12 The regulations provide that the franchise agreement must also contain provisions which prevent overvaluation of fees and unnecessary conduct in relation to a party's risks.¹⁹² Furthermore, no clause must allow conduct that is not reasonably necessary for the protection of the legitimate business interests of the franchisor, franchisee or franchise system.¹⁹³ A mandatory clause must be included in respect of supplier benefits. Such clause must state that the franchisor is not entitled to any undisclosed supplier benefits unless disclosed in writing with an explanation.¹⁹⁴

4.10.13 A prospective franchisee is entitled to contact or visit any existing franchisees to assess the disclosed information and business opportunity.¹⁹⁵ In addition, the CPA¹⁹⁶ provides that a franchisee is granted a 'cooling-off period' in which the franchise agreement may be cancelled by the franchisee, without cost or penalty, within ten business days after signature, by giving written notice to the franchisor.

4.10.14 **Pre-contractual disclosure**

4.10.14.1 In addition to the franchise contract, franchisors are required to provide prospective franchisees with a disclosure document setting out the information that they are required to disclose.¹⁹⁷ The CPA¹⁹⁸ provides that such document must be signed by an authorised officer of the franchisor, and it must be given to franchisees at least fourteen days prior to signature.

4.10.14.2 Current regulations under the CPA¹⁹⁹ provide that the disclosure document must include extensive information, including *inter alia*, the number of franchise outlets, the franchisor's turnover and profit, including financial statements, a statement confirming

¹⁹⁰ Section 22.

¹⁹¹ Section 7(1)c).

¹⁹² Regulation 2(2)(b)(ii).

¹⁹³ Regulation 2(2)(b)(i).

¹⁹⁴ Regulation 2(2)(c).

¹⁹⁵ Regulation 4(a)(iv).

¹⁹⁶ Section 7(2).

¹⁹⁷ Naude and Eiselen *Consumer Protection Act 7-3*.

¹⁹⁸ Regulation 3(1).

¹⁹⁹ Regulations 3 – 4.

whether there have been any significant changes in the financial position of the franchisor, written projections of potential sales, a list of current franchisees, and an organogram depicting the support system and place for the franchisee.

4.10.14.3 If the prescribed information is not included in the disclosure document or agreement, or any information is incorrect, the franchisee may argue that it was induced to enter into the agreement by misrepresentation with regard to material facts. This would render the contract voidable at the franchisee's option.²⁰⁰

4.10.14.4 It is important to note that the CPA does not regulate the actual content of the agreement and disclosure document. Therefore provided the information is included, the parties are free to decide on the content of the contract.²⁰¹ For example, franchisors are obliged to include terms in their contracts which govern termination of the relationship but the parties can decide for themselves exactly how the relationship can be terminated.²⁰²

4.10.15 Registration Requirement

There is no requirement for franchises to be registered. Where the franchisee is an incorporated entity, the requirements under the Companies Act²⁰³ will apply in respect of reservation and registration of company names and the operation of the company.²⁰⁴

4.10.16 General Law

Apart from the CPA, South Africa's common law also applies to franchising. The law values the principle of freedom of contract and provides that any contract freely and voluntarily entered into between parties of full legal capacity is binding on them.²⁰⁵ The law does not imply a duty of good faith unless a specific statute applies in the circumstances. However, disclosure of all relevant and material facts is implied in this regard and the scope of freedom to contract is limited by particular legislation, for example the CPA.²⁰⁶

4.10.17 Dispute Resolution

²⁰⁰ Abell *Franchise Law Review* 529.

²⁰¹ Naude and Eiselen *Consumer Protection Act* 7-3.

²⁰² *Ibid.*

²⁰³ Act 71 of 2008.

²⁰⁴ Sections 11 – 12.

²⁰⁵ Abell *Franchise Law Review* 532.

²⁰⁶ *Ibid.*

The CPA²⁰⁷ provides that franchisees must exhaust all remedies before approaching the courts. These other remedies include approaching an industry ombud, alternative dispute resolution agent, the consumer courts, or the National Consumer Commission. These options will thus provide easier means for franchisees to air their grievances.²⁰⁸ Cases involving unconscionable conduct, unfair contract terms and damages are dealt with by the courts in the event that the dispute cannot be resolved through the abovementioned remedies.²⁰⁹

4.11 Industry Ombud Schemes in terms of section 82 of the CPA

The Consumer Goods and Services Ombud - The CPA²¹⁰ has provided for statutory recognition of industry codes of conduct. The Minister of Trade and Industry is allowed to accredit industry specific ombudsman schemes, and prescribe accompanying industry codes.²¹¹ The Consumer Goods and Services Ombud, which enforces the Consumer Goods and Services Code of Conduct, has been accredited by the Minister as an “accredited industry ombud”, after recommendations made by the National Consumer Commission.²¹²

4.12 Consumer Goods and Services Code of Conduct

The Code consists of the minimum standards of conduct expected when engaging with Consumers, as well as assistance in resolving disputes that arise between consumers and industry members in terms of the CPA. The Code is thus enforceable against all franchisees and franchisors in South Africa upon approval, to the extent that goods and services are supplied to consumers.²¹³

4.13 Franchise Industry Code of Conduct

4.13.1 A process is underway to establish an ombud for the franchise industry as well as an ombud that will be involved in the resolution of disputes. The introduction of franchising regulations within the CPA and subsequent statutory recognition of an industry code will bring about a greater degree of resolution within the industry. The CPA²¹⁴ provides that a supplier/franchisor must not, in the

²⁰⁷ Section 69(d).

²⁰⁸ Naude and Eiselen *Consumer Protection Act 7-12*.

²⁰⁹ Abell *Franchise Law Review* 536.

²¹⁰ Section 82.

²¹¹ *Ibid.*

²¹² Consumer Act Regulations, GN R271, *Government Gazette* 38637, 30 March 2015.

²¹³ *Ibid.*

²¹⁴ Section 82(8).

ordinary course of business, contravene an applicable code. Accordingly, once an industry code has been adopted for the franchise industry, franchisors will be compelled to abide by the code.²¹⁵

4.13.2 In light of the above, it appears that South Africa has headed towards a co-regulatory approach. The South African government has identified franchising as a way to create jobs, alleviate poverty and promote black economic empowerment.²¹⁶ Government's implementation of statutory regulations under the CPA, as well as the role of industry, will be complementary rather than mutually exclusive, and this will encourage and contribute to effective co-regulation.²¹⁷

4.14 The Competition Act

The Competition Commission of South Africa issued the South African Franchising Notice to inform franchisors and franchisees about the impact of the Competition Act (Act 89 of 1998) ("South African Competition Act") on their activities and arrangements, to enable them to comply with the South African Competition Act.²¹⁸ Notably, this notice is not binding, but serves as a practical guideline for franchisors, franchisees and Competition Authorities in South Africa. South Africa approaches prohibited practices in the context of franchise agreements as follows:

(a) Resale Price Maintenance ("RPM")

RPM, a practice whereby parties in a vertical relationship sell products at certain prices, is *per se* prohibited under the South African Competition Act and can lead to both administrative penalties and criminal sanctions.²¹⁹ Whilst non-binding recommendations by franchisors as to the resale price are acceptable, it should be clear that the franchisee is not bound thereto and that there are no sanctions, penalties or disincentives for franchisees who deviate from the recommended prices. Franchisees should also be allowed freely to give discounts to their customers when and if they so wish without fear of being victimized.²²⁰

(b) Exclusive dealings

An exclusive dealing is a prohibited practice whereby a franchisor places an obligation on a franchisee to procure goods only from the franchisor or a franchisor-nominated supplier. Partaking

²¹⁵ Abell *Franchise Law Review* 537.

²¹⁶ Woker *Franchise Relationship* 2.

²¹⁷ *Ibid.*

²¹⁸ Franchising Notice at 1.1.

²¹⁹ The Competition Amendment Act introduced section 73A which is inserted into the principal Act. This section introduced criminal liability to directors of firms engaging in prohibited practices which recently came into operation on the 9th of June 2016. This section provides for directors or persons in a position of management authority, causing its firm to participate in cartel conduct, to be liable for a fine of up to R500 000 or imprisonment not exceeding 10 years, or both.

²²⁰ Franchising Notice at 4.11.

in such a practice raises serious competition concerns, as it reduces intra-brand competition and may have an adverse effect on the consumer by reducing consumer choice and competitive pricing. A franchisee should not, without good reason, be prevented from procuring goods from third parties if the goods are of like quality and would not harm the trade mark or reputation of the franchisor. Whilst this practice can limit competition, exclusive dealing provisions may be justifiable if they are indispensable for protecting the franchisor's know-how and goodwill (which, if unprotected, may inhibit franchisors from launching the franchise). If such a defence is acceptable by the competition authorities, the agreement or arrangement would not be deemed to be a contravention of the South African Competition Act and hence no action may be taken against the franchisor.²²¹

(c) Exclusive territories

Arrangements that seek to partition the market through the allocation of exclusive territories or customer groups limit competition and are prohibited by the South African Competition Act. However, in instances where the relationship is strictly vertical, where the franchisor does not itself offer products or services in potential competition with a franchisee, an efficiency defence may be raised, such as that the aim was to achieve efficiencies or improvement in distribution, namely better information flows.

(d) Bundling or tying of products

Arrangements that oblige franchisees to buy unnecessary products (known as “tied products”) in order to obtain certain necessary products (known as “tying products”) are prohibited. The South African Competition Act prohibits the practice of franchisors forcing franchisees to buy products that are not critical to the franchise, unless there are valid efficiency, technology or other pro-competitive justifications. As a last resort, the franchisor may apply for exemption to the commission.

(e) Abuse of dominance

As in many other jurisdictions, exclusionary acts of a firm in a dominant market position is more likely to be found to be anti-competitive, unless a clear pro-competitive benefit can be proven to the consumer and free market alike.

(f) Intellectual Property

The South African Competition Act specifically recognises that the protection of intellectual property rights may be integral to encouraging innovation, for which reason it exempts acts relating to the

²²¹ Franchising Notice at 4.14.

exercise of intellectual property rights.²²² Notwithstanding, competition concerns remain where a monopolistic franchisor refuses to grant a licence or charges excessive prices.

4.15 Initiatives designed to promote franchising

Although no exact statistics exist, credible estimates suggest that up to 80 out of every 100 SMME (Small, Medium and Micro Enterprise) start-ups fail within the first three to five years. The South African government is well aware of this and has determined that franchising is an effective remedy. The rationale is that because franchising offers access to skills transfer, branding, joint purchasing and marketing as well as strong initial and ongoing support franchisees, stand a much better chance of success than their independent counterparts. This Chapter provides an overview of existing support mechanisms.

(a) The Department of Small Business Development (“DSBD”)²²³

In June 2015, the Minister in charge initiated the formulation of the National Informal Business Upliftment Strategy (“NIBUS”). NIBUS addresses the development void at the lower end of Small, Medium and Micro Enterprise (SMME) Development. The NIBUS seeks to uplift informal businesses and render support to local chambers/business associations and Municipal Local Economic Development offices to deliver and facilitate access to upliftment programmes. The focus is on designated groups, i.e. women, youth and people with disabilities, in townships and rural areas of South Africa. The strategy advances Government’s priorities of speeding up growth and transforming the economy to create viable work and sustainable livelihoods through inclusive growth. The strategy specifically targets entrepreneurs in the informal economy. This sector has been identified as critical in addressing the key developmental goals of the Government, namely sustainable livelihoods (poverty), job creation (unemployment) and equality (inequality). More than two million South Africans are making means in the informal economy, mostly as survivalist enterprises. There are also vibrant economic business activities that need support to graduate from survival to sustainability and performance. The development and implementation of NIBUS is an ongoing process involving extensive consultation and engagement with various stakeholders including national departments, provinces, municipalities, agencies, chambers, sector departments, Treasury and other role players. Stakeholder engagement also includes donors, national funding institutions, intermediaries, service providers, the private sector, informal business organisations, associations and civil society.

²²² South African Competition Act, section 10(4).

²²³ Obtained from the website www.dsbd.gov.za

(b) The DSBD's vision

A radically transformed economy through effective development and increased participation of SMMEs and co-operatives in the mainstream economy. The missions of the DSBD are to:

-To create a conducive environment for the development and growth of small businesses and cooperatives through the provision of enhanced financial and non-financial support services and the leveraging of public/private partnerships (PPPs).

- The DSBD has been mandated by government to foster economic growth, facilitate the forming of partnerships and create enabling regulations.

The ultimate objective of these steps is to create jobs while facilitating radical economic transformation. The intended meaning of the terms used is explained below:

-Economic growth: To facilitate the development and growth of small businesses and co-operatives to contribute to inclusive and shared economic growth and job creation through public and private sector procurement.

-Partnerships: Partnerships (including PPPs) with all spheres of government as well as the private sector to ensure mutual cooperation that will benefit small businesses and co-operatives.

-Regulations: The DSBD will advocate for a conducive regulatory environment for small businesses and co-operatives to enable access to finance, investment, equitable trade and market access in an and sustainable manner.

-Radical transformation: The DSBD facilitates radical economic transformation through increased participation of small businesses and cooperatives in the mainstream economy.

Although franchising is not specifically mentioned, it apparently plays an important role in the DSBD's plans.

(c) Preferential funding schemes

For several decades now, government, working through several of its agencies, has made funding available to aspiring entrepreneurs including new franchisees. Unfortunately, not all of these schemes have achieved the desired results. However, lessons have been learned and currently, several funding programmes are in operation that have proven themselves to be highly successful. Some of these programmes assist prospective franchisees with access to funding only. Others go a step further and offer subsidised access to training and support services as well. All such

programmes have one thing in common. When assessing an application, the loan committee is not fixated on the amount of own contribution and available surety. The focus is on the applicant's demonstrated ability to successfully operate a business and create jobs. Because programmes of this nature are inevitably influenced by budgetary constraints and other external factors, they tend to change relatively frequently. This sub-Chapter provides some current examples but the list is by no means exhaustive.

(d) Small Enterprise Finance Agency (SEFA)²²⁴

The Small Enterprise Finance Agency (SEFA) Ltd, commonly known as SEFA, was established on 1st April 2012. It was the result of the merger of South African Micro Apex Fund, Khula Enterprise Finance Ltd and the small business activities of IDC (Industrial Development Corporation). The organisation has a regional footprint of 9 offices around the country. Its approach to facilitating business success is expressed in its mandate to foster the establishment, survival and growth of SMMEs with the objective being to contribute towards poverty alleviation and job creation. Its vision is explain that it aims to be the leading catalyst for the development of sustainable survivalist, micro, small and medium enterprises through funding and the provision of support ,with the mission of providing access to finance for survivalist, micro, small and medium businesses nationally by: offering wholesale and direct loans and providing credit guarantees; assisting financial intermediaries with capacity building; creating strategic partnership with relevant institutions in the field of SMME development; developing innovative finance products, tools and channels to catalyse increased market participation in the provision of affordable finance; monitoring the effectiveness and impact of our financing, credit guarantee and capacity development activities.

(e) The National Empowerment Fund (NEF)²²⁵

The National Empowerment Fund (NEF) was established in 1998. Its role is to support Broad-Based Black Economic Empowerment (BB-BEE). As the debate concerning what constitutes meaningful and sustainable BB-BEE evolves, the NEF anticipates future funding and investment requirements to help black individuals, communities and businesses achieve each element of the Codes of Good Practice. These include a focus on preferential procurement, broadening the reach of black equity ownership, transformation in management and staff and preventing the dilution of black shareholdings. The NEF differentiates itself not only with a focused mandate for BB-BEE, but by also assuming a predominantly equity-based risk to maximise the empowerment. The expected reward should balance the risk with the application of sound commercial decisions to support national priorities

²²⁴ Information obtained from the website www.sefa.org.za, 3rd March 2017.

²²⁵ Obtained from the website www.nefcorp.co.za 3rd March 2017

and government policy such as the Accelerated and Shared Growth Initiative for South Africa (“AsgiSA”) or targeted investments through the Department of Trade and Industry’s (“DTI”) Industrial Policy Framework (“IPF”). The work of the NEF therefore straddles and complements other Development Finance Institutions (DFIs) by allowing the organisations to work in close collaboration in the promotion of BB-BEE. With them, the NEF can enhance other DFIs and their mandates by sharing its specialist sector expertise and knowledge of BB-BEE. The NEF sees itself as a driver and thought-leader in promoting and facilitating black economic participation by providing financial and non-financial support to black-empowered businesses, and by promoting a culture of savings and investment among black people. Its vision and value statement sum this up nicely. Its vision is to become the leading provider of innovative transformation solutions for an economically inclusive South Africa. The NEF operates a franchise finance fund but prefers to deal with approved franchisees of well established brands. Funding is made available at the ruling prime rate set by the South African Reserve Bank from time to time. The NEF invites funding applications from PDIs subject to certain conditions being in place which is set out on the website. As a rule, the maximum amount made available for one project is R10 million and the NEF expects to finalise each matter within five to seven years.

(f) The Jobs Fund²²⁶

The Jobs Fund is a government initiative that was launched by the Minister of Finance in June 2011. Its objective is to co-finance projects by public, private and non-governmental organisations that have the potential to significantly contribute to job creation. This involves the use of public money to catalyse innovation and investment on behalf of a range of economic stakeholders in activities that contribute directly to enhanced employment creation in South Africa. The Jobs Fund does not intend to tackle long-term, structural causes of low growth and unemployment on its own. Numerous government initiatives are already tasked with parts of that challenge. Nor does the Jobs Fund aim to replicate or substitute these initiatives; rather it presents an opportunity to complement them. The Job Fund’s funding interventions will seek to overcome some of the barriers to job creation that have been identified including demand for labour, supply of labour and some to the broader institutional environment. The Jobs Fund has been designed specifically to overcome these barriers by providing public funding through four “funding windows” i.e. Enterprise Development; Infrastructure Investment; Support for Work Seekers and Institutional Capacity Building. Within the four broad windows identified above, the Jobs Fund seeks to stimulate good ideas, risk-taking and investment to discover new ways of working, where the costs and risks may be unknown, and where the pro-poor impact, principally in the form of sustainable job creation, may be

²²⁶ Obtained from the website www.jobsfund.org.za accessed on 4th March 2017

significantly larger than with other, more conventional, approaches. At its core, the Jobs Fund seeks to operate as a catalyst for innovation and investment in activities which directly contribute to sustainable job creation initiatives, as well as long term employment creation. Towards the end of 2016, the Jobs Fund announced the 7th Funding Round, themed *Industry Change for Scaling Inclusive Job Creation Models*. It constitutes an exciting funding programme currently accessible to franchisors and their future franchisees. It has the potential to turbocharge the development of franchising in South Africa because as will be explained in the following paragraph, it enables PDIs to invest in franchised brands necessitating relatively high initial investments without being forced to incur high debt. Some of the conditions for access to funding by the Jobs Fund vary somewhat from one round to the next. The most drastic change to funding conditions made in the current round, namely round 7, is that funding is offered as a grant rather than a deferred loan. This removes the burden of over-indebtedness from new ventures and therefore makes them more viable. Funding is accessible only to well-established franchisors with a solid track record. Amounts range from a minimum of R10 million to a maximum of R100 million. Should funding be granted, the franchisor would assume the role of intermediary. In other words, the franchisor is obliged to pass the funds on to individuals who have been approved as franchisees in principle but are unable to come up with the minimum own contribution and/or the type of surety commercial banks demand. The application process extends over seven stages namely the opening of a new funding round is communicated through the media and on the Jobs Fund website. Prospective applicants need to indicate their interest, after which these prospective applicants subsequently receive an invitation to attend a compulsory briefing session. During this session, attendees are familiarised with the overall approach the Jobs Fund takes to funding. Specific conditions applicable to the specific funding round are also explained. Most importantly, prospective applicants are left in no doubt that the process is an onerous one. Briefing sessions are presented at various centres country-wide. Applicants register on the Job Fund's website. They are then notified when the initial application form – the Concept Application – is ready to be downloaded. Franchisors complete the concept application online. This is a substantial document with auditing capabilities built in. Should any portion of the application remain incomplete, the system blocks submission. However, the applicant has an opportunity to edit the form until the information is complete. Jobs Fund officials screen the applications they have received. Their main assessment criteria are firstly, the applicant's (this being the franchisor) ability to demonstrate that systems are in place to ensure, as far as this is possible, that the grant recipients (these being the franchisees) will establish successful businesses and create sustainable jobs. Secondly, the creation of sustainable jobs within two to three years after funding has been received. Ideally, these jobs should be accessible to previously unemployed individuals or

others who find it otherwise difficult to secure employment. Thirdly, the applicant's ability to match funding on at least a 1:1 ratio. In other words, every Rand granted by the Jobs Fund must at least be matched, ideally exceeded, by the beneficiaries. Ideally, there should be a multiplier effect. (This means that the same investment should show the potential to create additional jobs at a later stage at little or no extra cost). Only applicants (franchisors) who pass the initial hurdles are invited by the Jobs Fund to complete the Full Application. This is a substantial document that requires fine-tuning of the information given in the Concept Application. The Job Fund's Loan Committee reviews the full applications and decides who qualifies for funding in this particular round. Funding is disbursed in instalments closely linked to the number of jobs the investment to date has created. Upfront funding is considered in exceptional cases only. As a rule, monies that have not been spent within two years go back into the Job Fund's funding pool. An extension of this period will only be granted if and when exceptional circumstances can be proven.

(g) The Micro Franchisor Development Programme

Most typical franchise opportunities require substantial investments. This is in the nature of the business concepts that are traditionally offered under franchise and cannot be wished away. For example, to establish a properly equipped fast food outlet costs around and upwards of R2 million. To set up a grocery store costs from R5 million upwards. Business realities dictate that there will never be enough capital available to set up every deserving applicant in a business of this magnitude. In response, international aid organisations developed a variation to the business format franchise model known as micro franchising. Essentially, a micro franchise is a regular franchise concept, only scaled down. All the systems and procedures that have made franchising so successful remain in place but the business concept and the infrastructure it requires are more modest.

Some franchising initiatives are developed through municipalise. For example, the Buffalo City Metropolitan Municipality (BCMM), located in the Eastern Cape is one of South Africa's seven super-municipalities and home to about 700,000 people. Unfortunately, unemployment in the region is notoriously high, even by South African standards where the average hovers around 28%. The BCMM decided to do something about it. As a first step, the BCMM put a programme in place to promote SMME development but soon found that the failure rate among new SMMEs is unacceptably high. To counter this, a decision was taken to promote franchising. The BCMMs franchise development programme was launched in 2014 and has become an annual event. It consists of an exhibition which attracts franchisors and promoters of low-cost business opportunities alike and a series of workshops that familiarise the local population with the concept of franchising. The most recent such event, held in November 2016, attracted almost 50 exhibitors and about 3,400

visitors. In 2017, the focus shifted somewhat. Whilst exhibitors from other parts of South Africa will continue to be welcome, more emphasis will be placed on the promotion of local franchisors, with emphasis on micro franchises and social franchises. An initiative designed to develop local expertise in franchising and small business promotion is also underway. This ambitious programme has been funded entirely by the BCMM. They carry all marketing costs and approved exhibitors receive a fully equipped exhibition stand, complete with signage and basic furniture, free of charge. Exhibitors are responsible only for travel and accommodation costs. Visitors have free access to the expo and the various workshops on offer, and they walk away with a bag containing sponsored items. This includes extensive literature informing visitors about franchising and available opportunities which is sponsored by FASA.

4.16 Conclusion

Franchising is well-established in South Africa and operates according to international best practice. The regulatory framework adopted in South Africa is co-regulation, a combination of explicitly regulating franchising through legislation and by industry bodies that monitor conduct and compliance.

CHAPTER FIVE

5. FRANCHISE ACTIVITY IN SELECTED COUNTRIES AROUND THE WORLD

5.1 Countries with statutory franchising regulations

The following country-specific information is based on a combination of desk-based research and the individual contributors' personal knowledge of some of these markets. The findings are positive. This is no coincidence, for the reason that internationally, franchising has reached maturity and it therefore stands to reason that as long as best practices are applied, successful outcomes should be the norm. We must point out that the focus was not on drawing comparisons between different countries, as this may not be useful. Rather, we aim to highlight aspects that we considered useful in formulating a strategy for the promotion of franchising in Namibia.

Table 3: Franchising in selected countries in the world.

The status of franchising in selected countries world-wide		
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5.1.1 Australia

Measured in surface area, Australia is among the largest countries in the world, covering as it does 7,692,024 km². The population has doubled since the 1960s and stands now at 23 million. Considering that Australia's economy is sound and its population affluent, it is surprising that franchising took hold relatively late. The first franchised brands on record set up shop during the early 1970s. The country has more than made up lost ground since then and now ranks among the leaders in the franchise sector world-wide. It has a very active franchise association, the Franchise Council of Australia ("FCA"). In 1994, a review²²⁷ of the Australian Code of Practice found that a self-regulatory approach was not effective in dealing with serious franchise disputes.²²⁸ Less than 50% of franchisors were registered and so the Code of Practice that was adopted could not be effectively enforced.²²⁹ The Franchise Council of Australia ("FCA") went into liquidation in 1997 and a report on fair trading was released which recommended that specific franchise legislation be introduced that would require compulsory registration of franchisors and compliance with a code of practice.²³⁰ This ultimately led to the introduction and adoption of the Franchising Code of Conduct which is legislated as part of the Competition and Consumer (Industry Codes- Franchising) Regulation 2014²³¹.

Australia has a very comprehensive approach with regard to its Code's definition of a franchise, which can be interpreted to include a variety of arrangements.²³² In addition to including the three standard elements of the definition, as discussed earlier, the Australian Code's definition has the potential to capture a wide range of licensing, distribution and agency arrangements not traditionally considered to be a franchise agreement.²³³ The Australian definition thus succeeds in being comprehensive and "all-inclusive", but sacrifices succinctness in the process.²³⁴

Australia has an established franchise Council of Australia ("FCA") The FCA is a voluntary organisation representing franchisees, franchisors and service providers in the franchise sector. The

²²⁷ R. Gardini, Review of the Franchising Code of Practice, Report to Senator the Hon. Chris Schacht, Minister for Small Business, Customs and Construction, Australian Government Publishing Service, Canberra, October, 1994.

²²⁸ Unidroit "Australia: Regulations and Legislation relevant to franchising" (2013) <http://www.unidroit.org/guide-franchise-2nd-national-info/131-instruments/franchising/guide/guide-2edition/national-information-2nd-franchise/country/272-australia-legislation-and-regulations-relevant-to-Franchising> (Accessed on 30 January 2017).

²²⁹ Woker *Franchise Relationship* 68.

²³⁰ *Ibid.*

²³¹ Select Legislative Instrument No. 168, 2014.

²³² Abell *Franchise Law Review* 12.

²³³ Abell *Franchise Law Review* 13.

²³⁴ *Ibid.*

FCA does not regulate franchising, but it is a support organisation for promoting international standards of best practice.²³⁵ The primary franchise-specific law in Australia is the Franchising Code of Conduct. This Code of Conduct is the prescribed mandatory industry code under the Competition and Consumer Act.²³⁶ The Code is administered and enforced by the Australian Competition and Consumer Commission (the "ACCC").²³⁷ Clause 2 states that the underlying purpose of the Code is to regulate the conduct of participants in the franchising industry towards each other. If there are violations of the Code, an affected party has a wide range of civil remedies.²³⁸ The Code imposes extensive obligations on franchisors in respect of pre-contractual disclosure. Franchisors create and maintain a prescribed disclosure document and provide it to all prospective franchisees, renewing franchisees, and, upon request, existing franchisees.²³⁹ The disclosure document must be provided at least 14 days before the relevant documents are signed by the prospective franchisee or before a prospective franchisee pays to the franchisor any non-refundable money (whichever is the earlier).²⁴⁰ The Code sets out the specific information that a franchisor must provide to franchisees, including extensive details of the franchised business and its operating history.²⁴¹ Such information includes, *inter alia*, background and business experience of the franchisor, past or pending litigation involving members of the franchisor, details of exclusivity and territorial issues, information about online sales, marketing funding and advertising fees, any profit-sharing arrangement, payments to be made by a franchisee, financial statements and reports, details regarding proposed end-of-term arrangements, and any other relevant updates pertaining to key changes that may have occurred since the disclosure document was created.²⁴² The disclosure document must have attached to it a copy of the Code and the franchise agreement.²⁴³ It must also include provision for signature and receipt by the franchisee, stating that the franchisee has had 14 days to read and understand the disclosure document before signing the agreement. The Code²⁴⁴ allows a franchisee a cooling-off period in which the franchise agreement may be terminated within seven days of signature and of paying non-refundable money. In addition to the disclosure statement, franchisors must give prospective franchisees a "prescribed information statement" which summarises key franchising risks and rewards.²⁴⁵ Such statement must be in the form set out in the Code²⁴⁶. There are no

²³⁵ <http://www.franchise.org.au/about-the-fca.html> (accessed on 22 January 2017).

²³⁶ 2010.

²³⁷ Abell *Franchise Law Review* 163.

²³⁸ Abell *Franchise Law Review* 169.

²³⁹ Clause 9.

²⁴⁰ P Colman & J Sier "Getting the deal through: Franchise 2017" (2017) *Law Business Research* 12 at 14.

²⁴¹ *Ibid.*

²⁴² Abell *Franchise Law Review* 167.

²⁴³ Abell *Franchise Law Review* 169.

²⁴⁴ Clause 26.

²⁴⁵ Abell *Franchise Law Review* 165.

mandatory requirements for the registration of disclosure documents or franchise agreements in Australia.²⁴⁷ The Code also requires franchisors (as well as franchisees) to attempt to resolve disputes and attend mediation through a duly authorised person.²⁴⁸ The Office of the Franchising Mediation Officer was established by the Australian government to assist franchisors and franchisees resolve their disputes without involving litigation.²⁴⁹ A franchisor cannot have a provision in the franchise agreement that expressly requires a franchisee to litigate, mediate or arbitrate in an Australian state other than where the franchise business is located.²⁵⁰ Furthermore, there cannot be a provision that requires the franchisee to pay the franchisor's costs associated with settling a dispute.²⁵¹ It is interesting to note that very few franchising disputes reach adjudication in Australian courts. This is because mediation is extensively used.²⁵² Trained mediators with commercial experience are located across Australia to help parties resolve disputes. It has been estimated that an outcome acceptable to both parties is achieved in about 70% of disputes.²⁵³

The common law, Australian consumer law and the equitable principles of contract adopted by the Australian courts also play a significant role in the regulation of franchising. The Code²⁵⁴ imposes an obligation on both parties to act in good faith in their dealings with one another. This is in accordance with the common law position that obliges each party to exercise their powers of the agreement with honest, reasonable conduct, and not capriciously or for some extraneous purpose.²⁵⁵ It is important to note that this obligation does not prevent a party from acting in its own legitimate commercial interest.²⁵⁶ Australian consumer law, which is part of the Competition and Consumer Act, prohibits conduct that is misleading or deceptive, as well as unconscionable conduct.²⁵⁷ Misrepresentation is one of the most common types of allegations made by a franchisee against a franchisor. The Australian Consumer Law deems representations as to future matters (for example, earning projections) to be misleading and deceptive, unless the maker of the representation can prove that it had reasonable grounds for the representation.²⁵⁸ From 12

²⁴⁶ Clause 11.

²⁴⁷ Abell *Franchise Law Review* 170.

²⁴⁸ Abell *Franchise Law Review* 168.

²⁴⁹ Colman & Sier *Law Business Research* 18.

²⁵⁰ Clause 21.

²⁵¹ Clause 22.

²⁵² Abell *Franchise Law Review* 177.

²⁵³ Woker *Franchise Relationship* 63.

²⁵⁴ Clause 6.

²⁵⁵ Abell *Franchise Law Review* 172.

²⁵⁶ *Ibid.*

²⁵⁷ Abell *Franchise Law Review* 173.

²⁵⁸ *Ibid.*

November 2016, amendments to the Australian Consumer Law will protect small businesses from unfair terms in standard form contracts.²⁵⁹

Today, franchising is a sophisticated and stable sector of the Australian economy. Based on a report published in 2014, it was noted that there had been a significant increase in the operation of franchises, less disputes between franchising parties, and substantial employment within the franchising sector.²⁶⁰ It appears that the Australian government supports the efforts of the ACCC. As a result, the ACCC's continued efforts of enforcement activity will likely remain effective.²⁶¹ It is submitted that due to a lack of commitment to self-regulation within the franchising sector, statutory regulation has ultimately proven more effective in Australia. The statutory Code, along with extensively and effectively used mediation techniques, has contributed to this result.

The Competition and Consumer Act of 2010 and the Franchising Code of Conduct ("the Code")²⁶² outline the rights and obligations which franchisors and franchisees in Australia have under law.²⁶³ In addition, Part IV of the Australian Trade Practices Act of 1974, as amended, prohibits any anti-competitive agreements and practices that could substantially lessen competition in vertical relationships. The Australian Competition and Consumer Commission ("the ACCC") also make use of the Franchising Code of Conduct to deal with franchising problems through mediation. Notably, in cases whereby franchisors abuse their powers to the disadvantage of franchisees, or do not abide by the rules of the code, the ACCC may intervene and take action on behalf of the franchisees.²⁶⁴ In making rulings and determinations, the ACCC considers *inter alia* the impact of any conduct on an entire community (and not merely the franchisee); public benefits (such as consistency across the franchise system); more efficient operation and management to the benefit of customers; and more efficient and effective bargaining between the franchisor and the franchisee.

Although there remain issues in balancing the anti-competitive effects of franchise agreements with competition law, the underlying philosophy adopted by the Australian lawmakers is that, while anti-competitive agreements and practices are prohibited by the Act, authorisation may be granted in

²⁵⁹ Colman & Sier *Law Business Research* 17.

²⁶⁰ Abell *Franchise Law Review* 159.

²⁶¹ W Scott "Recap of Australian Franchise Regulation" www.wileyrein.com/newsroom-newsletters-item-5276.html (accessed 13 January 2017).

²⁶² The Code ensures that franchisees are informed of all relevant facts when starting their businesses, and that they can access a fast and relatively inexpensive way to resolve any disputes. The Authority adopted this code (which is not theirs) and made it a mandatory code under the Trade Practices Act. I was alerted to the importance of this provision in the Franchising Notice at Fn 12.

²⁶³ M Murphy *Issues in Competition Law and Franchise Agreements in Australia*. Available at <https://www.hg.org/article.asp?id=35456> (accessed 5 December 2016).

²⁶⁴ *Ibid.*

cases where the public benefits of the conduct outweigh the negative effect on competition.²⁶⁵ As in Namibia, the rule of reason is applied in such cases, which entails that actions will be condemned once it has been established on the facts that such actions have an anti-competitive effect. Compared with the South African approach, price fixing, RPM, collective boycott and, in certain instances, exclusive dealing are regarded as *per se* prohibitions. The Australian approach to these prohibitions will be discussed in further detail:

Resale Price Maintenance

Under section 40 of the Competition and Consumer Act 2010, it is prohibited to engage in the practice of resale price maintenance. Various forms of resale price maintenance is provided for in relation to goods and services, including the withholding of supply as a result of failure to agree to or to adhere to a resale price maintenance regime. However, a franchisor is able to stipulate maximum prices or to recommend a price list under section 97, provided the franchisor makes it clear that the prices are merely a recommendation. Non-binding recommended prices are also allowed and do not constitute a contravention of the Trade Practices Act of 1974.²⁶⁶

Exclusive territories for the franchise businesses

Clauses constituting territorial exclusivity will not be prohibited unless they are likely to have the effect of substantially lessening competition. It will be allowed if the restriction of competition is for the public benefit and is limited to a reasonable time period, generally not exceeding five years.²⁶⁷

Exclusive dealings

With regard to the prohibition of exclusive dealings, franchisees are allowed to source goods or services from the supplier of their choice, but a franchisor may set an objective quality standard for these goods or services, provided that this practice does not have the effect of substantially lessening competition.²⁶⁸ An assessment of whether an exclusive dealing will result in a substantial lessening of the competition involves consideration of aspects such as: whether there has been a real effect on the competition in the overall market for the particular product; whether the refusal to supply would substantially restrict availability of that type of product to consumers; and whether consumers are severely restricted in their ability to buy the product.²⁶⁹ Remedies against exclusive dealings include approaching the supplier to discuss the purpose of the exclusive dealing, seeking assistance from any trade associations or industry bodies who may be able to help by suggesting

²⁶⁵ *Ibid.*

²⁶⁶ *Ibid.*

²⁶⁷ *Ibid.*

²⁶⁸ *Ibid.*

²⁶⁹ *Ibid.*

improvements to marketing strategies or acting as an arbitrator to settle disputes, contacting the local Small Business Commissioner, taking mediation or private legal action, or notifying the ACCC with documentary evidence. Section 24 of the Competition and Consumer Act 2010 further provides penalty provisions under which the ACCC can take court action to seek a financial penalty, or issuing an infringement notice for breach.²⁷⁰

Bundling or tying of products

In Australia, this practice is known as “Third Line Forcing” which occurs where a supplier (the franchisor) supplies goods or services on the condition that the customer also acquires goods or services from another person or business (unrelated to the supplier).²⁷¹ Concerns arise under the Act with these kinds of arrangements only where the arrangement has the purpose or likely effect of substantially lessening competition.²⁷² The ACCC has commented that competition is unlikely to be substantially affected where the franchisee's market and other suppliers' markets include a number of competing businesses.²⁷³

5.2 The business aspects of franchising

Franchises are on offer in many different industry sectors, with retailing leading the way. This is in stark contrast to most other countries where restaurants and especially fast food concepts are dominant. The most recent statistics available date back to 2014.²⁷⁴ An updated version is currently being prepared but was not available at the time this report was compiled. These statistics tell us that 1,160 franchised brands operate a total of about 790,000 business units. The sector employs in excess of 460,000 people and recorded sales of A\$144 billion. An interesting observation is that whilst initially, the franchise sector was dominated by foreign players, with food concepts KFC, Pizza Hut and McDonalds leading the way, this has subsequently changed. Based on the most recent count, about 86% of Australia's franchised brands are homegrown; they span a wide variety of industry sectors, including low-cost concepts like home maintenance and garden care. In excess of 30% of Australia's homegrown franchise concepts operate internationally, primarily through master licence arrangements. Not surprisingly, given the geographic and cultural proximities of the two markets, the main international destination for Australian franchisors is New Zealand. However, a growing number of franchisors venture further afield, with Asia, the USA and Europe, in this order,

²⁷⁰ *Ibid.*

²⁷¹ A Trist *Australia: What you need to know about: Competition issues in Franchising Supplier Arrangement*. Available at <http://www.mondaq.com/australia/x/292624/Franchising/What+you+need+to+know+about+Competition+issues+in+Franchising+Supplier+Arrangements>. (Accessed 5 December 2016).

²⁷² *Ibid.*

²⁷³ *Ibid.*

²⁷⁴ Obtained from the website www.franchise.org.au accessed on 7th March 2017.

preferred destinations. As a final observation, legislative intervention appears to have had the desired effect of regulating the sector effectively. This appears to be a safe assumption to make because in 2014, only 1.5% of franchisees were involved in legal disputes with their respective franchisors.

5.2.1 Brazil

The country covers 8,515,000 km² and is home to a population of 205.82 million people, making it the largest and most populous country in South America. The size of its franchise industry is usually underestimated. In fact, Brazil is a major player in the world of franchising. 2015 figures, the latest available, state that over 3,000 franchised brands served the market through more than 138,300 franchised units. The sector also accounted for about 1.2 million jobs, having grown by 8.3% during a period when unemployment figures were on the increase. Sales reached about US\$35 billion.

The Brazilian franchising sector is large and sophisticated in terms of business practices and in adapting concepts from both foreign and domestic franchisors.²⁷⁵ Brazil is also the largest and most populous country in South America. As a major emerging economy, it is significant to note that Brazil has implemented statutory franchising regulations through the Brazilian franchise law.²⁷⁶ Brazilian franchise law defines a franchise as “a system whereby a franchisor licenses to the franchisee the right to use a trade mark or patent, along with the right to distribute products or services on an exclusive or semi-exclusive basis and, possibly, also the right to use technology related to the establishment and management of a business or operating system developed or used by the franchisor, in exchange for direct or indirect compensation, without, however, being characterised as an employment relationship.”²⁷⁷ The reference to a patent (along with a trade mark) which differentiates this definition from others.²⁷⁸ The Brazilian Franchise Association (the “ABF”) is a non-profit entity whose objectives are to contribute to, promote and strive for the technical and institutional development of the franchise system. The BFA has established itself as the sector’s most representative body among the official national and international entities at the level of the federal government and in other administrative spheres.²⁷⁹ Along with the Franchise Law, the ABF rules and code of practice are influential amongst the franchising sector. The ABF counts more than one thousand members and has a strong presence in franchise-related matters.²⁸⁰ Brazilian

²⁷⁵ CC Schefer “Franchising in Brazil” <http://www.wileyrein.com/newsroom-newsletters-item-4977.html> \ (accessed 12 January 2017).

²⁷⁶ No. 8955 of 15 December 1994.

²⁷⁷ Abell *Franchise Law Review* 15.

²⁷⁸ *Ibid.*

²⁷⁹ Abell *Franchise Law Review* 209.

²⁸⁰ PF Zeidman “Getting the Deal Through: Franchise 2016” (2016) *Law Business Research* 25 at 27.

Franchise Law governs all franchise relationships that are established and operated within the Brazilian territory. The main aim of the Brazilian franchise law is to promote transparency through disclosure requirements rather than governing the private relationship between the parties.²⁸¹ Brazil's Franchise Law requires that a franchise disclosure document be delivered to the prospective franchisee at least 10 days prior to the execution of the agreement or payment of any fees related to the franchise, whichever occurs first.²⁸² If the franchisor fails to timeously provide the franchisee with the disclosure document, the franchisee may claim nullity of the agreement, request reimbursement of all amounts already paid to the franchisor or to third parties, and recover damages.²⁸³

The disclosure document must be in clear, comprehensive language and must provide basic information about the franchise, including *inter alia*, a summary of the details, background and information of the franchisor company, the franchisor's balance sheets and financial statements for the past two years, pending lawsuits involving the franchisor, a detailed description of the franchise and a general description of the business and relevant activities, information regarding whether the franchisee's direct involvement in the business's operation, an estimate of the initial investment to be made by the franchisee, exclusivity rights, and detailed information regarding the obligations of the franchisor to provide training, franchise manuals, and other assistance.²⁸⁴ It is interesting to note that the Brazilian Franchise Law requires an unusual disclosure item in that franchisors have to give a profile of the "ideal" franchisee in the disclosure document, in particular with details of its business experience and educational background.²⁸⁵ The franchise agreement must bear the signature of the representatives of both parties along with two witnesses.²⁸⁶ If the franchise agreement is executed outside of Brazil, the agreement must be notarised and legalised before the local Brazilian Consulate.²⁸⁷

In contrast to Australian franchise law, apart from the franchisor's obligation to provide updated disclosure to potential franchisees, there is no legal obligation for continuous disclosures to the current franchisees. Pre-contractual disclosure need only be provided once.²⁸⁸ In the event of violations of disclosure requirements, the franchisee may file a claim or commence mediation or arbitration proceedings for indemnification, if provided for in the franchise agreement. Annulment

²⁸¹ Abell *Franchise Law Review* 214.

²⁸² Abell *Franchise Law Review* 215.

²⁸³ *Ibid.*

²⁸⁴ Abell *Franchise Law Review* 216.

²⁸⁵ Abell *Franchise Law Review* 215.

²⁸⁶ *Ibid.*

²⁸⁷ CC Schefer "Franchising in Brazil".

²⁸⁸ *Ibid.*

of the contract and repayment of all the amounts already paid to the franchisor, such as affiliation fee and royalties, as well as damages, can be sought as a final resort.²⁸⁹ Even though the Brazilian Franchise Law prescribes that franchise agreements are valid and enforceable irrespective of whether they are registered, the recording of franchise agreements with the National Institute of Industrial Property (“INPI”) is recommended.²⁹⁰ This is necessary in order for the licensing of the relevant intellectual property to be enforceable against third parties. Furthermore, this recording of the agreement permits the remittance of payments to the foreign party, and qualifies the licensee (franchisee) for tax deductions.²⁹¹ The franchise agreement also needs to be registered at the Central Bank of Brazil for clearance to send royalties out of the country.²⁹² There is no dedicated procedure for the resolution of franchising disputes specifically. The general rules of the Brazilian Civil Procedure Code govern this area.²⁹³ Mediation is a recognised form of alternative dispute resolution but is not mandatory.²⁹⁴ The Brazilian judicial system can be extremely complex and slow.²⁹⁵ Ideally, parties should thus seek to settle their differences by mediation and arbitration. The ABF will soon have a dispute resolution centre, offering mediation and arbitration services.²⁹⁶ Certain arbitration centres have been established in Brazil to deal with lower-profile cases, with lower costs. The Brazilian Civil Code prescribes general rules and principles of contract law, which also have to be observed in franchise agreements. The principle of contractual good faith is now expressly referred to in the Brazilian Civil Code, requiring fairness and honesty during all stages of the transaction.²⁹⁷ Brazil has achieved an advanced level of maturity and reliability on a global scale.²⁹⁸ The Brazilian Franchise Association reported an impressive growth of 8.3% in total revenues from franchise operations in 2015, and sales are expected to keep expanding in the years to come.²⁹⁹ Currently, there is one bill of law that is intended to revoke and replace the current Brazilian Franchise Law, but it is still being analysed and discussed. The most significant changes that have been proposed include the amendment of the franchise definition to include production of goods, proposing further disclosure, the possibility of state and government owned companies adopting franchise systems, the governance of legal issues by Brazilian law, requiring a foreign party to hold a qualified attorney

²⁸⁹ Abell *Franchise Law Review* 215.

²⁹⁰ Abell *Franchise Law Review* 216.

²⁹¹ *Ibid.*

²⁹² Abell *Franchise Law Review* 217.

²⁹³ Zeidman 2016 *Law Business Research* 28.

²⁹⁴ Abell *Franchise Law Review* 224.

²⁹⁵ Zeidman 2016 *Law Business Research* 28.

²⁹⁶ Abell *Franchise Law Review* 225.

²⁹⁷ Zeidman 2016 *Law Business Research* 28.

²⁹⁸ Abell *Franchise Law Review* 208.

²⁹⁹ HVM Fernandes “Brazil: The Challenges of Brazilian Franchises” www.mondaq.com/brazil/x/483682 (accessed on 15 January 2017).

resident in Brazil for all legal correspondence, and settlement of disputes by arbitration.³⁰⁰ It is clear that the Brazilian government is committed to reviewing existing laws and institutions in their aim to achieve effective regulation. Brazil has taken steps to create a business environment that is conducive for innovation and entrepreneurship. Despite the economic challenges³⁰¹ that may be on the horizon, statutory regulation has proved to be successful within the Brazilian market of franchising.³⁰²

Brazil is one of the few comparable countries that has legislation specifically regulating franchise agreements. The Brazilian Franchise law is set out in Law n. 8,955 of December 15, 1994. This law, however, does not specifically regulate the competition law aspects of franchise agreements. Law n. 12,529/2012 lists anticompetitive practices and establishes rules concerning the abuse of a dominant position to franchise agreements. The Administrative Economic Protection Counsel (“CADE”) is the administrative government body competent for examining and assessing the occurrence of actions that may impair or limit free competition or result in the control of significant market shares.³⁰³ There is a broad prohibition of certain prohibited practices that are viewed as anticompetitive, especially those which are likely to unjustifiably limit competition, concentrate economic power, dominate markets, arbitrarily increase profits or impose abusive practices.³⁰⁴ In order to make a determination if conduct fits into the above categories, CADE will consider the nature of the business, the product or service involved, the size of the market, the relevant sector and the nature of the transaction.³⁰⁵ Based on the above determination, there have been instances where franchise agreements have been considered pro-competitive and the restrictions usually imposed are only intended to protect the network.³⁰⁶ As mentioned above, competition legislation in Brazil lists the anticompetitive practices that may constitute a violation of the economic order and therefore should be considered by the franchisor when concluding or enforcing a franchising agreement. The penalties for infringements of the economic order specified under article 37 of the Brazilian Competition Act are administrative fines that may vary between 0.1 per cent and 20 per cent of its gross turnover.³⁰⁷ The following practices are prohibited, unless a pro-competitive benefit can be shown:

³⁰⁰ Abell *Franchise Law Review* 226.

³⁰¹ Slowdown in retail activities and decline in household consumption.

³⁰² Fernandes “Brazil: Challenges”.

³⁰³ Obtained from <http://www.iclg.co.uk/practice-areas/franchise/franchise-2017/brazil>.

³⁰⁴ *Ibid.*

³⁰⁵ *Ibid.*

³⁰⁶ *Ibid.*

³⁰⁷ M Roberto *et al* ‘Brazil: Case Law on Abuse of Dominance’ *The Antitrust Review of the Americas* (2014) at page 1.

Resale price maintenance

The practice of fixing the price of products commercialised by franchisees may be allowed under the ‘rule of reason’ approach.³⁰⁸ However, as a general rule, price restrictions imposed by the franchisor in the franchise agreement must be carefully scrutinised, to confirm that such restrictions hold pro-competitive benefits and that they are not considered to be abusive under Brazilian law.³⁰⁹

Exclusive dealings, exclusive territories and bundling or tying of products

To establish fixed supply arrangements, to limit franchise activities to certain areas and to make the acquisition of certain products compulsory due to specific standards of quality may also be allowed in the context of the rule of reason approach.³¹⁰ These practices will be seen as abusive if these restrictions are unreasonably and unduly enforced by the franchisor.³¹¹

Abuse of dominant position

Under the Brazilian Competition Act, a dominant position is presumed whenever a company, or group of companies, is unilaterally able to change the market conditions, or whenever it holds 20 per cent or more of a relevant market.³¹² The existence of market power alone is not considered to be a violation of the economic order under the Brazilian legislation. In order for a dominant firm to be censured by the Brazilian System of Competition Defence, the firm must enjoy a dominant position in the relevant market and such dominant position should be used in a way that could actually, or even potentially, produce any of the anticompetitive effects listed in article 36 of the Brazilian Competition Act.³¹³ Home-grown franchise concepts dominate the market. They cover a wide range of industry sectors, as the table below shows.

Figure 2: Overview of the market structure of Brazilian franchise sector in 2015.

An analysis of the Brazilian franchise sector: Year 2015		
Industry sector	Market share %	Growth % 2014/15
Retail and services	21.1%	+10.2%
Food concepts	20%	+8.9%
Sport, health, beauty, leisure products and services	18%	+8.1%
Clothing retailers	7.4%	+6.9%
Hotel and hospitality sector	7.3%	+9%

³⁰⁸ <http://www.iclg.co.uk/practice-areas/franchise/franchise-2017/brazil>

³⁰⁹ *Ibid.*

³¹⁰ *Ibid.*

³¹¹ *Ibid.*

³¹² M Roberto et al ‘Brazil: Case Law on Abuse of Dominance’ *The Antitrust Review of the Americas* (2014) at page 1.

³¹³ *Ibid.*

Shoes and accessories	7.1%	+12%
Education and training	6.6%	+8.7%
Home and construction services	5.1%	-2.3%
Automotive sector	3.5%	+8.8%
Informatics and electronics	3%	+6.6%
Cleaning services	0.9%	+3.8%

Brazilian franchise concepts are sufficiently well developed to enable a growing number of franchisors to expand successfully into countries abroad. In fact, Brazilian franchisors have developed a unique approach to foreign expansion. They often seek to establish linkages with foreign-based franchisors active in a non-competing but complementary industry sector. The two entities essentially exchange master licences, with each party accepting responsibility for the development of the other party's brand in their respective home countries. Brazilian entrepreneurs seeking to strike master licence deals with foreign franchisors have developed an unorthodox approach as well. They aim to persuade the foreign master licensor to share the risk of bringing the franchise to Brazil by taking a meaningful stake in master franchisee.

5.2.2 Canada

Canada is a vast country with a relatively small population; it covers 9.9 million km² yet its population numbers only 35 million people. The population is affluent and supports a burgeoning franchise sector made up of a mix of foreign and local brands. The Canadian Franchise Association is well established and highly active. Canada has long been a desirable destination for foreign franchise systems and has shown itself to be a "good incubator" for the franchising business model.³¹⁴ Franchise legislation has existed since the early 1970s.³¹⁵ The federalist system of the country divides powers between the federal and provincial levels of government, and provinces have authority over private contractual matters. Canada is thus unique in respect of its franchise regulations because it is an example of a country that has no national legislation on franchising but rather individual states and provinces within the country that have franchise-specific laws.³¹⁶ Five of the ten provinces have enacted franchise legislation.³¹⁷ In the Ontario Arthur Wishart Act³¹⁸ (to be discussed further below) the definition of a franchise is relatively broad and sets out the primary features of the franchise business model.³¹⁹ The national industry body for franchising, founded in

³¹⁴ Abell *Franchise Law Review* 227.

³¹⁵ E Levitt "Canadian Franchise Legislation: Finding the Balance" (2008) <http://franchise.org/canadian-franchise-legislation-finding-the-balance> (accessed 25 January 2017).

³¹⁶ Ofodile "Franchising Law".

³¹⁷ Abell *Franchise Law Review* 227.

³¹⁸ Act 2000, S.O. 2000, Chapter 3.

³¹⁹ Abell *Franchise Law Review* 232.

1967, is the Canadian Franchise Association (“CFA”).³²⁰ Members agree to abide by the Code of Ethics as well as the spirit of the Code in its application to general policies, standards and practices.³²¹ Important elements highlighted within the code of ethical franchising practice include compliance with Federal and Provincial laws, pre-contractual disclosure, inclusion of material matters, reasonable guidance from franchisors, fairness in dealings, efforts to resolve by mediation, the attaining of legal advice prior to signature of a franchise agreement, and encouragement from franchisors to promote understanding and open dialogue with franchisees.³²² Alberta³²³, New Brunswick³²⁴, Manitoba³²⁵, Ontario³²⁶ and Prince Edward Island³²⁷ have enacted franchise legislation.³²⁸ The main areas covered by these provincial statutes are pre-contractual disclosure, the duty of fair dealing (including the duty to act in good faith), and the right of association. In substance, the various statutes of the provinces are all very similar. The Wishart Act will be specifically discussed because it contains many of the features present in the statutes of other provinces. The Wishart Act requires franchisors to make full and accurate disclosure so that potential franchisees can make informed decisions before accepting a franchise contract.³²⁹ The disclosure document must contain, *inter alia*, all ‘material facts’ prescribed in the regulations, the financial statements of the franchisor, copies of all agreements that the franchisee will be required to sign as well as certain mandatory statements.³³⁰ The Wishart Act states that a material fact is any information that would have a significant effect on the value or the price of the franchise, or the decision to acquire the franchise.³³¹ The catch-all of disclosure of all ‘material facts’ greatly broadens the scope of what needs to be covered in a franchise disclosure document.³³² Some of the important facts required to be disclosed include the business background of the franchisor, bankruptcy matters, costs of establishing the franchise, training requirements, on-going assistance from the franchisor, as well as financial statements and annual costs.³³³ The disclosure document must be provided to the prospective franchisee no less than fourteen days before signing of the

³²⁰ Abell *Franchise Law Review* 227.

³²¹ *Ibid.*

³²² *Ibid.*

³²³ Alberta Franchise Act, Chapter F-23.

³²⁴ The Franchises Act.

³²⁵ The Franchise Act or Bill 15.

³²⁶ Arthur Wishart Act.

³²⁷ RSPEI 1988, c F-14.1.

³²⁸ Abell *Franchise Law Review* 231.

³²⁹ *Ibid.*

³³⁰ Abell *Franchise Law Review* 232.

³³¹ Section 1(1).

³³² Abell *Franchise Law Review* 232.

³³³ *Ibid.*

franchise agreement or payment of money related to the franchise, whichever occurs first.³³⁴ A franchisee has the right within two years of signature to rescind the agreement if the document is highly deficient and could essentially equate to no disclosure. If the disclosure document was improper or incomplete, a period of sixty days applies in terms of the right to cancellation.³³⁵ Courts have held that franchise agreements give rise to an implied obligation to act in good faith.³³⁶ The rights, obligations and requirements stipulated by the Wishart Act cannot be excluded or waived by the parties to a franchise agreement.³³⁷ After the enactment of the Wishart Act, the Uniform Law Conference of Canada (“ULCC”) determined that it was in the best interests of all provinces that a model Franchise Act and Regulations be developed.³³⁸ Considering that most franchise systems aim to operate in more than one province, creating consistency and uniformity in provincial franchise legislation would assist in reducing barriers of entry for domestic and foreign franchisors.³³⁹ In creating a model Franchise Act and Regulations, the ULCC conducted hearings from experts in government, private practice and academia.³⁴⁰ The end product adopted many features from the Wishart Act³⁴¹ and the Alberta Franchises Act.³⁴² The provinces’ franchising statutes are now largely based on the ULCC Model Franchise Act. Franchise disputes can be addressed before the courts, or by way of arbitration or mediation. Mediation in some provinces is mandatory and is strongly supported as an alternative to litigation.³⁴³ The remedies available depend on the relief sought and the type of damages claimed. Injunctive orders can be used to enforce contractual performance or restrict conduct, and damages can of course be sought for both pecuniary and non-pecuniary losses.³⁴⁴ With each province having adopted slightly differing laws, there may be potential uncertainty for franchisors entering Canada.³⁴⁵ However, even though there are minor differences among the franchise statutes in Canada, the statutes are similar enough to make the creation of one franchise disclosure document for use in all of the provinces, for now, an attainable objective.³⁴⁶ Many franchisors voluntarily provide pre-contractual disclosure to franchisee prospects in all parts of Canada and formulate a disclosure document that can be used across the country.³⁴⁷ Furthermore,

³³⁴ *Ibid.*

³³⁵ Abell *Franchise Law Review* 233.

³³⁶ Abell *Franchise Law Review* 234.

³³⁷ *Ibid.*

³³⁸ *Ibid.*

³³⁹ *Ibid.*

³⁴⁰ *Ibid.*

³⁴¹ Act 2000, S.O. 2000, Chapter 3.

³⁴² Revised statutes of Alberta 2000.

³⁴³ Abell *Franchise Law Review* 235.

³⁴⁴ *Ibid.*

³⁴⁵ Abell *Franchise Law Review* 142.

³⁴⁶ Levitt “Canadian Franchise Legislation.”

³⁴⁷ *Ibid.*

most franchise systems are operable in one or more provinces, so providing disclosure is not an impediment in any event.³⁴⁸ It is predicted that, with the ever-increasing volume of franchise activity in Canada, most of the other provinces will soon enact similar franchise legislation to afford their citizens the protections that are available to other residents of other provinces, and so in time, a “predictable and equitable franchise jurisprudence” will evolve across Canada.³⁴⁹

Franchising in Canada is governed principally by provincial legislation, with six provinces having enacted specific statutes in this regard. However, in addition to provincial regulation, franchisors and franchisees operating in Canada must also comply with the federal Competition Act of 1985 as amended, which applies generally to all businesses and industries in Canada.³⁵⁰ The prohibitions established by the Competition Act are broadly divided into two categories: criminal offences and “reviewable matters” (also referred to as “reviewable practices”). Canadian legislation criminalises certain anti-competitive conduct, for example conspiracies³⁵¹ and bid-rigging. Reviewable practices include abuse of dominance, various distribution practices (exclusive dealing/market restrictions/tied selling/refusal to deal), price maintenance and non-criminal agreements between competitors.³⁵² The general approach is that an agreement or conduct is assessed on a case-by-case basis to determine whether competition is or is likely to be lessened substantially.³⁵³ As in Namibia, Canada follows the rule of reason approach in assessing anti-competitive practices. The Canadian approach to reviewable practices will be discussed in further detail below:

Resale Price Maintenance

Section 76 of the Competition Act determines that a franchisor may not attempt to impose a minimum resale price on a franchisee, or otherwise seek to “directly or indirectly influence upward or discourage the reduction of a resale price.”³⁵⁴ Whereas RPM had, prior to 2009, been a *per se* criminal offence, under section 76 RPM is now a civil reviewable practice and only actionable if it has

³⁴⁸ *Ibid.*

³⁴⁹ Levitt “Canadian Franchise Legislation.”

³⁵⁰ M Katz *et al* *Competition law considerations for the franchise industry in Canada* (2016) Available at <http://kluwercompetitionlawblog.com/2016/10/22/competition-law-considerations-for-the-franchise-industry-in-canada> (Accessed 6 December 2016).

³⁵¹ Criminal agreements between competitors.

³⁵² M Katz *et al* *Competition law considerations for the franchise industry in Canada* (2016) Available at <http://kluwercompetitionlawblog.com/2016/10/22/competition-law-considerations-for-the-franchise-industry-in-canada> (Accessed 6 December 2016).

³⁵³ Franchising Notice at 5.3.

³⁵⁴ M Katz *et al* *Competition law considerations for the franchise industry in Canada* (2016) Available at <http://kluwercompetitionlawblog.com/2016/10/22/competition-law-considerations-for-the-franchise-industry-in-canada> (Accessed 6 December 2016).

had, is having, or is likely to have an “adverse effect on competition in a market”.³⁵⁵ Under Canadian law, there is no prohibition against a franchisor imposing a maximum resale price on a franchisee.³⁵⁶

Exclusive dealings, exclusive territories and bundling or tying of products

Section 77 of the Competition Act prohibits a franchisor from engaging in “exclusive dealing”, “market restrictions” or “tied selling” when it is a “major supplier of a product in a market”; and the conduct is likely to lessen competition substantially by impeding entry or expansion of a firm or a product in a market, or otherwise have any exclusionary effect. These distribution practices are assessed under the rule of reason approach.³⁵⁷ The Canadian Competition Tribunal may make an order prohibiting a supplier from continuing to engage in an exclusive dealing or tied selling. It may also stipulate any other requirements that, in its opinion, are necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.³⁵⁸

Abuse of dominance

This reviewable practice is generally referred to as monopolization in Canada and is dealt with under section 79 of the Competition Act. It requires demonstrating a negative impact on competition (“substantial prevention or lessening competition in a market”), and applies when a dominant party in a market uses “anti-competitive acts” to harm competition.³⁵⁹ As in Namibia, cases of abuse of dominance are dealt with under the rule of reason or on the substantial lessening of competition test.³⁶⁰ Canada is home to about 1,100 franchised brands which are represented by over 76,000 outlets. These brands offer goods and services in 30 different industry sectors. The industry is extremely stable, with franchisors having been in business for an average of 17 years. The same “average franchisor” operates 75 units, 63 of which are franchised, the balance company-owned. The historical growth rate averages 4.4 units per annum. Overall, more than 45% of all retail sales are generated by franchised brands. The sector generates US\$74.10 billion in annual sales and provides direct employment for 1, 5 million people.

The Canadian Franchise Association (CFA) was established in 1967. It has over 600 corporate members and has become a powerful promoter of the franchise concept.

³⁵⁵ *Ibid.* According to the Competition Bureau’s Price Maintenance Enforcement Guidelines (2014), price maintenance conduct will only have this effect where it is likely to “create, preserve or enhance the market power” of the supplier, i.e., give the supplier the ability to behave relatively independently of the market.

³⁵⁶ *Ibid.*

³⁵⁷ Franchising notice at 5.3.

³⁵⁸ *Ibid.*

³⁵⁹ M Katz et al Competition law considerations for the franchise industry in Canada (2016) Available at <http://kluwercompetitionlawblog.com/2016/10/22/competition-law-considerations-for-the-franchise-industry-in-canada> (Accessed 6 December 2016).

³⁶⁰ Franchising notice at 5.3.

5.2.3 United States of America

As mentioned, the USA is the birthplace of modern-day franchising. Franchise activity can be traced back to the mid-1850s when the Singer Sewing Machine Company embarked on a programme to distribute its sewing machines through a product franchise model. During the early part of the 20th century, motor car manufacturers and fuel distributors followed suit but the real upturn in franchise activity commenced in the mid-1950s. The sector now claims approximately 50% of all retail sales. In response to misuse occurring during the early days, it is highly regulated. As mentioned, the United States is known as the “birthplace” of franchise regulation, with the first law being passed in California in the early 1970s.³⁶¹ The franchising industry is thriving in the United States and much of the growth during the past few years is due to the expansion of new and emerging concepts.³⁶² In the USA, both the federal government and individual states within the country have adopted laws that specifically regulate franchising.³⁶³ At the federal level, franchising is regulated by the US Federal Trade Commission (“FTC”) and the main rule that is applied is the Franchise Rule³⁶⁴ which the FTC promulgated in 1979 and updated in 2007.³⁶⁵ In addition, about fifteen states regulate franchising in varying degrees. Under the FTC Rule, a business arrangement is defined as a franchise if it has three elements: (1) the franchisor grants the franchisee the right to use the franchisor’s trade mark; (2) the franchisor exerts or has the authority to exert a significant degree of control or assistance over the franchisee’s method of operation; and (3) the franchisee pays the franchisor a fee.³⁶⁶ It must be noted that the abovementioned federal definition differs from various state definitions, so the applicability and requirements of state laws need to be considered.³⁶⁷

Both federal and state franchise laws impose pre-contractual disclosure obligations and restrictions. The FTC Franchise Rule governs franchise offerings in each of the fifty states and requires franchisors to make material disclosures to prospective franchisees.³⁶⁸ The franchisor must provide prospective franchisees with a disclosure document at least fourteen days before any agreement is signed or consideration is paid.³⁶⁹ Several mandatory disclosure items must be included.³⁷⁰ The FTC Rule considers it an unfair and deceptive practice for franchisors to disclaim or require franchisees to

³⁶¹ Abell *Franchise Law Review* 147.

³⁶² Abell *Franchise Law Review* 592.

³⁶³ Abell *Franchise Law Review* 597.

³⁶⁴ Disclosure requirements and Prohibitions concerning franchising & Disclosure Requirements Concerning Business Opportunities – 16 CFR Parts 436 and 437.

³⁶⁵ Ofodile “Franchising law”.

³⁶⁶ Abell *Franchise Law Review* 598.

³⁶⁷ *Ibid.*

³⁶⁸ *Ibid.*

³⁶⁹ Abell *Franchise Law Review* 599.

³⁷⁰ Abell *Franchise Law Review* 600.

waive reliance on any representations made in the disclosure document.³⁷¹ At federal level, the FTC is mandated to enforce the Federal Trade Commission Act³⁷² (“FTC Act”). The FTC Act is a wide-ranging law that prohibits unfair methods of competition as well as unfair or deceptive acts or practices in commerce, extending to franchise agreements.³⁷³ In addition to the federal regulation, at least fifteen states in the US regulate franchising.³⁷⁴ The state laws (in varying degrees) address issues such as registration, disclosure and the relational aspects of a franchising agreement. Most states have legislation that provide franchisees with standing to sue for unfair and deceptive conduct, which could include a violation of the federal FTC Rule.³⁷⁵ Franchise litigation involves generally two types of remedies: monetary damages and injunctive relief.³⁷⁶ The FTC Franchise Rule does not require that a franchise agreement must be registered with the FTC.³⁷⁷ However, fourteen states require registration of the franchise offering prior to the offer for sale of a franchise.³⁷⁸ The registration process varies by state, but generally requires franchisors to pay fees, submit a copy of their disclosure documents, and file certain state-specific registration forms and documents.³⁷⁹

Contract and consumer law play a role in franchising too. One of the most important principles developed by the US courts in promoting fairness and equity in contractual relations, is the implied covenant of good faith and fair dealing in the performance of commercial contracts.³⁸⁰ Consumer protection and unfair deceptive trade practices have been adopted at federal level and in every state.³⁸¹ Some states have recognised franchisees as consumers under their respective consumer protection acts, which generally cover immoral and unethical behaviour that has resulted in substantial injury on a franchisee’s part.³⁸² A franchise agreement’s dispute resolution clause will determine whether the parties to the agreement must arbitrate or litigate their disputes.³⁸³ A standard set of rules governs litigation that occurs in federal courts, whereas a more diverse set of rules governs litigation in the state courts.³⁸⁴

³⁷¹ *Ibid.*

³⁷² Act of 194 (15 U.S.C 41 – 58).

³⁷³ Ofodile “Franchising law”.

³⁷⁴ Abell *Franchise Law Review* 598.

³⁷⁵ *Ibid.*

³⁷⁶ Abell *Franchise Law Review* 610.

³⁷⁷ Abell *Franchise Law Review* 598.

³⁷⁸ Abell *Franchise Law Review* 599.

³⁷⁹ *Ibid.*

³⁸⁰ Abell *Franchise Law Review* 602.

³⁸¹ Abell *Franchise Law Review* 605.

³⁸² *Ibid.*

³⁸³ Abell *Franchise Law Review* 609.

³⁸⁴ *Ibid.*

The USA is an example of a country that has both federal and state governments that regulate franchising in varying degrees. The complex network of both state and federal laws indicates strong reliance on statutory regulations. As mentioned, the USA was the birthplace of franchise regulation and as such, legislation in this regard has developed over the years and remains the primary source of franchising regulation. Anti-trust laws in the USA have been developed and expanded in response to a growing economy over the last few decades. The Sherman Anti-Trust Act of 1890 (1890 as 15 U.S.C. §§ 1-7) was the first Federal act that outlawed monopolistic business practices. It has since been amended by the Clayton Act of 1914 (15 U.S.C. § 12-27), which prohibits activities that restrict interstate commerce and competition in the marketplace. The implementation of an antitrust legal framework led to a more developed understanding of the pro-competitive benefits of distribution restrictions and resulted in the elimination of *per se* standards of illegality in favour of the application of antitrust law's predominant rule of reason.³⁸⁵ The rule of reason now governs all truly vertical resale restraints challenged under section 1 of the Sherman Act, so that plaintiffs must demonstrate that a restraint has a substantially adverse effect on competition.³⁸⁶ Therefore, most agreements and prohibited practices are dealt with on a case-by-case basis under the rule of reason.

Resale Price Maintenance

Until 2007, it was illegal for a franchisor to require or coerce its franchisees to resell goods either at a specified price or above a certain minimum price. However, in the case of *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007), the Supreme Court held that such vertical price fixing RPM practices are no longer *per se* illegal and, further, that they will now be governed by a rule of reason approach in which legality or illegality is dependent upon whether the RPM practice causes an unreasonable restraint of trade.³⁸⁷ Certain states, in an attempt to overturn the *Leegin* decision, have enacted legislation which declares that RPM agreements are *per se* illegal under its state antitrust law.³⁸⁸ The *Leegin* decision did not directly affect the status of RPM under state law, and as such, the approach to RPM may differ from state to state. Franchisors may engage in RPM in less risky states, while pursuing alternative pricing techniques in the riskier states, for example, by

³⁸⁵ RT Joseph *Antitrust Law, Franchising, and Vertical Restraints* Published in Franchise Law Journal, Volume 31, Number 1, Summer 2011 by the American Bar Association at page 1.

³⁸⁶ *Idem* at p2.

³⁸⁷ SB Feirman *et al Antitrust Law Developments In Franchise System Pricing -Legal Principles And Best Practices* at p 3 presented at the 47th Annual Legal Symposium of the International Franchise Association.

³⁸⁸ These states include Maryland and California. In the states of New York Illinois and Michigan also seem to be in favour of RPMs as *per se* prohibitions.

making suggested resale prices,³⁸⁹ a minimum advertised price policy,³⁹⁰ or a unilateral pricing (“Colgate Doctrine”) policy.³⁹¹

Exclusive dealings, exclusive territories and bundling or tying of products

In terms of the Sherman Act, such practices are prohibited if they are established through agreements, arrangements or conspiracies.³⁹² These prohibitions are also viewed as more severe in cases where the offending firm is a dominant firm. Case law has shown that there was a very strict approach to these types of practices in the past.³⁹³ The suggested approach is that, in cases where market allocations, exclusive dealings and tying of products form part of a wider integration of production or distribution or joint venture, the rule of reason should apply.³⁹⁴

Abuse of dominance

Section 2 of the Sherman Act makes it a felony to “monopolize, or attempt to monopolize, or conspire with any other person to monopolize any part of trade or commerce.”³⁹⁵ Dominant market power is characterized by the power to control prices or exclude competition.³⁹⁶ It will constitute abuse if a dominant firm engages in predatory pricing, refusals to deal, refusing to access an essential facility and other exclusionary acts where harm to competition has been established.³⁹⁷

As mentioned, although affected to some extent by recent economic ups and downs, the franchise sector has weathered the storm much better than its independent counterparts. Credible forecasts indicate that the franchise sector can look forward to continued growth during 2017 as figures contained in the table below indicate.

³⁸⁹ One form of SRPs is when a franchisor advertises prices and disclaims that the prices are available “at participating dealers” or that prices “prices may vary.” In that scenario, franchisees are free to depart from the franchisor’s SRPs without retribution by the franchisor.

³⁹⁰ Known as MAP, this policy sometimes condition receipt of cooperative advertising or other promotional funds from the supplier on the reseller’s adherence to suggested advertised prices in certain designated media.

³⁹¹ The “Colgate Doctrine” provides that, absent a purpose to create or maintain a monopoly, a business is free to choose the parties with whom it deals and to determine the terms and conditions (including resale price conditions) of those business dealings.

³⁹² Sherman Act 15 USC 1.

³⁹³ As seen in *United States v Topco Association* 405 US 596 (1972).

³⁹⁴ Butterworths Competition Law Handbook (17th ed) 2011 at 5.7.2.

³⁹⁵ *Idem* at 7.3.

³⁹⁶ *United States v El du Pont de Nemours Co* 351 US 377 (1956).

³⁹⁷ Butterworths Competition Law Handbook (17th ed) 2011 at 5.7.2.

Figure 2: Franchise development outlook 2017.

USA: Franchise outlook for the year 2017³⁹⁸				
Industry sector	Number of units	Number of employees (000)	Sales (\$ billions)	Projected sales growth over 2016
Automotive	37,603	196	41.2	+3.8
Business services	106,772	643	96.4	+4.1
Commercial and residential	65,072	245	42.6	+0.9
Lodging	28,029	620	71.1	+4.9
Personal services	109,223	484	35.0	+6.1
Quick service restaurants	190,494	3,610	237.6	+6.7
Real estate	62,424	247	49.9	+4.6
Retail – food	52,891	470	37.9	+4.1
Retail – products and services	60,453	346	30.7	+5.5
Table/full service restaurants	31,476	1,025	67.5	+6.8
Totals	744,437	7,885	709.9	+5.3

Franchise concepts developed in the USA have made inroads into just about every market around the world. In this context, it should be remembered that while initially, foreign expansion may have been a ‘nice to have’ for enterprising franchisors, it has now become a necessity. McDonald’s operate over 3,000 restaurants in the USA alone. KFC has more than 4,500 locations. Quite clearly, these companies are approaching saturation point in their home market and, as a result, expanding into foreign markets was the logical choice. For obvious reasons, Canada was their first stop, then came Europe and Australia. Asia and Africa are the current hotspots for franchise expansion. Anecdotal evidence suggests that brands originating from the US were welcomed with open arms and quickly established a solid presence in most parts of the world. By contrast, foreign franchisors wishing to set up shop in the lucrative but highly competitive USA market tend to find this hard going. It’s not that they aren’t welcome in the USA. They simply had to learn the hard way that market expectations and legal requirements combine to make the USA market a hard nut to crack. In addition to needing an outstanding concept, franchisors wishing to enter the USA successfully need to have deep pockets and take a long-term view on profitability. Lastly, the USA is home to the International Franchise Association (IFA) which is the oldest franchise association in the world. It was established in 1960 and has evolved into a powerful lobbyist for the franchise sector. It’s 2014 budget amounted to US-\$14.5 million and it employs a full-time staff of 47. Membership comprises of more than 1,300 franchisors which are active in over 300 different business sectors, more than

³⁹⁸ Adapted from the website www.franchise.org accessed on 8th March 2017.

12,000 franchisees and a good number of professional firms that support the industry, primarily in aspects of marketing, law, technology and business development.^{399 400}

5.2.3 Tunisia⁴⁰¹

Prior to 2009, franchisors were hesitant to enter the Tunisian market. Franchises were approved on a case-by-case process, which many viewed as indicative of corruption.⁴⁰² In response, Tunisia enacted franchise legislation with the assistance of the US Department of Commerce's Commercial Law Development Program.⁴⁰³ One of the current objectives of the Tunisian government is to create a franchise-friendly environment to spur economic growth among the country's small- and medium-sized businesses.⁴⁰⁴ It is worthwhile to note that Tunisia (along with South Africa) is one of the only two countries in Africa that have expressly regulated franchising.⁴⁰⁵

In Tunisia, Law No. 2009-68⁴⁰⁶ regulates franchising. Article 15 requires the franchisor to provide to the franchisee a disclosure document. Disclosure must be made twenty days before the execution of the franchise agreement.⁴⁰⁷ Required disclosure items include the franchisor's details, business history of the franchisor, proof of trade mark registration, information about the franchise network (including a list of Tunisian franchisees), expenses and investments as well as the financial statements of the franchisor.⁴⁰⁸ In Tunisia, franchise agreements may also require the authorisation of the Ministry of Trade if they are in certain regulated sectors.⁴⁰⁹ The Ministry may require that the draft franchise agreement, the draft franchise disclosure document, and all related documents be translated into French (or Arabic).⁴¹⁰ The franchise agreement must be registered with the Tunisian tax authorities within sixty days from the date of execution of the agreement.⁴¹¹ In addition, the franchisee may record its right of use to the franchisor's trade mark with the National Register of Marks in order for the parties to be able to enforce the agreement against third parties.⁴¹²

³⁹⁹ Adapted from the website www.franchise.org accessed on 8th March 2017

⁴⁰⁰ Adapted from the website www.sourcewatch.org accessed on 9th March 2017

⁴⁰¹ Adapted from the website <http://export.gov/usoffices> accessed on 8th March 2017

⁴⁰² RA Smith "Franchising in Tunisia" (2015) <http://www.wileyrein.com/newsroom-newsletters-item-5348.html> (Accessed on 26 January 2017).

⁴⁰³ *Ibid.*

⁴⁰⁴ *Ibid.*

⁴⁰⁵ B Marzheuser-Wood *Franchising in Africa* (2014) Franchise Law Review 129 at 133.

⁴⁰⁶ Dated 12 August 2008.

⁴⁰⁷ Marzheuser-Wood *Franchising in Africa* 134.

⁴⁰⁸ *Ibid.*

⁴⁰⁹ Marzheuser-Wood *Franchising in Africa* 135.

⁴¹⁰ Smith "Franchising in Tunisia".

⁴¹¹ *Ibid.*

⁴¹² *Ibid.*

The Tunisian Franchise Association was created in 2010 and is the franchising sector's principal lobbying arm.⁴¹³ The Association states that its mission is to promote franchising in Tunisia through information and education.⁴¹⁴ The Association is available for anyone interested in setting up a franchise. For franchising parties, the Association aims to put parties in contact with each other and assist with making the best choices through the Association's franchising consulting expertise.⁴¹⁵ The Tunisian Chamber of Commerce and Industry and the business branch of the Ministry of Commerce work in partnership with the Mediterranean Chambers of Commerce and Industry to organise a franchise exhibition show in Tunisia once a year.⁴¹⁶ The Tunis Med Franchise show draws the attention of Tunisian entrepreneurs from all sectors and includes growing participation from foreign franchisors.⁴¹⁷ Since 2009, Tunisia has offered a more attractive legal and regulatory environment for franchising. Increasing numbers of Tunisians are showing interest in the franchise concept and many are participating in international franchise shows.⁴¹⁸ The IFA has acknowledged Tunisia's growing franchising sector too.⁴¹⁹ Tunisia is currently in a position to see significant growth in the franchise sector and could well be considered a hidden gem of international franchise development opportunities.⁴²⁰ Implementing statutory legislation has provided benefits, growth and value into the Tunisian franchising market.

When it comes to franchising, Tunisia's history is brief. For far too long, bureaucratic red tape had been allowed to stifle the development of the franchise sector. Foreign products that found their way into Tunisian markets were simply imported and on-sold by traditional distribution networks. It was only during 2009 when the US Department of Commerce's Law Development Program assisted local authorities with the creation of a vastly improved framework for franchising that things changed for the better. From this point onwards, the government of Tunisia has adopted franchising as a tool for the development of sustainable SMEs. Foreign franchisors in most industry sectors are now able to recruit local master licensees without having to seek approval from the Ministry of Commerce on a case-by-case basis as was previously the case. Unfortunately, exceptions continue to exist. Excluded sectors are food and beverages, real estate and advertising. To operate a foreign-

⁴¹³ "Tunisia: Franchising" <https://www.export.gov/article?id=Tunisia-franchising> (Accessed on 26 January 2017).

⁴¹⁴ Tunisie Franchise <http://www.tunisiefranchise.com/Compagnie/> (Accessed on 26 January 2017).

⁴¹⁵ *Ibid.*

⁴¹⁶ The Regulations of the Tunis-Med Franchise: <http://www.tunis-medfranchise.com/index.php?id=31&L=1> (Accessed on 26 January 2017).

⁴¹⁷ *Ibid.*

⁴¹⁸ "Tunisia: Franchising" <https://www.export.gov/article?id=Tunisia-franchising> (Accessed on 26 January 2017).

⁴¹⁹ B Solomon "IFA hosts Tunisia Franchise Forum" (2012) <http://www.franchise.org/ifa-hosts-tunisia-franchise-forum-0> (Accessed on 26 January 2017).

⁴²⁰ Smith "Franchising in Tunisia".

based franchise in an excluded sector, prospective franchisees are required to seek prior approval. This is widely seen as a formality but the process is cumbersome and time consuming. In essence, it is subject to the applicant managing to convince government officials that established local businesses will not be harmed by the new competitor. Foreign franchises originate primarily from the USA. Brands include but are not limited to Re/Max, Sign-A-Rama, Pizza Hut, Fatburger, Papa John's and Johnny Rockets. About 15 home-grown franchise concepts are also in evidence. The total number of franchisees is estimated at about 100.⁴²¹ Tunisian banks are beginning to embrace franchising. They expect approved prospective franchisees of established brands to contribute a minimum of 20% in unencumbered funds to the total cost of setting up their franchise, not unreasonable at all by international standards. The interests of the franchise sector are represented by the Association Tunisienne de la Franchise (ATF). It was established in 2010 but at the end of 2016, it had a mere 20 members. Quite clearly, the ATF is still in its infancy but its office bearers continue to have a positive outlook regarding its growth potential. To deliver on its mandate of promoting franchising, the ATF works closely with the Tunis Chamber of Commerce and Industry. The latter is the business branch of the Ministry of Commerce. In a three-way partnership with the Mediterranean Chamber of Commerce and Industry, the ATF arranges an annual franchise exhibition. Public response is encouraging, signalling that over time, franchising is likely to develop within the Tunisian economy.

5.3 Franchising in selected countries with a self-regulation approach and/or reliance on generic legislation

Countries listed under this heading either rely on self-regulation, use generic legislation to control the franchise sector or apply a combination of both. As mentioned earlier, countries that do not have franchise-specific legislation include industrialised countries, emerging economies and other developing countries. There are a few countries that have strong, successful and influential bodies that regulate franchising very effectively. There are also countries that lack franchise legislation but nevertheless have extensive disclosure rules that apply to all contracts including franchising agreements. Equally, some countries that lack franchise-specific laws have impressive and well-functioning laws in the areas of consumer protection, contract, trade and intellectual property.⁴²²

⁴²¹ The status of franchising in selected countries world-wide: Tunisia. Completed by a representative of the ATF during January 2017

⁴²² Levitt "Canadian Franchise Legislation."

5.3.1 Germany

Widely seen as Europe's economic powerhouse, Germany covers a land area of 357,021 km² and is home to over 81 million people. This makes it the most populous country in Europe but population figures are shrinking.⁴²³ Regardless, franchising is well established in Germany and the German Franchise Association is instrumental in controlling and promoting the sector. Germany is a mature franchise market. Even though it does not have any franchise-specific laws, it is probably one of the most heavily regulated franchise markets in the world.⁴²⁴ There is no legislated definition but the Code of Ethics of the German Franchise Association provides a comprehensive definition in line with the general essential elements of the franchise definition. The German Franchise Association is a member of the European Franchise Federation and of the World Franchise Council.⁴²⁵ It has been the umbrella association for the franchising industry for more than three decades in Germany. The Association is committed to professional and reputable franchising and its objective is to represent the economic, social and political interests of the franchising industry.⁴²⁶ The Code of Ethics is the foundation of the Association. The most important stipulations in the Code of Ethics include the requirement of one pilot project's demonstration by the franchisor, start-up training, provision of the Code of Ethics to the franchisee, and provision of all important information, including fee structure.⁴²⁷ Provisions applicable to franchising can be found in the general codes of law such as the Civil and Commercial Codes. These provisions, *inter alia*, impose pre-contractual disclosure obligations and an onerous expectation of good faith on all parties.⁴²⁸ Making claims of profit to potential franchisees is particularly risky and so the law concerning misrepresentation is relevant here too. Pre-contractual obligations are codified in the Civil Code⁴²⁹. During the pre-contractual phase, both parties must disclose all material facts to each other. Facts that pertain to the potential success of the franchise are material and must be disclosed.⁴³⁰ Earning claims must be based on reliable and relevant data, of which estimates must be labelled as such.⁴³¹ A test of fairness will be imposed on any provision in a standard form contract that has not been negotiated by the rules on unfair contract terms. The threshold for qualifying as 'negotiated' is rather high in Germany.⁴³²

⁴²³ Obtained from the website www.franchise.org/Germany accessed on 10th March 2017

⁴²⁴ Abell *Franchise Law Review* 143.

⁴²⁵ Abell *Franchise Law Review* 309.

⁴²⁶ Deutscher Franchise Verband- German Franchise Association www.franchiseverband.com (Accessed on 25 January 2017).

⁴²⁷ *Ibid.*

⁴²⁸ Abell *Franchise Law Review* 311.

⁴²⁹ Section 311(2).

⁴³⁰ Abell *Franchise Law Review* 312.

⁴³¹ *Ibid.*

⁴³² *Ibid.*

Franchisors can in fact be treated as if they were consumers in domestic arrangements.⁴³³ The Civil Code protects new businesses, including some franchisees in relation to loans and financial aid, as well as instalment supply contracts. Specific statutory information requirements are relevant and franchisees may therefore be entitled to cancel their contracts.⁴³⁴ The concepts of good faith and fair dealing are implicit in all agreements. Franchisors cannot exercise their contractual rights or change their business formats without consequences. It is generally franchisors, as the dominant parties, that find they have to defend themselves from allegations of behaving unfairly or in bad faith.⁴³⁵ In low skill businesses such as contract cleaning, employers have been known to cloak their liabilities to their employees by using a form of 'false franchising'.⁴³⁶ The German courts have been strict with this type of abuse. In the *Eismann*⁴³⁷ case it was held that if the franchisor controls every aspect of an individual franchisee's business, such individual franchisees in that situation are actually 'hidden employees' and this amounts to abuse of employment rights.⁴³⁸ Judgments of a court of an EU Member State are enforceable in other Member States without the need for any special procedures.⁴³⁹ Arbitration awards are fully recognised and mediation is available too. Injunctions can be obtained relatively easily and damages can be awarded but are usually intended to cover actual losses incurred.⁴⁴⁰ Germany has a strong, stable economy and continues to indicate impressive GDP rates. The legislative authority in Germany is also predictable and reliable.⁴⁴¹ The franchise relationship is subject to pre-contractual disclosure and firm contractual provisions, coupled with well-functioning laws in other areas. Legal security provides franchising parties with reliable, quick and easy access to the law.⁴⁴² Despite there being no franchise law, the Civil and Commercial Codes have contributed to the effective functioning of franchising regulations within Germany.⁴⁴³ In surveys, German franchisors complain that the recruitment of suitable individuals as franchisees is the greatest challenge they face. One can only assume that because the German economy is stable and unemployment is practically a non-issue, not too many Germans see entrepreneurship as a desirable career path.

⁴³³ *Ibid.*

⁴³⁴ Abell *Franchise Law Review* 314.

⁴³⁵ Abell *Franchise Law Review* 313.

⁴³⁶ *Ibid.*

⁴³⁷ NJW 1997, 2973.

⁴³⁸ Abell *Franchise Law Review* 143.

⁴³⁹ Abell *Franchise Law Review* 314.

⁴⁴⁰ *Ibid.*

⁴⁴¹DFV "International Franchising: A guide for franchisors entering the German Market" www.franchiseverband.com (Accessed on 25 January 2017).

⁴⁴² *Ibid.*

⁴⁴³ Abell *Franchise Law Review* 309.

Germany nevertheless has a vibrant franchise sector as Figure 7 illustrates. It also shows the split of franchise activities into business sectors. What Figure 7 does not show is that installers of solar panels make up a strong sub-segment of the sector headed 'Trade, home installations, repairs and maintenance. This is noteworthy not only because of the franchise opportunities it creates. It also illustrates the potential of renewable energy sources. Germany is certainly not known for the number of sunny days it enjoys yet solar power and other renewable energy sources have become substantial contributors to this country's energy needs. This realisation could point towards the creation of a vibrant new industry in Namibia.

Figure 8: Overview of the German Franchise sector. 2015/16

The German franchise sector at a glance⁴⁴⁴		
Key factors	2016 numbers	Growth 2015/16
Franchisors	950	0.0%
Franchisees	119,302	+1.3%
Franchised outlets (some franchisees operate multiple outlets)	159,348	+1.7%
Employees	697,532	+1.7%
Sales expressed in billion US-\$ (converted from Euros at the 2017/3 rate)	110,222	+4.8%
Franchised outlets by industry sectors		
Service establishments		39%
Retail		30%
Food, tourism and leisure establishments		22%
Trade, home installations, repairs and maintenance		9%

The German Franchise Association (Deutscher Franchise Verband – DFV) was established in 1978 and currently has approximately 265 members. It represents the interests of the franchise sector within Germany and, through its close affiliation with the European Franchise Federation (EFF) and the World Franchise Council, at pan-European and global level. The DFV also acts as the first point of contact for all individuals interested in franchising. Most importantly, the DFV offers extensive education and training on all aspects of franchising through its wholly-owned subsidiary, the German Franchise Institute (DFI). It also has developed the DFV System Check, a quality seal for its franchisor members. Those wishing to obtain this quality seal need to undergo a substantial audit during which all facets of the franchise operation are examined. To remain valid, the process must be repeated every three years.

⁴⁴⁴ Adapted from the website www.franchiseverband.com accessed on 10th March 2017

5.3.2 United Kingdom

The United Kingdom (UK) incorporates England, Scotland, Wales and Northern Ireland. It has a surface area of 243,610 km² and is home to over 65 million people. Modern-day franchising is extremely well established in the UK. Historic links to franchising aside, the UK was the first target market after Canada for franchise concepts originating from the USA. US-based franchisors were not the first to establish franchises in the UK. This honour goes to food giant J Lyons & Co, who developed the Wimpy Burger chain as well as two ice cream brands, Lyons Maid and Mr Softee, in the 1950s. These three concepts were successfully rolled out as franchises. The franchise sector is supported by one of the oldest and most respected franchise associations world-wide, namely the British Franchise Association (BFA). The United Kingdom is one of the more mature franchise markets on an international basis.⁴⁴⁵ The 2013 NatWest British Franchise Association Survey reported a continuing expansion of franchising in the UK, including an 11% increase since the start of the recession in 2008.⁴⁴⁶ The UK is generally considered to be a relatively easy place in which to do business, with little regulations. There are no specific franchise laws and the UK is generally one of the more pro-franchisor jurisdictions.⁴⁴⁷ The regulation of franchising has been debated several times in the UK, with successive governments concluding that there is not enough evidence to suggest that franchises are more risky than other forms of business to warrant special controls around them.⁴⁴⁸ Self-regulation through the British Franchise Association (“BFA”) is considered to be the most effective way of regulating franchising.⁴⁴⁹ According to the BFA, franchising is defined as a system of marketing goods, services or technology, which is based upon a close and ongoing collaboration between legally, and financially separate and independent undertakings, the franchisor and its individual franchisees. The franchisor grants the franchisee the right, and imposes the obligation, to conduct a business in accordance with the franchisor’s concept. In exchange for direct or indirect compensation, this right entitles and compels the franchisee to use the franchisor’s trade name, intellectual property rights, operating methods and all business-related systems. This is supported by the continuing provision of commercial and technical assistance, within the framework and for the term of the written franchise agreement, concluded between the parties.⁴⁵⁰

The UK’s national franchise association, the BFA, was formed in 1977. The BFA is a voluntary self-regulating body with its stated aim ‘to promote ethical franchising practice in the UK and help the

⁴⁴⁵ Abell *Franchise Law Review* 571.

⁴⁴⁶ *Ibid.*

⁴⁴⁷ Abell *Franchise Law Review* 147.

⁴⁴⁸ Ministry of Economic Development 2008 *Ministry of Economic Development* 14.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ <https://www.thebfa.org/about-bfa/code-of-ethics> (accessed on 24 January 2017).

industry develops credibility, influence and favourable circumstances for growth'.⁴⁵¹ Members are obliged to comply and ensure that their franchise agreements conform to the BFA code of ethics. The BFA code is based on the European Code of Ethics for franchising. It is interesting to point out that the courts in the UK have recognised the importance of the BFA Code in assessing the behaviour of franchisors generally, whether such franchisors are BFA members or not.⁴⁵² Members of the BFA are required to disclose certain information in writing to prospective franchisees within a reasonable time period prior to signature of the agreement. Such information includes the business and financial position of the franchisor, the main officers of the franchisor, details of the franchise business, details regarding the franchise network and franchisees, any financial projections or historical financial performance data, and key terms of the franchise agreement.⁴⁵³ The BFA Code requires franchise recruitment advertising to be free of misrepresenting or ambiguous statements. With regard to pre-contractual disclosure, references to future possible results (especially with financial projections) must be objective, factually based and truthful.⁴⁵⁴ In terms of the ongoing obligations, the parties must exercise fairness in their dealings with each other. Parties are expected to resolve complaints, grievances and disputes with good faith and goodwill through fair and reasonable communication and negotiation.⁴⁵⁵ The BFA also requires that a copy of the BFA code be provided to prospective franchisees before execution of a franchise agreement.⁴⁵⁶ The BFA code does not specify mandatory clauses, only a list of essential minimum terms to be contained in the agreement. Such terms include, *inter alia*, the parties' rights and obligations, the terms of payment by the franchisee, the duration of the agreement, and provisions for termination.⁴⁵⁷ There are no registration requirements in the UK that are applicable to the franchisor-franchisee relationship. There is also no requirement to register the franchise agreement.⁴⁵⁸

Along with the voluntary code of the BFA, the relationship between parties in a franchise in the UK is governed by principles of contract law with a number of statutes and case law affecting the relationship and agreement.⁴⁵⁹ Generally the principle of *caveat emptor* (buyer beware) applies to the pre-contractual phase of the franchisor-franchisee relationship.⁴⁶⁰ The laws of misrepresentation, both fraudulent and negligent, also apply to the pre-contractual phase, as

⁴⁵¹ Abell *Franchise Law Review* 572.

⁴⁵² *Drivertime Recruitment Ltd. Re DST Ltd* [2005] 1 BCLC 411.

⁴⁵³ Abell *Franchise Law Review* 578.

⁴⁵⁴ <https://www.thebfa.org/about-bfa/code-of-ethics> (accessed on 24 January 2017).

⁴⁵⁵ *Ibid.*

⁴⁵⁶ Abell *Franchise Law Review* 579.

⁴⁵⁷ Abell *Franchise Law Review* 581.

⁴⁵⁸ Abell *Franchise Law Review* 580.

⁴⁵⁹ Abell *Franchise Law Review* 583.

⁴⁶⁰ Abell *Franchise Law Review* 578.

enshrined in the Misrepresentation Act⁴⁶¹ and common law. Recent case law has indicated that the courts are increasingly willing to award substantial damages for misrepresentation by franchisors.⁴⁶² Franchisees are not generally treated as consumers under English law and therefore are not afforded consumer protection rights. However it is interesting to note in the significant case of *Papa Johns (GB) Limited v Elsada Doyley*⁴⁶³, the franchisee was in essence treated as a quasi-consumer in the way that the court applied the Unfair Contract Terms Act⁴⁶⁴ to the franchise agreement in that case.⁴⁶⁵ No general legal obligation requires franchisors and franchisees to act in good faith towards each other; however it is clear that an implied concept of good faith is steadily gaining recognition in respect of the performance phase of contracts.⁴⁶⁶ There is no specific procedure for franchise disputes in the UK. Most disputes are settled before reaching formal alternative dispute resolution methods or court based litigation.⁴⁶⁷ The BFA supports both a mediation and arbitration scheme. Mediation is also actively encouraged by the Civil Procedure Rules in respect of domestic franchising disputes, although it is not mandatory. For international franchisors and more sophisticated disputes, the use of an experienced international arbitration body would be more appropriate.⁴⁶⁸ Successive UK governments have made it clear that they are not contemplating franchise regulation. Due to complaints being rare, the government sees no reason for legislation requiring disclosure or enforcing standards in the franchisor-franchisee relationship.⁴⁶⁹ Furthermore, self-regulation of franchising in the United Kingdom is effective and facile due to a number of factors. The BFA is a powerful and highly respected body that imposes quality standards. Many franchisors wish to be a member of the BFA because it reflects well on their status and makes franchisee recruitment easier.⁴⁷⁰ As mentioned, the courts have viewed the BFA Code as establishing franchising best practices.⁴⁷¹ This is a sure caution that those franchisors who are not BFA members and thus do not follow the BFA code, may nonetheless be held to the same standards when franchise disputes arise.⁴⁷² In addition, the relatively small size of the UK plays a role in facilitating general awareness of franchisor activities. A small number of bankers, lawyers and consultants undertake a substantial amount of franchising work, which means that negative information about franchisors can be

⁴⁶¹ Act 1967.

⁴⁶² Abell *Franchise Law Review* 578.

⁴⁶³ [2011] EWHC 2621 (QB).

⁴⁶⁴ Act 1977.

⁴⁶⁵ Abell *Franchise Law Review* 584.

⁴⁶⁶ Abell *Franchise Law Review* 583.

⁴⁶⁷ Abell *Franchise Law Review* 588.

⁴⁶⁸ *Ibid.*

⁴⁶⁹ J Pratt "Franchising in the United Kingdom" (2013) *Franchise Law Journal* 32 at 95.

⁴⁷⁰ Pratt *Franchise Law Journal* 95.

⁴⁷¹ *Drivertime Recruitment Ltd. Re DST Ltd* [2005] 1 BCLC 411.

⁴⁷² Pratt *Franchise Law Journal* 95.

circulated swiftly.⁴⁷³ In light of the above, the United Kingdom has successfully managed to achieve and maintain an effective system of self-regulation within the franchising sector.

The competition legislation applicable to investigations of anti-competitive and restrictive practices agreements as they relate to franchising agreements is set out in four statutes: the Fair Trading Act 1973; the Restrictive Trade Practices Act 1976; the Resale Prices Act 1976 and the Competition Act 1980.⁴⁷⁴ The principles of Article 81(1) of EC Competition Law are also followed, which prohibits agreements that will have an appreciable anti-competitive effect on competition.⁴⁷⁵ Chapter 1 of the UK Competition Act prohibits agreements whose object or effect is to prevent, restrict or distort competition within the UK.⁴⁷⁶ Offending agreements may as a result, be void, and the parties may also be liable for penalties of up to 10 per cent of their income generated in the UK. Of further relevance is the British Franchise Association (“BFA”), a trade association with the purpose of promoting ethical franchising in the UK. The BFA's "Code of Ethics", which is not legally binding but which its members must abide by, provides a benchmark for good industry practice.⁴⁷⁷ Vertical agreements are considered not to raise competition issues except when imposed by a firm with market power.⁴⁷⁸ This is known as a “block exemption” from Article 81 and/or the Chapter I prohibitions for many vertical agreements which generally don't give rise to competition concerns. They will be exempt unless one or more of the parties to the agreement possesses market power in the relevant market. This exemption prevents placing an unnecessary burden of scrutiny on “essentially benign agreements.”⁴⁷⁹

Franchise agreements that do not automatically fall within the Block Exemption have to be assessed in order to determine whether the pro-competitive gains outweigh the negative effects of the restriction in order to justify an individual exemption.⁴⁸⁰ Particular factors to consider include: if a transfer of know-how is regarded as being important, the more it will be considered that a restraint on the franchisee will be more likely or necessary to create efficiencies, or be indispensable in order

⁴⁷³ *Ibid.*

⁴⁷⁴ Competition Policy and Vertical Restraints: Franchising Agreements at p 79 Available at <https://www.oecd.org/competition/abuse/1920326.pdf> (Accessed 6 December 2016).

⁴⁷⁵ Franchising Note at 5.5.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ Fieldfisher *The Legalities of Franchising in the UK :What International Franchisors Need to Know* at page 2.

⁴⁷⁸ Franchising Note at 5.5.

⁴⁷⁹ Fieldfisher *The Legalities of Franchising in the UK :What International Franchisors Need to Know* at page 2.

⁴⁸⁰ Lexis PSL Competition Practice Note *An overview of competition issues impacting vertical commercial Agreements* Available at: http://www.klgates.com/files/Publication/21f7413f-a5b7-4838-80b5-d5b807be9b4b/Presentation/PublicationAttachment/1978153d-5051-4c46-8121-d7b43ffe2cd8/An%20Overview%20of%20Competition_Vertica_Agreements.pdf (Accessed 6 December 2016).

to protect the knowhow;⁴⁸¹; where a non-compete obligation on the goods or services purchased by the franchisee is necessary to maintain the common identity and reputation of the franchise network.⁴⁸²

Resale Price Maintenance

RPM is considered to be a “hard core” (a *per se*) restriction and receives no protection through the block exemption, as it is seen as capable of having an appreciable effect on competition. However, there is some scope for short term price promotions and restrictions on excessive prices.⁴⁸³ Maximum pricing and recommended pricing are allowed, provided they do not result in price fixing and reduction of price competition.⁴⁸⁴

Exclusive dealings, exclusive territories and bundling or tying of products

As a general principle, franchisees must remain free to decide from where and to whom they sell or buy goods or services, and this generally cannot be restricted by a franchise agreement. Bundling, or tying of products, may also constitute an abuse of a dominant position where a supplier has market power. It seems that these distribution practices are allowed to a limited extent for franchises with smaller market power, provided the restrictions should go no further than is necessary to protect the franchisors' legitimate business interests and know how.⁴⁸⁵

Abuse of dominance

A dominant firm with significant market power in a relevant market will not be subject to the block exemption discussed above. Usually, the first step in the analysis of a vertical restraint is to assess whether one or more parties to the agreement has market power.⁴⁸⁶ If significant market power is established in the particular market, the restrictions as set out in Chapter I of the Competition Act will be meticulously regulated. The EC Treaty and the Competition Act of 1998 prohibit conduct by undertakings which amount to an abuse of a dominant position. The test applied to establish abuse of dominance is: firstly, whether an undertaking is dominant in the relevant market; and, secondly, if they are abusing this dominant position. The following conduct will constitute abuse: directly or indirectly imposing unfair selling or purchase prices or other unfair trading conditions; limiting production, markets or technical development to the prejudice of consumers; applying dissimilar conditions to equivalent transactions and making the conclusion of contracts subject to the

⁴⁸¹ *Ibid.*

⁴⁸² *Ibid.*

⁴⁸³ *Idem* page 3.

⁴⁸⁴ Franchising Note at 5.5.

⁴⁸⁵ Fieldfisher *The Legalities of Franchising in the UK :What International Franchisors Need to Know* at page4.

⁴⁸⁶ Office of Fair Trading *Vertical agreements: Understanding Competition Law* at 7.9

acceptance of parties of supplementary obligations which have no connection with the subject of the contract.⁴⁸⁷ Abuse of a dominant position is prohibited in the UK, unless a clear pro-competition benefit can be shown. The history of franchising in the UK can be traced back to feudal England when lords allowed peasants certain rights on part of their land in return for a fee.⁴⁸⁸ The tied pub system, which continues to be used to this day, is another example. To this end, Lyons & Co can be seen as the pioneer of franchising in the UK. ServiceMaster was the first US-based franchise to arrive on the UK's shores. By the mid-1960s, some of the large fast-food brands had set up operations. This led to a boom in franchising, with near-catastrophic consequences. Blinded by the mistaken belief that franchising offered quick and easy money, naïve and outright unscrupulous operators jumped on the bandwagon and tarnished the good name of franchising. They offered underdeveloped or unworkable concepts as franchises and/or failed to adhere to sound franchise practices in the areas of franchisee selection, initial and ongoing support. This prompted legitimate franchisors to establish the British Franchise Association (BFA) in 1977. The BFA developed a set of standards for the sector which prospective members had to agree to adhere to. Within a few short years, franchising had regained its reputation as a concept that puts individuals into business for themselves but not by themselves. Since then, franchising has grown in leaps and bounds; indeed, franchising has set a series of records in 2015, arguably a year during which the economy as a whole was less than buoyant. The results are reflected in the BFA/Natwest Franchise Survey 2015, an annual event presented by the BFA with sponsorship from Natwest Ban.

Figure 10: Franchising key facts in the UK in 2015

Key facts about franchising in the UK: 2015			
Franchised brands	901	Total annual sales	US-\$18.36 bio
Franchisees	44,200	%age of profitable units	97%
Direct employees	621,000		

Upholding ethics in franchising aside, the BFA is also active in promoting the concept of franchising vis-à-vis government, prospective franchisors, franchisees and the public at large. Education, training and the provision of a mediation and arbitration service are other noteworthy activities. Today, the BFA has over 300 members, the vast majority of them being franchisors. Professional service

⁴⁸⁷ Butterworths *Competition Law Handbook* (17th ed) 2011 at 3.9.

⁴⁸⁸ Obtained from the website www.thebfa.org accessed on 10th March 2017

providers are admitted as members as well and more recently, membership was opened up to franchisees. Because this category is new, membership figures are not yet available.

5.3.3 New Zealand

New Zealand consists of two islands with a total land surface of 261,021 km² which are home to a population of about 4.5 million people. The country's GDP in 2016 stood at US\$185.8 billion, US\$41,555 per capita. It follows that the standard of living is extremely high, a finding that is underpinned by the average life expectancy which now stands at 81.16 years. Franchising in New Zealand is developing at a rapid rate and is becoming more sophisticated. New Zealand is often regarded as one of the most deregulated countries in the world in which to conduct small to medium-sized businesses and there is no specific legislation controlling the operation of franchising.⁴⁸⁹ In 2008, the Ministry of Economic Development in New Zealand published a discussion paper on "The Review of Franchising Regulation in New Zealand" (the "Review"). This was initiated because of high profile cases of alleged fraud involving franchises.⁴⁹⁰ Questions were raised about whether franchisees were sufficiently protected by the current laws and whether government should address potential gaps in the legislation and enhance the contractual process. Subsequently, the government determined that a franchise-specific law was not the way forward and as such rejected the need for same.⁴⁹¹ The rationale in doing so will be discussed herein.

Franchise agreements are subject to a range of generic laws such as contract, consumer, intellectual property and competition laws. Self-regulation is steered by the Franchise Association of New Zealand ("FANZ"), a non-profit body which requires its members to adhere to a Code of Practice and a Code of Ethics.⁴⁹² The term franchising has no formal legal definition in New Zealand. This was an issue that was raised in the Review for franchising in 2008 in respect of how a franchise would be defined for purposes of regulation considerations and whether all types of franchise arrangements would be covered.⁴⁹³ The Franchise Association of New Zealand ("FANZ") was formed in 1996 and has established a framework to promote the growth and development of franchising through its rules and codes of practice and ethics.⁴⁹⁴ There are no mandatory pre-contractual disclosure requirements in New Zealand. However, if a franchisor is a member of the FANZ, a disclosure document that complies with the FANZ Code of Practice must be given to any prospective franchisee

⁴⁸⁹ Abell *Franchise Law Review* 451.

⁴⁹⁰ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 1 at 8.

⁴⁹¹ Abell *Franchise Law Review* 146.

⁴⁹² Abell *Franchise Law Review* 454.

⁴⁹³ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 18.

⁴⁹⁴ Abell *Franchise Law Review* 452.

at least fourteen days before the franchise agreement.⁴⁹⁵ There are certain mandatory clauses that must be included in franchise agreements where a franchisor is a member of FANZ. A franchisee must be provided with seven-day cooling off period, whereby a prospective franchisee can decide not to enter into the contract.⁴⁹⁶ There must be clause stating that the FANZ Rules, Franchising Code of Practice, and Code of Ethics must be adhered to and followed by both the franchisor and franchisee.⁴⁹⁷ Lastly, the agreement must contain a dispute resolution clause with the recommended mode of resolving a dispute, being mediation or arbitration.⁴⁹⁸

In New Zealand, a franchise is treated as a commercial contract to be negotiated between the parties.⁴⁹⁹ Despite having no franchise-specific law, New Zealand has generic legislation included in the Fair Trading Act⁵⁰⁰, the Real Estate Agent Act⁵⁰¹, the Commerce Act⁵⁰² and the Contractual Remedies Act⁵⁰³, all of which franchise agreements are subject to.

The Fair Trading Act and Contractual Remedies Act are very useful and powerful statutes for franchisees to claim damages against franchisors where warranted.⁵⁰⁴ If a disclosure document contains misrepresentations, the franchisor will most likely be liable under the Fair Trading Act. This Act also has several prohibitions relating to conduct in trade, including offences relating to advertising misrepresentations.⁵⁰⁵ The Contractual Remedies Act also allows damages if misrepresentation occurs and also includes termination rights in certain circumstances for breach of contract or misrepresentation.⁵⁰⁶ With regard to the principle of good faith, the courts in New Zealand have been cautious about implying a general duty of good faith into contracts.⁵⁰⁷ Most franchise agreements already contain good faith provisions and it is a term which is not unusual in relational contracts.⁵⁰⁸ It is believed that it may be more appropriate to allow this area of law to develop on a case by case basis.⁵⁰⁹ Even though there are no franchise-specific registration regulations, it is essential to note that if a particular franchise system falls within a specific industry, relevant statutes and regulations would need to be complied with, for example, an industry such as

⁴⁹⁵ Abell *Franchise Law Review* 454.

⁴⁹⁶ Abell *Franchise Law Review* 455.

⁴⁹⁷ *Ibid.*

⁴⁹⁸ *Ibid.*

⁴⁹⁹ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 12.

⁵⁰⁰ Act of 1986.

⁵⁰¹ Act of 2008.

⁵⁰² Act of 1986.

⁵⁰³ Act of 1989.

⁵⁰⁴ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 12.

⁵⁰⁵ *Ibid.*

⁵⁰⁶ *Ibid.*

⁵⁰⁷ Abell *Franchise Law Review* 456.

⁵⁰⁸ Abell *Franchise Law Review* 457.

⁵⁰⁹ *Ibid.*

the medical industry. It is thus essential that parties do not just simply assume that there are no restrictions in New Zealand.⁵¹⁰

The FANZ Code sets out a dispute resolution procedure which can be used by both parties to seek a more co-operative and cost-effective solution. The Code requires all members to settle disputes by mediation in the first instance and this process does not affect the legal rights of both parties to resort to litigation.⁵¹¹ For those franchise systems that are not members of FANZ, the process to follow in a dispute is often set out within the franchise agreement. During the Review to consider whether current laws provided sufficient protection or whether new laws should be brought in to regulate franchising, certain issues were highlighted. These issues included information imbalance, contractual power imbalance, costs of resolving disputes and public perception.⁵¹² The options put forward to address any problems within the sector were (1) maintaining the status *quo* (generic legislation and self-regulation), (2) education initiatives, or (3) introducing franchise specific regulations which could include disclosure requirements, obligations to obtain professional advice, a cooling-off period, mandatory mediation processes, minimum contractual terms and/or obligations of 'good faith' bargaining.⁵¹³

Submissions were split fairly evenly in their support for and against franchise-specific legislation. It is interesting to note that FANZ actually favoured the status *quo* as it did not agree that there were features of franchise contracts or widespread problems in the sector which would necessitate franchise-specific legislation.⁵¹⁴ There was concern following the review that if a central government agency were to take over the core function of an organisation like FANZ, there would be a sense of potentially reinventing the wheel. There would also be a risk that the quality of the regulation would be reduced because of the lack of specialist knowledge of franchising.⁵¹⁵ In considering the results, the Ministry of Economic Development decided that there was not a case for franchise-specific regulations. The basis for doing so entailed numerous conclusions. It was reasoned that fraud is a matter that is adequately dealt with by current laws and that the fraud reports themselves were not evidence of a widespread problem within New Zealand's franchising sector. It was decided that the status *quo* appeared to be working effectively and that there was no evidence of widespread problems within the current framework.⁵¹⁶ The franchising industry in New Zealand has remained

⁵¹⁰ Abell *Franchise Law Review* 455.

⁵¹¹ Abell *Franchise Law Review* 460.

⁵¹² Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 17.

⁵¹³ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 18 – 26.

⁵¹⁴ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 18 – 26.

⁵¹⁵ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 18.

⁵¹⁶ Ministry of Economic Development: *Review of Franchising Regulation in New Zealand* 21.

“buoyant” and a number of overseas and local franchisors have entered the market.⁵¹⁷ FANZ has reported an increase in the number of applications for membership following the cases of alleged fraud. This indicates that franchise businesses have taken steps to protect and promote their reputation.⁵¹⁸ New Zealand is evidently a sterling example of a country that can afford to rely on self-regulation coupled with strong generic legislation, to effectively regulate the franchising industry

According to the latest figures available,⁵¹⁹ New Zealand’s franchise sector is made up of 485 franchisors and 22,400 franchisees. Sector-wide sales amount to US-\$13.85 billion and the sector provides employment to more than 100,000 people. This research was carried out in 2012 and is the most recent available. Ethical franchising in New Zealand is governed by the Franchise Association of New Zealand (FANZ). This organisation emerged as the result of the break-up of the Australian-based Franchise Association of Australia and New Zealand (FAANZ) which was re-named Franchise Council of Australia. The split was entirely amicable and motivated only by differences between Australia and New Zealand, primarily in legal aspects.

The FANZ has over 350 members made up of franchisors and professional firms providing services to the franchise sector. Members are bound by a strict code of ethical conduct. The organisation is extremely active in all facets of promoting the concept of franchising and supports educational and training initiatives that benefit the franchise sector. Lastly, FANZ acts as a contact point for anyone wishing to know more about franchising in New Zealand. As previously mentioned, no formal research into the sector has been undertaken of late but anecdotal evidence suggests that franchising went through a challenging period between 2012 and 2015. It appears that during a few years of plenty, some franchisors were less than cautious with their expansion plans. When the economy experienced a downturn, it caused some of their weaker franchisees to fail. However, Franchise Consultants⁵²⁰ undertook an opinion survey in 2015. Responses indicate that the failures were a necessary correction and that the sector has now fully recovered. Indeed, respondents stressed that they are extremely confident regarding their future prospects but also face a set of challenges. None of the challenges mentioned appear to be insurmountable, in fact, they indicate that the sector has come out on the other side of the downturn stronger. Figure 8 provides details.

⁵¹⁷ Abell *Franchise Law Review* 462.

⁵¹⁸ *Ibid.*

⁵¹⁹ Adapted from research carried out jointly by faculty members of Massey University and Griffith Business School, both operating in New Zealand in 2012; accessed 10th March 2017

⁵²⁰ Adapted from www.franchise.co.nz accessed on 10th March 2017

Figure 9: Challenges faces by Franchisors in New Zealand

Challenges faced by NZ-based franchisors*	
1. Recruitment of suitable franchisees	7. Access to finance
2. Attracting and retaining good staff	8. Franchise business model challenges
3. Zee investment and cost containment	9. Consumer sentiment, spending
4. Keeping abreast of the competition	10. Workload and managing operations
5. Securing suitable trading sites	11. Keeping up with IT developments
6. Concerns regarding the economy	

* Challenges are arranged based on the frequency with which they were mentioned

5.3.4 India

The international franchise community considers India to be among the most promising markets world-wide, with good reason. Over the past few years, the country has seen rampant growth of its middle-class triggered by the IT boom. This resulted in growth of 75% in consumer spending within the period 2011 to 2015.⁵²¹ An easing of legal restrictions on foreigners doing business in India is another boon but challenges remain. Some of the laws that continue to govern the conduct of doing business, for example the Contract Act, date back to 1872. Corruption also remains a serious problem. However, India’s new government was elected on a platform of pro-growth and anti-corruption, so there is hope.

India is an attractive country for a franchising entrepreneur. The government is constantly seeking to improve the ease of doing business in India. In addition, there is a growing class of middle income families with significant disposable income. In 2012, reports indicated that the Indian franchising market was expected grow further by 30% by 2017.⁵²²

Despite the popularity of the franchising model and its tremendous growth potential, India does not have a franchise-specific law. Franchising is governed by certain Indian laws that regulate business in general.⁵²³ There is no specific statute dealing with franchise matters but Chapter 5 of the Financing Act⁵²⁴ defines a franchise as an “agreement by which the franchisee is granted representational rights to sell or manufacture goods or to provide service or undertake any process identified with

⁵²¹ Extracted from the report *The Franchise Industry in India 2015 – Trends and Highlights* published on the website <http://franchiseasia.com> accessed 10th March 2017

⁵²² Franchising Association of India <http://www.fai.co.in/franchising-in-india.html> (accessed 24 January 2017).

⁵²³ Abell *Franchise Law Review* 338.

⁵²⁴ 1999.

the franchisor, whether or not a trade mark, service mark, trade name or logo or any such symbol, as the case may be, is involved.”⁵²⁵ The FAI, formed in 2001, is an industry association for the franchising sector, representing franchisees, franchisors and service providers to the sector. The Association is a member of the World Franchise Council and is thus affiliated with franchising associations of other countries.⁵²⁶ The main objectives of the FAI are to establish standards of international best practice for Indian franchise systems, to provide information and education to existing franchise parties, and to educate state and central government on relevant issues within the sector.⁵²⁷ The FAI also offers marketing services and networking opportunities that bring together the top creative thinkers and franchise experts to talk about the most important issues affecting franchising.⁵²⁸ The membership of any national franchise association is not mandatory. Franchisors and franchisees may voluntarily choose to join such associations.

The Indian Franchise Association was incorporated in 2008 to and is dedicated to encouraging and promoting best practices within the franchising sector of India.⁵²⁹ Key objectives include improving the competitiveness of the industry, assisting small and medium enterprises to invest, encouraging industry-government partnership for emulating best practices, encourage and promote education, organise training courses and open dialogue within the industry.⁵³⁰ As opposed to the FAI, the IFA is not a member of the World Franchise Council. Members of the IFA agree to abide by a code of ethics. The Code purports to ensure a system of self-regulation in the public interest and of the members of the IFA.⁵³¹ The Code includes a detailed list of definitions, a comprehensive list of the parties’ obligations and outlines the requirements of pre-contractual disclosure and the content of the franchise agreement.

A franchisor must provide a detailed disclosure document to a prospective franchisee at least ten days prior to signature. The disclosure document must include details of the franchisor, litigation history, bankruptcy filings, payments to be made, initial investment, the obligations of both parties, financing arrangements, territorial rights, financial statements and various other categories of information.⁵³² The franchise agreement must comply with the contract law of India and the Code of Ethics. The agreement must set forth, without ambiguity, the respective obligations and

⁵²⁵ Abell *Franchise Law Review* 344.

⁵²⁶ Franchising Association of India <http://www.fai.co.in/franchising-in-india.html> (accessed 24 January 2017).

⁵²⁷ Franchising Association of India <http://www.fai.co.in/franchising-in-india.html> (accessed 24 January 2017).

⁵²⁸ *Ibid.*

⁵²⁹ Indian Franchise Association <http://www.franchiseindia.org/Code-of-Conduct> (accessed on 19 January 2017).

⁵³⁰ *Ibid.*

⁵³¹ *Ibid.*

⁵³² *Ibid.*

responsibilities of the parties and all other material terms. A list of essential minimum terms must be included in the agreement.⁵³³ Due to the absence of any franchise-specific legislation, franchise agreements in India are governed by the principles of contract law and various other laws such as the Indian Contract Act⁵³⁴, the Sale of Goods Act⁵³⁵, and the Specific Relief Act⁵³⁶, which are relevant to all franchise agreements. There are no laws in India which require a franchisor to provide a lengthy pre-contractual disclosure document to a potential franchisee, nor are there any laws regarding registration.⁵³⁷ Aspects of potential litigation, bankruptcy, initial fee, estimated initial investment and other aspects relevant thereto, are expected to be captured by a party's own due diligence and commercial understanding in respect of the principles of contract law.⁵³⁸ Termination aspects are not regulated so parties can exercise freedom in their contractual provisions.⁵³⁹ The Indian Contract Act provides the requirements for all aspects of the franchise agreement including offer, acceptance, validity, breach and termination.⁵⁴⁰ Contracts are voidable when an innocent party is subject to misrepresentation. When misrepresentation occurs, an innocent party may declare the contract voidable, or insist on performance in terms of what was consented to as a result of the misrepresentation. A contract is however not voidable if the innocent party had means of discovering the truth by due diligence.⁵⁴¹ The Sale of Goods Act provides conditions that are relevant in contracts for sale of goods, some of which can be waived. The Act also includes rules relating to passing of title and risk in the goods, and remedies for breach of contracts.⁵⁴²

The Specific Relief Act sets out the remedies available for enforcement of contracts. Specific performance of a contract is a discretionary remedy that may be awarded if the court is satisfied that damages would not be adequate for breach of contract.⁵⁴³ With regard to the principle of good faith, Indian law does not specify a duty of good faith. However the courts will not disregard the fact that a party cannot take advantage of its wrongdoing.⁵⁴⁴ The methods for dispute resolution available to franchisors and franchisees are litigation, arbitration, conciliation or mediation. India's court system is incredibly slow and there are staggering delays associated with Indian court proceedings. India has an estimated 10.5 judges per one million people, and cases can take ten to

⁵³³ *Ibid.*

⁵³⁴ Act of 1872.

⁵³⁵ Act of 1930.

⁵³⁶ Act of 1873.

⁵³⁷ Abell *Franchise Law Review* 344.

⁵³⁸ Abell *Franchise Law Review* 344.

⁵³⁹ *Ibid.*

⁵⁴⁰ E Wulff & A Dube "DLA Piper: Franchising in India" (2014) www.dlapiper.com (accessed 24 January 2017).

⁵⁴¹ Abell *Franchise Law Review* 345.

⁵⁴² *Ibid.*

⁵⁴³ Abell *Franchise Law Review* 346.

⁵⁴⁴ Abell *Franchise Law Review* 347.

thirty years before a decision.⁵⁴⁵ As a result, commercial contracts usually provide for disputes to be settled by arbitration in India or outside India. In cases of cross-border franchises, it is generally recommended that the seat of arbitration be outside India to ensure speed and certainty.⁵⁴⁶ Domestic arbitration can be chosen under the Arbitration and Conciliation Act⁵⁴⁷, especially if the franchisor wishes to seek interim relief against the franchisee in India.⁵⁴⁸

Being geographically vast and culturally diverse, India offers a very favourable franchising environment with a huge consumer market. In the last few years, the government has thus made the ease of doing business in India a primary goal, as well as boosting investment.⁵⁴⁹ There has however not yet been a specific and formal discussion concerning the need for the introduction of specific franchising regulations. Although it must be noted that one of the stated objectives of the IFA is to engage in proactive dialogue with the government to identify policy issues that need to be addressed.⁵⁵⁰ Even though business and commercial laws in India can contribute in protecting and governing a franchise arrangement, there is a growing need to improve this regulatory and legal framework within India.⁵⁵¹ Excessive corruption and government bureaucracy are considered to be the biggest obstacles to doing business in the country.⁵⁵² Franchise regulations would thus provide the legal stability that foreign franchisors are familiar with and thus encourage further growth of the industry.⁵⁵³ Statistics relating to India's economy in general and franchising in particular are impressive. Figure 10 provides an introduction. In this context, we must point out that exact figures pertaining to the Indian franchise sector are hard to come by. Given the rampant growth of this sector, this is understandable. Please note, when figures from various sources varied, the lowest available figure was used.

⁵⁴⁵ Wulff & Dube "Franchising in India".

⁵⁴⁶ Abell *Franchise Law Review* 350.

⁵⁴⁷ Act of 1996.

⁵⁴⁸ Abell *Franchise Law Review* 351.

⁵⁴⁹ Abell *Franchise Law Review* 338.

⁵⁵⁰ Indian Franchise Association <http://www.franchiseindia.org/Code-of-Conduct> (accessed on 19 January 2017).

⁵⁵¹ Wulff & Dube "Franchising in India".

⁵⁵² *Ibid.*

⁵⁵³ *Ibid.*

Figure 11: Facts on Indian franchising industry.

India: Facts and figures 2015/16 ^{554 555}			
General statistics		Franchise-related statistics	
Total surface area	3,287 million km ²	No of franchisors	3,000 +
Total population	1,295 billion	Foreign franchisors	300+
GDP	US\$2,251 billion	Annual sales	US\$13.4 billion
Per capita	US\$1,498.00	Annual growth rate	Estimated at 25%
Middle-income earners	23 million		
Unemployment rate	3.6%		

Franchise opportunities are offered in all the usual industry segments including retail, health and wellness, food / beverages and education. Indeed, education is flagged as the sector with the greatest growth potential. The fact that India is a trailblazer in the sectors of social and micro franchises may be of relevance here. Social franchising is can be utilised in sectors like health care while microfranchise concepts are applied, for example, in the distribution of microloans or airtime. The Franchising Association of India (FAI)⁵⁵⁶ was formed in 2001. Its head office is in Mumbai; it also maintains a branch office in New Delhi. The FAI is a member of the World Franchise Council and maintains close relations with franchise associations in other parts of the world. FAI's members include franchisors, franchisees, financial institutions, consultants and suppliers to the sector. The organisation promotes the concept of franchising, arranges or supports events for the sector and endorses a formal qualification in franchising presented by a local college. Lastly, the FAI acts as a resource that is accessible to anyone with an interest in franchising.

5.3.5 Japan

The Medium and Small Retail Commerce Promotion Act (Act No. 101 of 1973 – MSRPCA) and the Anti-monopoly Act, 1947 as amended, apply to franchising agreements.⁵⁵⁷ The Franchise Guidelines and the Distribution Guidelines provide which activities or restrictions are problematic under the Antimonopoly Act.⁵⁵⁸ If the restrictions on unfair trade practices under the Anti-monopoly Act are violated, the Fair Trade Commission is permitted to order the breaching party to cease and desist from the activity, to delete the relevant clauses from the agreement and to take any other measures

⁵⁵⁴ Adapted from the website www.trade.gov/topmarkets accessed 11th March 2017

⁵⁵⁵ Adapted from the website <http://franchiseasia.com> accessed 11th March 2017

⁵⁵⁶ Adapted from the website www.fai.co.in accessed 11th March 2017

⁵⁵⁷ Japan Franchise (2016) *International Comparative Legal Guides* Available at <http://www.iclg.co.uk/practice-areas/franchise/franchise-2016/japan> (Accessed 6 December 2016).; Franchising Notice at 5. 4.

⁵⁵⁸ *Ibid.*

necessary to eliminate problematic activities.⁵⁵⁹ The Japanese franchising guideline document cautions franchisees and franchisors to abide by the law and to take heed of the Anti-monopoly Act when contracting.⁵⁶⁰ Most practices are judged under the rule of reason approach. The considerations to be taken into account vary depending on the nature of the provision, but include: the position of the franchisee, the possible effects on competition among franchisees bound by the provision, the extent of the disadvantage to the franchisee, and a comparison of the disadvantage to the franchisee with the necessity to protect the franchisor's know-how.⁵⁶¹ An important general consideration is whether the restrictions in an agreement are necessary to attain the business objectives of the franchise.⁵⁶² Business activities by parties through contracts, agreements or any other concerted actions are prohibited if they are contrary to the public interest and result in substantial restraint of competition in any particular field of trade.⁵⁶³ Japan approaches prohibited practices as follows:

Resale Price Maintenance

The Franchise Guidelines regulate transactions between franchisors and franchisees. According to these guidelines, it is acceptable for the franchisor to propose selling prices if it is necessary to provide a clear market position for the company or to coordinate business operations. Prohibited RPM applies only in circumstances where the conduct would have an adverse effect on consumers and was imposed on the reseller.⁵⁶⁴ However, it does not apply to legitimate acts performed by an entrepreneur who produces or sells a commodity.⁵⁶⁵ RPM is therefore not a *per se* prohibition, as it is evaluated according to pro-competitive consequences.

Exclusive dealings, exclusive territories and bundling or tying of products

These practices are generally prohibited but, as stated above, they will be assessed according to their pro-competition benefits.⁵⁶⁶

Abuse of dominance

In determining a dominant bargaining position, the degree of dependence by the contracted party on the transactions with the contracting party, the contracting party's position in the market, the possibility of the contracted party to change its customers, a difference in the size of the business of

⁵⁵⁹ Antimonopoly Act, Article 20.

⁵⁶⁰ Franchising Notice at 5.4.

⁵⁶¹ *Ibid.*

⁵⁶² Competition Policy and Vertical Restraints: Franchising Agreements at p 74 Available at <https://www.oecd.org/competition/abuse/1920326.pdf> (Accessed 6 December 2016) .

⁵⁶³ *Ibid.*

⁵⁶⁴ *Ibid.*

⁵⁶⁵ *Ibid.*

⁵⁶⁶ *Ibid.*

the parties to the transactions, and the supply and demand relationship for the services covered by transactions, should be taken into account overall.⁵⁶⁷ If it is found that there is an abuse of a dominant position without there being any pro-competitive benefit for the consumer and other undertakings alike, such an act will be against the Anti-monopoly Act.

5.3.6 The European Union

The Member States of the EU entered into various treaties with the aim of regulating the European market. These treaties include the Treaty of Rome in 1957, the Lisbon Treaty on 1 December 2009 and the Treaty on the Functioning of the European Union on 10 October 2012. The first major revision of the 1957 Treaty of Rome was the Single European Act of 1987, which set the European Community an objective of establishing a single market in an attempt to remove barriers and to increase harmonisation and competitiveness among its countries. These treaties make specific reference to the prohibition of anticompetitive agreements and other concerted practices. Beside EU competition laws, all member states adopted national competition laws must be in line with the above mentioned treaties and national directives.

In the European Commission, the application of legislation has shown a tendency towards a more economic approach in the assessment of vertical agreements under the EU competition rules.⁵⁶⁸ In the absence of market power, vertical agreements that contain restrictions to competition may be considered to improve the production and distribution of goods and services.⁵⁶⁹ However, notwithstanding the efficiencies generated and other pro-competitive benefits, the accepted view is that vertical agreements can also have anti-competitive effects, particularly if they result in market foreclosure, restrict price competition or result in the division of markets.⁵⁷⁰ Whether or not the franchise agreement might raise competition concerns depends on its nature or formulation, or on the structure, market size or market power.⁵⁷¹ As discussed above, Article 81(1) of the EU Competition Law prohibits agreements that will have an appreciable effect on competition, and would apply in franchise agreements if it is shown that harm is caused to third parties, especially where there are no alternatives.⁵⁷²

⁵⁶⁷ Guidelines concerning abuse of a dominant bargaining position in service transactions under the Antimonopoly Act March 17, 1998 Fair Trade Commission at page 4.

⁵⁶⁸ Franchising Notice at 5.7.

⁵⁶⁹ *Ibid.*

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Idem* at 5.8.

⁵⁷² *Ibid.*

Resale Price Maintenance

RPM is prohibited where parties have market power. In the case of *Pronuptia v Schillgali* (1996) ER 353, the court found that price fixing was *per se* illegal in respect of franchising. Individual or group exemptions may be granted if there are overriding countervailing benefits, such as an improvement in efficiency or the promotion of research and development.⁵⁷³ Maximum pricing and recommended pricing are allowed, provided that they do not result in price fixing and reduction of price competition.

Exclusive dealings, exclusive territories and bundling or tying of products

As a general principle, franchisees must remain free to decide from where and to whom they sell or buy goods or services, and this generally cannot be restricted by a franchise agreement. Bundling, or tying of products, may also constitute an abuse of a dominant position where a supplier has market power. It seems that these distribution practices are allowed to a limited extent for franchises with smaller market power, provided the restrictions should go no further than is necessary to protect the franchisors' legitimate business interests and know how.

Abuse of dominance

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of a dominant position. According to the European Court of Justice, an undertaking has a dominant position if it has a position of economic strength which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers, and ultimately consumers.⁵⁷⁴ Examples of abuse include imposing unfair prices or trading conditions, limiting production; markets or technical development to the detriment of the consumer; applying discriminatory prices or conditions; and tying.⁵⁷⁵ The EU commission has shown an inclination to follow a more “economics-based” approach of the USA and to further require proof that a dominant firm’s conduct has an anti-competitive effect in the market.⁵⁷⁶

5.4 African countries using sundry provisions to regulate franchising

The countries listed in this sub-Chapter don’t have franchise-specific legislation. Rather, they attempt to control the sector by means of existing legislation, with varying levels of success.

⁵⁷³ *Ibid.*

⁵⁷⁴ *United Brands Company v Commission* (1978) ECR 207 par 65.

⁵⁷⁵ Butterworths Competition Law Handbook (17th ed) 2011 at 7.3.

⁵⁷⁶ *Ibid.*

As mentioned above, South Africa and Tunisia are the only African countries that have expressly regulated franchising and make use of pre-contractual disclosure requirements. Other countries such as Kenya, Nigeria, Uganda, Egypt, the Cape Verde Islands and Angola regulate franchising through technology transfer legislation, application of agency laws or the application of consumer protection legislation.⁵⁷⁷ There are also no classic franchise registration laws in Africa but a number of registration issues in the wider sense arise.⁵⁷⁸ In African countries that derive their legal systems from Portuguese law⁵⁷⁹ or French law,⁵⁸⁰ a general duty of good faith may exist that can require voluntary disclosure of key facts. In former British colonies, including Uganda, Ghana, Nigeria, Zambia and Botswana, the focus is on misrepresentation. For example, the Contract Act⁵⁸¹ in Uganda provides that misleading information overstating profitability or success rate must be avoided.⁵⁸²

A report published by the African Development Bank Group in 2002, dealt with an analysis of the franchise sector in Africa and presented research regarding the existence and effectiveness of franchising in Africa.⁵⁸³ The African Development Bank recommended that franchise-specific legislation be introduced in Africa and that South Africa be used as a benchmark for same.⁵⁸⁴

Pan-African Franchise Federation

A pan-African Franchise Federation was founded in 2013. Its formation follows on-going efforts by the World Franchise Council to establish a formal organisation for the franchise sector in Africa.⁵⁸⁵

States salient information pertaining to other African countries

The Southern African Customs Union (“SACU”)⁵⁸⁶, the Southern African Development Community (“SADC”)⁵⁸⁷ and the Common Market for Eastern and Southern Africa (“COMESA”)⁵⁸⁸ were

⁵⁷⁷ Marzheuser-Wood *Franchising in Africa* 135.

⁵⁷⁸ *Ibid.*

⁵⁷⁹ Including Cape Verde Islands, Angola and Mozambique.

⁵⁸⁰ Including Tunisia, Algeria and Morocco.

⁵⁸¹ Act No. 7 of 2010.

⁵⁸² Section 10.1.

⁵⁸³ African Development Bank Group *Enhancing Development in Africa: Franchising Report* (2002).

⁵⁸⁴ *Ibid.*

⁵⁸⁵ Marzheuser-Wood *Franchising in Africa* 130.

⁵⁸⁶ With the following member states: Botswana, Lesotho, Namibia, Swazi land and South Africa.

⁵⁸⁷ With the following member states Angola, Botswana, Democratic Republic of Congo (DRC), Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

⁵⁸⁸ With the following member states Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

established to regulate cross-border competition in Africa.⁵⁸⁹ Of these bodies, Namibia is a member state of SACU and SADC. These bodies have various aims and objectives, however, in one form or another each aspire to promote fair competition in the common market and to encourage cooperation between member states in effectively combating prohibited practices in Africa.⁵⁹⁰ A prohibited practice is defined as “any conduct which appreciably restrains trade states.”⁵⁹¹ Although the necessary frameworks have been created, enforcement and cooperation between these member states have been far from effective.⁵⁹²

The most prominent of these bodies in the area of franchising and competition law is COMESA, of which Namibia is not a member state.

Articles 16 and 18 of the COMESA Competition Regulations sets out those vertical agreements which may infringe the Competition Regulations if not authorised.⁵⁹³ These include agreements which restrict, or are likely to restrict, the entry of any undertaking into a market; prevent or deter any undertaking from engaging in competition in a market; eliminate or remove any undertaking from a market; directly or indirectly impose unfair purchase or selling prices or other restrictive practices; or to limit the production of goods or services for a market to the prejudice of consumers.⁵⁹⁴ Under article 20 of the COMESA Competition Regulations, an enterprise (including a franchise) may apply for authorisation or exemption of their existing and contemplated agreements which, even if they are anti-competitive, have public benefits that outweigh their anti-competitive detriment.⁵⁹⁵

5.4.1 Kenya

Kenya covers an area of 581,309 km² and has a population of 44,35 million. The latest available GDP figure is US\$55.24 billion, US\$1,245.00 per capita.⁵⁹⁶ Although this will be seen as low by international standards, one must bear in mind that income inequality in Kenya is great, as is the case in other African countries. In reality, Kenya has a rapidly growing middle-class whose members

⁵⁸⁹ N Sakata ‘Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?’ (2011) Available at <http://www.compcom.co.za/wp-content/uploads/2014/09/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf> (2011) at 6.

⁵⁹⁰ *Idem* at 9.

⁵⁹¹ BM Wood Franchise Review: *Franchising in Africa* At p 140. Available at www.dentons.com/~media/PDFs/Insights/2014/May/Franchise_Review_All.pdf

⁵⁹² N Sakata “Are Southern African competition law regimes geared up for effective cooperation in competition law enforcement?” at page 10. Available at: <http://www.compcom.co.za/wp-content/uploads/2014/09/African-Regional-cooperation-PaperFinal-27-Sept-11-.pdf>

⁵⁹³ COMESA Competition Commission *Notice On The Commencement Of Operations Of The COMESA Competition Commission* (2013).

⁵⁹⁴ *Ibid.*

⁵⁹⁵ *Ibid.*

⁵⁹⁶ Adapted from the website www.google.co.za accessed 11th March 2017.

are willing and able to spend money on luxuries. The Kenyan Consumer Protection Act⁵⁹⁷ expressly provides that a consumer includes a franchisee within a franchisee agreement, and so the Kenyan CPA is thus applicable to franchisees. However, it does not disclose a technical disclosure requirement. The Kenyan CPA is based largely on the South African CPA and purports to protect franchisees from certain unfair practices and excessively one-sided contractual agreements. Franchising in Kenya does not have a strong history. Over the years, several attempts were made to get franchising off the ground but those faded. A reason may be that Kenya does not have franchise-specific legislation. Further, the authorities appear to have been slow in enforcing other legislation that could have protected franchisors' intellectual property. More recently, things have improved. The arrival of several iconic brands including KFC has added fresh impetus to the concept. As a result, attempts to kick-start franchising may well be successful.

As matters stand, Kenya's franchise sector is dominated by food concepts. Aside from KFC, relatively recent arrivals include Subway, Naked Pizza, Cold Stone Creamery and Domino's Pizza. They joined well-established South African brands including Debonairs, Steers and Spur. Some locally-developed retail franchises exist but are described by experts as informal franchises. More recently, a large international real estate franchisor established a presence in Nairobi and plans to expand to other centres using proven franchise practices. The Kenya Franchise Association was established in the early 2000s but does not appear to be active. In fact, an article published in 2016 by a local newspaper described it as nascent.

5.4.2 Egypt

Egypt covers an area of 1.01 million km² and has a population of 91.5 million people. 2015 GDP came in at US\$330.78 billion, US\$ 3,314 per capita. As such, it is the largest consumer market in the MENA (Middle East and North Africa) region.⁵⁹⁸ However, for at least the last decade, political instability has had a negative impact on the country's economy and the franchise sector has not escaped this. The economy is now on the mend and the fact that government actively promotes franchising does assist. Egypt has one of the most developed franchise industries in Africa.⁵⁹⁹ In Egypt, Commercial Agency Law⁶⁰⁰ generally regulates franchising.⁶⁰¹ It must be mentioned that significant efforts have been made to promulgate a new law regulating matters relating to franchising. Currently,

⁵⁹⁷ Act No. 46 of 2012.

⁵⁹⁸ Obtained from the website www.worldbank.org accessed 11th March 2017

⁵⁹⁹ K Tyre and D Vilmenay "Africa: A continent rich with franchising opportunities" (2011) www.lexnoir.org/pdfs/KendallTyre%20Africa.indd.pdf (Accessed on 3 January 2017).

⁶⁰⁰ Law 120 of 1982.

⁶⁰¹ Marzheuser-Wood *Franchising in Africa* 139.

considerations of introducing franchising legislation is listed as a top priority within current Parliament's agenda, and is expected to be issued soon.⁶⁰² The government established the Egyptian Franchise Development Association ("EFDA"). The EFDA is a member of the World Franchise Council and contains a Code of Ethics to which all members must adhere to. The Code aims to establish a framework for best practices and encourages self-regulation in respect of governance on the EFDA and its members.⁶⁰³ The Code includes the obligations of the parties and pre-contractual disclosure requirements.⁶⁰⁴ A disclosure document must contain all material information and be provided to prospective franchisees at least fourteen days prior to signature of an agreement.⁶⁰⁵ The Code also provides that parties must resolve their disputes in good faith and good will through fair and reasonable negotiations.⁶⁰⁶ As mentioned, Egypt has not yet enacted specific laws regulating franchising agreements, however, guidance is provided by the Law on the Protection of Competition and the Prohibition of Monopolistic Practices No. 3 of 2005, which regulates agreements or contracts between competing persons.⁶⁰⁷

Resale Price Maintenance

RPM, which is seen as a form of price fixing, is prohibited in Egypt. Article 6 of Law 3 of 2005 prohibits agreements or contracts between competing persons in any relevant market, if they are intended to cause increasing, decreasing or fixing prices of sale or purchase. In terms of article 22, the sanction for partaking in this prohibited practice is a fine of between 30 000 and 10 million Egyptian Pounds.

Exclusive dealings, exclusive territories and bundling or tying of products

The allocation of markets, products, and exclusive territories is prohibited in Egypt.⁶⁰⁸ Article 6 of Law 3 of 2005 prohibits agreements or contracts between competing persons in any relevant market if they are intended to divide product markets or to allocate them based on geographic areas, type of customers, goods, seasons or time periods. Restricting the production, distribution or marketing operations may also result in a punitive penalty of between 30 000 and 10 million Egyptian Pounds.

⁶⁰² M Rashed "Egypt: Franchising in Egypt" (2016).

<http://www.mondaq.com/x/544538/Contract+Law/Franchising+In+Egypt> (Accessed 26 January 2017).

⁶⁰³ Egyptian Franchise Development Association: <http://www.efda.org.eg/index.php/code-of-ethics> (Accessed on 26 January 2017).

⁶⁰⁴ *Ibid.*

⁶⁰⁵ *Ibid.*

⁶⁰⁶ *Ibid.*

⁶⁰⁷ Shalakany Law Office Legal Advisers Guide *To Doing Business In Egypt* (2012).

⁶⁰⁸ *Ibid.*

Abuse of a dominant position

The prohibitions of a firm with a dominant market position are discussed in Article 8 of Law 3 of 2005. A firm is precluded from engaging in exclusionary acts, especially when it is a dominant firm, since this will amount to the abuse of a dominant position.⁶⁰⁹ An entity holding at least 25% of a market share is considered as having a dominant position. This market power may allow such a firm to influence the prices or what is on offer, prohibit suppliers from doing business with certain entities and allocate markets which holds no true competitive benefit for consumers and competitors alike.⁶¹⁰ The U.S. Commercial Services' most recent report on Egypt's economy, published on 11th January 2017, describes franchising as the best prospect industry sector for the country.⁶¹¹ The report further states that franchising is expanding in Egypt as well as in the MENA region. A peculiarity of the Egyptian market is that while US-based franchise brands dominate the market, typically through master licence arrangements, franchising often stops at master licensee level. Instead of offering franchises to others, master licensees choose to expand the brand's local presence through company-owned outlets. (Other sources suggest that this approach is not unique to Egypt but is typical throughout the MENA region and many other parts of Africa.) Nevertheless, a growing number of locally-developed franchise concepts are emerging, primarily in the retail sector. This is driven by consumer demand fuelled by improving standards of living, although the gap created by income disparities remains high.

The table reproduced as Figure 12 provides an insight into the current status of the franchise sector in Egypt

Figure 12: Franchise statistics for Egypt. 2015/16

Franchise statistics: Egypt	
Total number of franchise systems	500
Number of franchise systems originating from the U.S.	65
Sector-wide sales through franchised networks	US\$14 billion
Average percentage of annual growth of the sector	20 to 25%
Number of category A consumers (average income US\$14,400 p.a.)	5 million

⁶⁰⁹ *Ibid.*

⁶¹⁰ Article 4 of the Competition Law No. 3 of 2005.

⁶¹¹ Adapted from the report Egypt – Franchising Industry Sector accessed on the website <http://export.gov/egypt> accessed 12th March 2017

Egypt has an active franchise association known as the Egyptian Franchise Development Association (EFDA). It was established in 2001 and works towards the development of franchising in Egypt. It also arranges exhibitions, seminars and conferences, and maintains close ties with the international franchise community through its membership of the World Franchise Council (WFC).⁶¹²

5.4.3 Morocco

Morocco covers an area of 446,550 km² and is home to 33.01 million people. The country's GDP is US\$103.11 billion, US\$8,200 per capita. The country has a thriving economy and the concept of franchising is well developed. Many Moroccans are entering the middle class where convenience and brand awareness are important. This is reflected in the development of shopping malls, with Morocco Mall, being North Africa's largest shopping centre.⁶¹³ Morocco has no specific legislation in respect of franchising but this lack of specific legislation does not mean that there is a legal vacuum. The Moroccan Federation of Franchise has adopted a code of conduct, designed to inform the contracting parties on the different rules of the franchise and to safeguard their interests.⁶¹⁴ Such rules relate to contractual clauses which must provide details on their obligations. The Moroccan Franchise Association offers diversified services to franchising parties including consulting, preparation of business and financing plans and assistance with franchisee tracking procedures.⁶¹⁵ The Association's stated mission is to promote franchising in Morocco through information and published studies. Over 400 franchise concepts operate in Morocco. Their activities are split between retail (retail stores and food service establishments) which hold a 55% market share and services (home services, automotive and business-to-business services) making up the balance. For cultural reasons, the sector is dominated by French concepts but concepts originating from the U.S. are catching up fast. There is also a strong presence of locally-developed franchise concepts. The Moroccan government supports franchising through its 'Plan Rawaj.' This plan aims to create commercial activity zones in Morocco's 12 major cities by 2020. These zones offer its visitors an attractive, safe and high-quality shopping experience slanted towards the needs of the local population. They are not dissimilar to malls or shopping centres in other countries. The redevelopment of Morocco's airports will offer additional opportunities for franchise concepts, especially in the fields of retail and food. Morocco's franchise association is known as Fédération Marocaine de la Franchise (FMF). They did not respond to our written request for information, and at the time of compiling this report, their website was not accessible.

⁶¹² Adapted from the website www.efda.org.eg accessed 12th March 2017

⁶¹³ Adapted from the website <http://export.gov/morocco> accessed 12th March 2017

⁶¹⁴ Z Sayl "The International Business Environments of Franchising in Morocco" (2015) *Indian Journal of Economics and Development* 1 at 6.

⁶¹⁵ Franchise Maroc: <http://www.franchisemaroc.com/Compagnie/> (Accessed on 26 January 2017).

5.4.4 Nigeria

Nigeria covers an area of 923,768 km² and its population numbers 173.60 million people. There is a desire for franchise goods and services but not all can afford them. This notwithstanding, on the face of it, the country offers incredible opportunities but this is offset by economic and political problems. On the economic front, the fall in the price of crude oil has hit the country hard. Urbanisation exceeding the authorities' ability to provide adequate basic services exacerbates the problem. In the political arena, Boko Haram continues to test government's ability to maintain law and order. The military has stepped up its efforts to regain control of the country's security situation, and authorities have adopted measures to stimulate the economy and get inflation under control.⁶¹⁶ In Nigeria, the National Office for Technology and Promotion ("NOTAP") deals with the registration and review of license agreements that deal with, *inter alia*, use of the trade mark, supply of technical expertise, supply of managerial assistance and training of personnel.⁶¹⁷ As franchise agreements include both a trade mark license and transfer of technical expertise, they must be registered with NOTAP. This Office will then examine the agreement to ensure it does not impose certain excessive restrictions on the franchisee.⁶¹⁸ The Nigerian International Franchise Association ("NIFA") is a trade organisation committed to the development and promotion of franchising in Nigeria.⁶¹⁹ The NIFA's goals include educating potential investors and entrepreneurs on the potential of franchising in Namibia, creating an environment to attract investment, co-operating with government regulatory agencies to encourage appropriate policies, to advocate ethical conduct, to network internationally and to create a database of all existing franchise operations in Nigeria.⁶²⁰

The franchise concept has been promoted in Nigeria for at least two decades, frequently with assistance by foreign aid organisations like the UNDP and UKAID. Moreover, the National Office for Technology Acquisition and Promotion (NOTAP) is mandated to promote franchising. According to the US Embassy in Nigeria, only five major U.S. brands are currently operating in Nigeria including Coca-Cola, Pepsi and KFC.⁶²¹ Home-grown franchise concepts are supposed to exist as well but they could not be traced. Also worrying is the fact that the First International Franchise Exhibition presented in Lagos in December 2015 attracted only 20 exhibitors, with not one formal franchise concept among them. No reliable statistics reflecting franchise activity in Nigeria exist, and the Franchise Association of Nigeria (NIFA) failed to respond to our written request for information.

⁶¹⁶ Adapted from the website www.afdb.org accessed 12th March 2017

⁶¹⁷ Chapter 62 of the Laws of the Federation of Nigeria 2004.

⁶¹⁸ Marzheuser-Wood *Franchising in Africa* 135.

⁶¹⁹ Nigerian International Franchise Association: <http://www.nigerianfranchise.org/aboutnifa.html>.

⁶²⁰ *Ibid.*

⁶²¹ Adapted from the website <http://export.gov/nigeria> accessed 12th March 2017

5.4.5 Uganda

Uganda measures 241,038 km² in size and is home to 37.58 million people. With a GDP of US\$27.60 billion and US\$672.81 per capita, it is one of the poorest countries in the world.⁶²² It would appear from Uganda's Investment Code Act⁶²³ that all franchise agreements must be registered if the transfer of foreign technology is involved. If there is no registration, the agreement is void.⁶²⁴ Unfortunately, compliance with the Investment Code Act is rare and authorities do not strictly enforce the act.⁶²⁵ U.S. Commercial Services report that several major American firms are active in Uganda, including Citibank, Prudential, AIG, Caterpillar, John Deere, NCR, Sheraton, Marriott, Coca-Cola, Pepsi-Cola and others but we could not find any evidence of the existence of SME-friendly franchise operations. Nor were we able to trace a local franchise association. However, a social franchise active in the field of birth control exists and reports to have achieved good results.⁶²⁶

5.4.6 Ethiopia

Ethiopia covers an area of 1,104 km² and is home to 94.1 million people. GDP is US\$47.53, US\$1,380 per capita. The latter figure in itself gives an indication that the economic situation in Ethiopia is not good. A World Bank report on doing business in Ethiopia identifies corruption, crime, finance, firm characteristics, gender issues, informality, infrastructure, innovation and technology, performance, regulations and taxes, trade and workforce as stumbling blocks. These factors combine to make market entry difficult for foreign entities but stresses that things are rapidly improving.⁶²⁷ The U.S. Commercial Service also indicates that improvements are on the cards.⁶²⁸ Franchising can play a major role in this regard. Technology transfer agreements are regulated by the Investment Proclamations 2002 and 2003.⁶²⁹ Business process franchising may require registration with the agency. As in Nigeria and Uganda, there are restrictions imposed on the powers of the franchisor.⁶³⁰ Some large international brands, primarily but not only of U.S. origin, operate under franchise arrangements here. Examples are Pepsi Cola and some of the big brand hotel chains. By and large, franchising remains an alien concept to the Ethiopian small business sector. It appears that steps are being taken to establish the Ethiopian Franchising Association (EFA). However, at the time this

⁶²² Adapted from the website <http://export.gov/uganda> accessed 12th March 2017

⁶²³ Cap 92. Commencement: 25 January, 1991.

⁶²⁴ S29.1.

⁶²⁵ Marzheuser-Wood *Franchising in Africa* 135.

⁶²⁶ Extracted from an article published on the website www.ecoforumjournal.ro accessed 12th March 2017

⁶²⁷ Adapted from an article by Matthew Davis, CFA published by www.renewstrategies.com accessed 13th March 2017.

⁶²⁸ Adapted from the website <http://export.gov/ethiopia> accessed 13th March 2017

⁶²⁹ *Ibid.*

⁶³⁰ *Ibid.*

report was compiled no details could be obtained. It is pleasing to note, however, that social franchising has made inroads into the health sector.⁶³¹

5.4.7 Angola

Angola covers an area of 1,246,700 km² and is home to 25,8 million people. The country's GDP in 2014 was US\$146,67 billion, per capita US\$6,054. (This figure indicates that GDP per capita increased dramatically over the past few years. It stood at US\$3928.80 in 2010.) For historic reasons, Portuguese is the main language spoken in Angola and goods sourced from Portugal or Brazil are in evidence everywhere but this is rapidly changing. International travel, especially to Europe, South Africa and the Middle East, creates awareness of goods and services available. The growing number of shopping centres established in Luanda and other centres caters for this demand. Angola applies commercial agency law to franchise relationships. The Angolan Contract law specifically stipulates that the provisions governing termination of agency agreements also apply to franchise agreements.⁶³² There are no legal restrictions on setting up a franchise in Angola but foreign exchange issues create difficulties. At present, KFC, Pizza Hut, Bob's Burger, Wimpy and O Boticario operate under franchise arrangements. Shoprite Checkers also has a presence in Angola. Several franchised brands, including Nando's (South Africa), were trading there but subsequently withdrew.⁶³³

5.5 Observations pertaining to other countries

Countries discussed in this sub-Chapter do not have a well-developed franchise sector but certain market characteristics have prompted us to include them in this report.

5.5.1 Lebanon

Lebanon covers 10,452 km² and is home to a population of 5,98 million. GDP at 2014 figures is US\$49,63 billion, per capita US\$8,843.⁶³⁴ The country's economy was booming but is now negatively affected by the Syrian refugee crisis. According to a World Bank report, Lebanon accommodates the highest number of refugees per capita in the world for the fourth year running. Consumer demand is sluggish and is expected to remain so for the foreseeable future.

Nevertheless, the real estate market has recorded a small upturn of late but this is offset by a deceleration of remittances to Lebanon due to economic pressures experienced by other countries

⁶³¹ *Franchising Reproductive Health Services* www.ncbi.nlm.nih.gov accessed 13th March 2017

⁶³² Marzheuser-Wood *Franchising in Africa* 137.

⁶³³ Obtained from the website www.export.gov/Angola accessed 13th March 2017

⁶³⁴ Obtained from the website <http://data.un.org> accessed 13th March 2017

in the region where Lebanese citizens find work.⁶³⁵ Franchising is well-established in Lebanon and continues to grow. In fact, franchising is ranked among the fastest-growing business sectors in the country. This is driven by Lebanon's consumers who are typically well-educated and widely travelled, thus familiar with foreign brands and lifestyle choices. Many of the big international brands operate under franchise arrangements and locally developed concepts are in evidence as well, especially but not only in the food sector. The Lebanese Franchise Association (LFA) was established in 2006 and currently has 138 members. According to its website, the LFA aims to build and maintain a favourable economic and regulatory climate for the sector. To keep up with international developments, it maintains close ties with its international counterparts.⁶³⁶

5.5.2 Botswana⁶³⁷

Franchising appears to be thriving in Botswana. It is apparent from a visit to any shopping mall or other retail centre, that a multitude of well-known brands are in evidence. Indeed, over 60 brands known to expand through franchising, mostly originating from South Africa but also from the USA and one from Zimbabwe. More in-depth research reveals that the concept of franchising as it should be practiced is practically non-existent in Botswana. This apparent contradiction can be explained as follows: entrepreneurs, many of them expatriates, acquire the exclusive licence rights to a brand for Botswana. They then establish one outlet to test the market. Should this prove successful, they roll out the concept nationally in the format of a "branch" network. For example, the master licensee of a well-known South African chicken brand operates a branch network of about 18 stores in Botswana yet all these stores are owned by the master licensee. Nevertheless, this remains a franchise arrangement and may allow for expanded expansion and economies of scale. To be fair, these brands still create economic activity in Botswana. They purchase local goods and provide employment for an estimated 2,000 plus local individuals. However, enabling newcomers to entrepreneurship to be in business for themselves but not by themselves is a tenet of franchising.

One or two locally-developed concepts which offer franchises to others exist but their franchise concepts fall short of internationally recognised best franchise practices. Moves are afoot to set up a franchise association in Botswana, to be known as Franchise Association Botswana (FAB). It will work towards popularising the concept among government representatives and local entrepreneurs, with a view to promote the creation of micro franchises and social franchises. We have included the above example because according to our findings, the situation appears to mirror realities in

⁶³⁵ Obtained from the website www.worldbank.org/lebanon accessed 13th March 2017

⁶³⁶ Taken from the website www.lfalebanon.com accessed 13th March 2017

⁶³⁷ The bulk of the information used in this sub-Chapter was provided by Moanamisi Gadiile of Business Platform, Gaborone, Botswana, who is a driving force in promoting franchising in his home country.

Namibia. Recommendations on how the status quo in Namibia can be improved are given in chapter seven.

5.5.3 Rwanda

Rwanda covers 26,338 km² and is home to a population of 11.78 million people. It's GDP in 2016 figures is US\$8.2 billion, US\$638 per capita.⁶³⁸ Although the majority of the population remain poor, government has succeeded in reducing the number of those living below the official poverty line of US\$1.25/day from 57% in 2005 to 45% in 2010. Rwanda has also made big strides towards gender equality, with almost 64% of parliamentarians being women. In Life expectancy, literacy levels and spending on healthcare have improved dramatically. In response, foreign aid to Rwanda has increased significantly and currently makes up between 30 and 40% of government's annual budget. According to a report compiled by U.S. Commercial Service⁶³⁹, franchising is still uncommon in Rwanda but government-sponsored efforts should change that over time. The Rwanda Development Board, an agency of government, embarked on a drive to establish franchising in Rwanda. A week-long workshop addressed by foreign experts in this field was presented in 2012 and expectations were high. Unfortunately, not much has happened yet. Follow up and maintaining momentum is important. Further, it is appropriate to highlight the potential of social franchising as illustrated by the following success story. The organisation One Family Health (OFH), a subsidiary of the Health Store Foundation, delivers pharmacy and health services to the rural population under a social franchise model. An extract from their website follows: "In rural Rwanda, lack of transportation significantly impedes access to basic healthcare. The average Rwandan family walks an average of three hours or more to reach the nearest clinic. The organisation OneFamilyHealth reduces this barrier by opening primary health clinics within rural communities via a social franchise model. In many instances, this reduces walking times for members of local communities by more than four hours. Using our nurse-owned franchise model, we bring essential medicines and healthcare services to the most vulnerable and underprivileged populations. By increasing access to basic medical intervention, our clinics play a crucial, often lifesaving role in the communities we serve. "OneFamilyHealth combines micro-enterprise and franchise business principles to create opportunities for trained qualified nurses to own and operate their primary healthcare clinics under a franchise model, improving their economic status and access to other opportunities. We support Franchisees by enhancing their business acumen and furthering their capacity to organize and

⁶³⁸ Obtained from the website www.weforum.org accessed 13th March 2017

⁶³⁹ Obtained from the website www.export.gov/Rwanda accessed 13th March 2017

manage their business. Franchisees are trained to manage their finances and personnel, medicine stocks, patient health records and interactions with health authorities.”⁶⁴⁰

5.6 The International Franchise Association

5.6.1 The IFA and its Code of Ethics

5.6.1 The International Franchise Association, formed in 1960, is the world’s oldest and largest organisation representing franchising globally, with its mission statement being the protection, enhancement and promotion of franchising worldwide.⁶⁴¹

5.6.2 The Code of Ethics of the IFA is intended to establish a framework for the implementation of best practices in the franchise relationships of IFA members. This Code of Ethics is one component of the IFA’s self-regulation program which also includes streamlined measures for the enforcement mechanisms of the Code.⁶⁴² The Code represents ideals to which all IFA members agree to subscribe in their franchise relations.⁶⁴³ Rather than purporting to anticipate solutions to every problem that may arise, the Code aims to provide a set of core values that are the basis for the resolution of challenges that may arise in franchise relations. It is merely a code according to which the IFA and its members will govern themselves.⁶⁴⁴

5.6.3 The values outlined in the Code are strongly based on moral and ethical principles.⁶⁴⁵ The values include the following: (1) trust, truth and honesty; (2) mutual respect and reward; (3) open and frequent communication; (4) compliance with laws; and (5) the use of internal dispute resolution.⁶⁴⁶

5.6.4 Trust, truth, and honesty

Based on the foundation of mutual commitment of the parties to fulfil their obligations in a franchise agreement, a party must act consistently and promote and protect the interests of the brand. IFA members must be sincere in “word, act and character” and commit to sharing information to face challenges in clear and direct terms. Emphasis is placed on the goal that a positive public image will

⁶⁴⁰ Obtained from the website www.onefamilyhealth.org accessed 13th March 2017

⁶⁴¹ International Franchising Association: <http://franchise.org/mission-statementvisioncode-of-ethics> (Accessed on 24 January 2017)

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.*

⁶⁴⁵ Adler “Ethics of Franchising” 75.

⁶⁴⁶ International Franchising Association: <http://franchise.org/mission-statementvisioncode-of-ethics> (accessed 26 January 2017)

attract investment and promote growth. This growth can only be achieved by mutual trust and honesty between franchising parties.⁶⁴⁷

5.6.5 Mutual respect and reward

In order for each specific party to be successful, members need to embrace the concept of team support and be willing to show respect and consideration for those whom such members partake in franchising businesses with. IFA members value the responsibility of improving their franchise system in manner that rewards both franchisors and franchisees.⁶⁴⁸

5.6.6 Open and frequent communication

IFA members appreciate the inherent nature of mutual interdependence within a franchise agreement, and thus understand that continuous effective communication is vital between the franchisor-franchisee relationship. Openness, candour and trust is necessary for effective communication which is vital component of a successful franchise system. IFA members agree to establish and maintain programmes to promote effective communication. Such programs should be disclosed to the public and be available to all franchise members to partake in open dialogue. IFA members are encouraged to also make use of the IFA Ombudsman to assist in promoting co-operation in light of issues affecting the franchise system.⁶⁴⁹

5.6.7 Compliance with laws

IFA members agree to comply and fully support all applicable franchise regulations within their countries. The information provided during pre-contractual disclosure is valued by members as a core contribution to a favourable environment for franchising. This value is fundamental for successful and mutually beneficial franchise relationships.⁶⁵⁰

5.6.7.1 Conflict resolution

Under this value, IFA members should recognise that disputes will inevitably arise and should establish a method for internal dispute resolution. The use of such dispute resolution mechanisms should be encouraged, disseminated and publicised.⁶⁵¹

In light thereof, the IFA has created the IFA Ombudsman program which is an independent third party to assist and facilitate communication and co-operation in avoiding and resolving disputes.

⁶⁴⁷ *Ibid.*

⁶⁴⁸ *Ibid.*

⁶⁴⁹ *Ibid.*

⁶⁵⁰ *Ibid.*

⁶⁵¹ *Ibid.*

The IFA furthermore recommends the use of the Franchise Mediation Program when a more formal mediation service is needed to resolve conflict.⁶⁵²

The IFA Ombudsman is independent of the Association.⁶⁵³ An adopted mission statement of the IFA Ombudsman is “to provide a confidential, neutral, independent, and informal process that facilitates fair and equitable resolution of disputes.”⁶⁵⁴ The IFA Ombudsman Program offers IFA members options for the resolution of disputes.⁶⁵⁵

5.6.8 World Franchise Council

5.6.8.1 Membership of the WFC

The World Franchise Council (“WFC”) is an entity that unites franchise associations around the world.⁶⁵⁶ In 1994, a group of national franchise association executives, led by the IFA and the European Franchise Federation, unanimously decided to establish the WFC.⁶⁵⁷ The IFA is thus a member of the World Franchise Council and only recognises franchise associations that are part of the Council.⁶⁵⁸

The mission of the World Franchise Council is to support the development and protection of franchising, and promote a collective understanding of best practices in fair and ethical franchising worldwide.⁶⁵⁹ When considering the countries discussed in this report, it can be pointed out that the following countries all have franchise associations that are members of the World Franchise Council: South Africa, Australia, Brazil, Canada, USA, Germany, New Zealand, United Kingdom, India, Lebanon and Egypt.⁶⁶⁰ As such, the abovementioned countries will have the benefit of being connected to other WFC member associations in the promotion of good professional conduct within the franchising sector globally. Furthermore, each of the WFC’s national franchise associations must ensure the promotion of the WFC Code of Ethics in their respective countries.⁶⁶¹

5.6.8.2 The WFC’s Code of Ethics

⁶⁵² *Ibid.*

⁶⁵³ International Franchising Association: Self-regulation: Ombudsman <http://franchise.org/self-regulation-ombudsman> (Accessed on 2 February 2017).

⁶⁵⁴ *Ibid.*

⁶⁵⁵ *Ibid.*

⁶⁵⁶ International Franchising Association: Franchising Associations Worldwide <http://franchise.org/franchise-associations-worldwide> (Accessed on 25 January 2017).

⁶⁵⁷ World Franchise Council: <http://www.worldfranchisecouncil.net/> (Accessed on 26 January 2017).

⁶⁵⁸ International Franchising Association: Franchising Associations Worldwide.

⁶⁵⁹ World Franchise Council: Home.

⁶⁶⁰ International Franchising Association: Members.

⁶⁶¹ The World Franchise Council: Code of Ethics.

The World Franchise Council's Code of Ethics is based on commonly established principles of its members. Each of the WFC's national franchise associations played a role in formulating the principles.⁶⁶² As pointed out in the preamble, these principles are not intended to be law but rather a description of "good professional conduct among the actors in franchising around the world."⁶⁶³

The Code requires that franchisors must provide all necessary information to the franchisee no less than seven days before signature, taking into account respective commitments and responsibilities.⁶⁶⁴ The information must be objective, verifiable and devoid of misrepresentation. The contract and copy of the national Code of Ethics must be provided to the franchisee in a language understood by the franchisee. Selection of franchisees must not be based on discrimination. The Code provides that the franchisor must provide information openly and truthfully to the franchisee regarding experience, training and financial means. The Code encourages professional advice, dissemination of information about other franchisees and transparency.⁶⁶⁵

In terms of the Code, the franchisor must develop and maintain technical expertise and operational know-how that supports the franchise relationship.⁶⁶⁶ A franchisor must give notice to a franchisee if there is non-performance of the obligations to allow an opportunity for fulfilment of same.⁶⁶⁷ A franchisee must not compete with the network by appropriating know-how provided by the franchisor.⁶⁶⁸ The franchisee has a duty to provide the franchisor with operational information.⁶⁶⁹ Both franchising parties must be committed to co-operation, respect for mutual obligations, resolving conflict through mediation and executing responsibilities for the interest of consumers.

The Code provides that the franchise contract must define respective rights and obligations, be equitable, allow a return on investment for the franchisee, specify conditions of sales or transfer as well as any renewal and termination, and must respect the laws in force of the country in which the contract is to be executed.⁶⁷⁰ With respect to termination, the Code merely provides that the provisions should protect the franchisor's know-how through appropriate non-compete restrictions on the franchisees.⁶⁷¹

⁶⁶² The World Franchise Council's Principles of Ethics: I. Preamble.

⁶⁶³ *Ibid.*

⁶⁶⁴ The World Franchise Council's Principles of Ethics: III. Acquisition of the franchise

⁶⁶⁵ *Ibid.*

⁶⁶⁶ The World Franchise Council's Principles of Ethics: IV. Conduct of the franchise.

⁶⁶⁷ *Ibid.*

⁶⁶⁸ *Ibid.*

⁶⁶⁹ *Ibid.*

⁶⁷⁰ *Ibid.*

⁶⁷¹ The World Franchise Council's Principles of Ethics.

CHAPTER 6

6. FRANCHISING IN NAMIBIA

6.1 Introduction

The world over, franchising is seen as a vehicle for the establishment of sustainable SMEs and job creation. In Namibia, a need for both exists but our investigation of the current status of franchising revealed that the concept's potential is underutilised. In this Chapter, we identify some of the problems that hinder the development of franchising.

6.2 The legal and regulatory framework

The different types of Intellectual Property legislation that has been enacted by the Namibian Legislature are as follows:⁶⁷²

- Copyright and Neighbouring Rights Act, 1994 (Act No. 6 of 1994)⁶⁷³
- Trade Marks in South West Africa Act no 48 of 1973
- Patents, Designs, Trade Marks and Copyright Act no. 9 of 1916
- Patents, Designs and Trade Marks Proclamation no. 17 of 1923
- Merchandise Marks Act 17 of 1941, as amended in South Africa to April 1978.
- Heraldry Act 18 of 1962, as amended in South Africa prior to Namibian independence.
- Paris Convention for the Protection of Industrial Property (January 1, 2004)⁶⁷⁴
- Convention Establishing the World Intellectual Property Organization 1967, amended in 1979 (WIPO Convention)⁶⁷⁵
- Madrid Agreement concerning the International Registration of Marks, 1891.⁶⁷⁶

⁶⁷² Legal Assistance Centre *Namlex Index to the laws of Namibia* 8 ed (2010). Available at <http://www.lac.org.na/laws/pdf/namlex2010.pdf> (accessed on 20 February 2017); WIPO Lex *Namibia Laws*. Available at <http://www.wipo.int/wipolex/en/profile.jsp?code=na> (accessed on 20 February 2017)

⁶⁷³ This Act provides for the protection of copyright and performers' rights. Regulations are contained in GN 32/1996 (GG 1257). Certain provisions of the Act are made applicable to the countries of the Berne Copyright Union by GN 127/2001 (GG 2562). See *S v Marume 2007* (1) NR 12 (HC). With regards to publications, please see Eynna S Nwauche, "The public interest in Namibian copyright law", *Namibia Law Journal*, Volume 1, Issue 1, 2009, available at www.namibialawjournal.org.

⁶⁷⁴ Paris Convention for the Protection of Industrial Property, 1883, as amended in 1979 revised at Brussels (1990), Washington (1911) The Hague (1925), London (1934), Portugal (1958) and Stockholm (1967) and amended on 28 September 1979 ratification by Namibian Parliament: 28 March 2003. Deposit: 29 December 2003; effective date: 1 January 2004

⁶⁷⁵ Accession: 23 December 1991

⁶⁷⁶ Accession: 31 March 2004

- Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, 1989⁶⁷⁷
- Hague Agreement concerning the International Deposits of Industrial Designs of 1925, as governed by the 1960 Act and the Geneva Act⁶⁷⁸
- Patent Cooperation Treaty, 1970, as amended in 1979, and modified in 1984 and 2001 ratification by the Namibian Parliament: 28 March 2003.⁶⁷⁹
- Harare Protocol on Patents and Industrial Designs within the Framework of the African Regional Industrial Property Organization, 1982.⁶⁸⁰
- Banjul Protocol on Marks within the Framework of the African Regional Industrial Property Organization, 1993.⁶⁸¹
- Berne Convention for the Protection of Literary and Artistic Works (March 21, 1990)
- Lusaka Agreement on the Creation of the African Regional Intellectual Property Organization (ARIPO) (October 14, 2003)

6.3 Related laws, enacted by the Legislature, are as follows:

- Communications Act, 2009 (Act No. 8 of 2009)
- National Arts Fund of Namibia Act, 2005 (Act No. 1 of 2005)
- National Heritage Act, 2004 (Act No. 27 of 2004)
- Namibian Broadcasting Act, 1991 (Act No. 9 of 1991)
- IP-related Multilateral Treaty:
 - World Trade Organization (WTO) - Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (1994) (January 1, 1995)

6.4 Trade Mark Legislation⁶⁸²

Of relevance for the Namibian Trade Mark landscape, is the Trade Marks in South West Africa Act no. 48 of 1973 and the Trade Marks in South West Africa Regulations, 1973. Namibia is a member of the Paris Convention, the Madrid Agreement and Protocol, the ARIPO (Banjul Protocol), and the WTO/TRIPS. It is expected that Namibia's new Industrial Property Act, which will provide for the Paris Convention, ARIPO (Banjul Protocol) and the Madrid Agreement and Protocol (addressed in

⁶⁷⁷ Accession: 31 March 2004

⁶⁷⁸ Accession: 31 March 2004

⁶⁷⁹ The Accession: 1 October 2003; effective date: 1 January 2004.

⁶⁸⁰ Accession approved by Parliament: 28 March 2003

⁶⁸¹ Accession approved by Parliament: 28 March 2003

⁶⁸² For more information see the case of *Sparletta (Pty) Ltd v Namibia Breweries Ltd* 1991 NR 384 (HC).

more detail below), will come into force shortly. Until the enabling regulations are published, trade mark applications are still processed under the existing legislation. In terms of the current legislation, provision is made for the registration of trade marks for goods and for services, for certification marks⁶⁸³, and for defensive trade marks. A trade mark is defined as a mark intended to be used, in the course of trade, in respect of goods or services, so as to: indicate a connection between the goods or services and a person who has the right, either as owner or as register user, to use the mark, distinguish the goods or services in respect of which the mark is used from the same or similar goods or services connected with another person. The Act provides for a Part A and a Part B of the Register. In order to be registrable in Part A of the register, the mark must be or contain a distinctive mark, while for registration in Part B the mark must be capable of becoming distinctive through use.⁶⁸⁴ The International Classification of Goods and Services (Nice Classification) is applicable to Namibian Trade Mark Law, and a separate application has to be filed for each class of interest. No express provision is made for well-known marks, except the provision for the registration of a defensive mark.⁶⁸⁵ A defensive trade mark may be registered where a trade mark is already registered in Part A of the register in respect of specified goods or services, and it has been used so extensively that there is a likelihood that the use of the mark by another person in respect of different goods or services would indicate a connection with the owner of the registered mark and/or goods or services originating from such owner. The owner may then register the mark (defensively) also in respect of such other goods or services, without the intention of using the mark in regard to such other goods or services.⁶⁸⁶ With regards to colour trade marks, the current Act provides that a trade mark may, in its entirety or in part, be limited to a specific colour or colours. This feature will be taken into account in determining the distinctiveness of a trade mark. Although the current Trade Marks Act makes no express reference to the claiming of priority rights, Namibia has acceded to the Paris Convention. The Namibian Constitution contains a provision to the effect that international treaties to which Namibia has acceded will have legal effect, whether supported by local legislation or not.⁶⁸⁷ Therefore, it is expected that priority rights should be recognised. Furthermore, no provision is made in the Act for the recognition of trade mark applications filed and

⁶⁸³ A certification mark is a mark suitable to be used in the course of trade in respect of goods or services certified in regard to origin, material, method of manufacture, quality, accuracy or any other characteristic, from goods or services not so certified. Certification marks are registrable in Part A of the register.

⁶⁸⁴ This is similar to the previous Trade Marks Act of 1973 of South Africa, but has since been removed

⁶⁸⁵ The new Industrial Property Act will make provision for the protection of well-known marks, as per the Paris Convention.

⁶⁸⁶ Defensive registrations have been removed from the current South African Trade Marks Act of 1993.

⁶⁸⁷ S Brown, E Du Plessis and DF Tanziani (eds) *Adams & Adams Practical Guide to Intellectual Property in Africa* (2012) 388.

registered in terms of the Banjul Protocol of ARIPO and designating Namibia. Since Namibia has acceded to the Banjul Protocol, the validity of such registrations is uncertain at this stage.

6.5 Copyright Legislation

Firstly, it is important to note that Namibia is a member of the Berne Convention and the WTO/TRIPS. The Copyright Act provides for the following works to be eligible for copyright protection: literary works⁶⁸⁸, musical works, artistic works⁶⁸⁹, cinematograph films, sound recordings, broadcasts, programme-carrying signals, published editions and computer programs. There are no formal requirements for the registration of copyright. For a work to qualify for protection, the work must, in general, be written down, recorded or otherwise reduced to material form. Furthermore, the author must be a citizen of Namibia, or domiciled or ordinarily resident in Namibia. Alternatively, the work must have been made or first published in Namibia. Copyright protection may also be extended by Ministerial notice, to persons who are citizens of, or domiciled or resident in, a country which is a party of a treaty of which Namibia is also a party, and which provides for copyright protection.

The ownership of copyright in a work initially vests in the author, unless the work was done in terms of a commission (in the case of certain works) or in the course of the author's employment, in which case it vests in the person who commissioned the work or in the employer. In the case of literary, musical and artistic works (except photographs) the copyright endures for the lifetime of the author plus 50 years. In the case of all other works, the duration is 50 years from the date on which the work was made or was made available to the public. Protection afforded by copyright Copyright confers on the owner the exclusive right to control the doing in Namibia of any of the following acts: reproducing of the work in any material form, including the translation or adaptation thereof, publishing the work if previously unpublished, performing the work in public, broadcasting the work, causing the work to be transmitted in a diffusion service. The following acts are amongst acts excluded from the rights of the owner: the doing of any of the listed acts by way of fair dealing for purposes of research, private study or private use, the use of the work for purposes of criticism and review, the use of the work for purposes of reporting on current events. Copyright is transmissible by way of assignment and may be licensed. No assignment and no exclusive licence shall have effect unless it is in writing and signed by the assignor or the licensor.

⁶⁸⁸ Literary works are defined to include: novels, stories, poetic works, dramatic works, stage directions, film scenarios, broadcasting scripts, textbooks, treatises, essays, articles, encyclopaedias, dictionaries, letters, reports, memoranda, lectures, addresses and sermons, tables and compilations of data

⁶⁸⁹ Artistic works are further defined to include: paintings, sculpture, drawings, engravings, photographs, works of architecture, and works of artistic craftsmanship

6.6 Patent Law

As set out above, the relevant legislation for Patents are the Patents, Designs, Trade Marks and Copyright Act no. 9 of 1916, the Patents, Designs and Trade Marks Proclamation no. 17 of 1923 and Patent Rules, 1917. Namibia is a member of the Paris Convention, ARIPO (Harare Protocol), the PCT and the WTO/TRIPS. However, this legislation has not yet been implemented. Accordingly, patent applications are still being processed under the old legislation.⁶⁹⁰ This being said, the Namibian Patent Office is accepting the filing of convention and PCT national phase applications. The validity of any patents granted on this basis is uncertain in the light of the absence of local enabling provisions. Nevertheless, the Namibian Constitution does contain a provision which indicates that any international treaties which are signed by Namibia will have legal effect, whether supported by local legislation or not.⁶⁹¹ Patentable subject matter in Namibia are as follows: any new and useful art, process, machine, manufacture or composition of material, or any new and useful improvement thereof; capable of being used or applied in trade or industry; and not known or used by others in Namibia, and not on sale for more than two years in any country outside the territory prior to the filing of the patent application⁶⁹². However, if the invention is contrary to law, public order or good morals, it is not patentable.⁶⁹³ There are no specific provisions related to microbiological processes. Namibia is not a member of the Budapest Treaty, but membership of the Treaty is open to Namibia through ARIPO. Priority date is recognised through the membership of the Paris Convention and ARIPO, although uncertainty does remain regarding the validity thereof. Examination is performed on formal requirements and the basis of claiming, relative to a provisional application, if any, are made by the IP office. The patent term is extendable for a further term of seven years or, in exceptional cases, 14 years. If there is no working of the patented invention within two years of grant of patent, compulsory licensing may be afforded. Furthermore, there are no provisions dealing with the exhaustion of rights or parallel importation.

6.7 Design Law

Namibia is a member of the Paris Convention, ARIPO (Harare Protocol), The Hague Agreement, and the WTO/TRIPS. In terms of the 1923 Proclamation, design protection is obtainable by way of a

⁶⁹⁰ S Brown et al *Adams & Adams* 381

⁶⁹¹ S Brown et al *Adams & Adams* 381

⁶⁹² S Gregory *Intellectual Property Rights and South Africa's Innovation future* no. 23 Development through trade SAIIA (2008) 27-28. Available at <https://www.saiia.org.za/research-reports/294-trade-report-no-23-august-2008/file> (accessed on 20 February 2017)

⁶⁹³ Adams & Adams. 381. 2012.

national filing in Namibia. The author or creator, or his assignee, may apply for registration. As indicated above, Namibia is expected soon to have a new Industrial Property Act, which will provide for the Paris Convention, The Hague Agreement and ARIPO. However, this Act has not yet been promulgated, and applications are therefore still being processed under the old legislation. A design means features of shape, configuration, pattern and/or ornament applied to an article by whatever means, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whether manual, mechanical, or chemical, separate or combined, not being a design for a sculpture. The Act requires the applicant to specify the class in which the application must be registered. Goods are classified in the manner appearing in a schedule which is attached to the 1923 Proclamation. Although Namibia has become a member of the Paris Convention, the Hague Agreement and ARIPO (Harare Protocol), the Proclamation does not provide for priority rights in terms of the Paris Convention, nor for ARIPO applications designating Namibia, nor for international applications via The Hague agreement. Nonetheless, the Namibian Designs Office is accepting the filing of convention applications. The validity of any designs granted on this basis is uncertain in the light of the absence of any local enabling legislation.⁶⁹⁴ Separate design applications must be filed for each class in which protection is required. An application for registration of a design already registered abroad must be filed within four months of the first foreign registration and must include the date and number of that registration.⁶⁹⁵

6.8 Industrial Property Act

Namibia's Industrial Property Act, 2012 (the "Act") has not been enacted. Once in force, the Act will provide for entrance into Namibian law of the Paris Convention, ARIPO (Banjul Protocol), the Madrid Agreement and Protocol, the Patent Cooperation Treaty and the Hague Agreement Concerning the International Registration of Industrial Designs. It will repeal the Patents, Designs, Trade Marks and Copyright Act no 9 of 1916, the Patents, Designs and Trade Marks Proclamation no 17 of 1923; the Patents, Trade Marks and Copyright Proclamation no 33 of 1940; and the Trade Marks in South West Africa Act no 48 of 1973.⁶⁹⁶ The Act seeks to both modernise outdated intellectual property laws and consolidate all intellectual property law in one statute. Some of the new developments will include:

⁶⁹⁴ The Namibian Constitution does contain a provision which indicates that any international treaties which are signed by Namibia will have legal effect, whether supported by local legislation or not. Adams & Adams. 386.

⁶⁹⁵ Although this provision was repealed in 1947 in respect of applications in South Africa, it is not clear whether the provision still applies in Namibia.

⁶⁹⁶ S Brown et al *Adams & Adams* 373

The following industrial property agents are defined namely protection for well-known marks in terms of the Paris Convention; an Industrial Property Tribunal that will, *inter alia*, rule on appeals under the Act; the securitization (hypothecation) of intellectual property rights by way of Deed of Security. The Multi-Stakeholders Workshop, held during 2016, which consisted of representatives of WIPO, the Ministry of Industrialization, Trade and SME Development, BIPA and German Cooperation (“the Workshop”) addressed their view that the proposed Act is comprehensive, addresses limitations of existing laws and is in line with the requirements of regional and international agreements, to which Namibia is a party.⁶⁹⁷

6.9 The role and importance of BIPA

In recent years, Namibia's Ministry of Trade and Industry has established the Business and Intellectual Property Authority (BIPA), an internal unit that will eventually become a fully-fledged state-owned agency. BIPA's purpose is to function as a central point or one-stop centre for the registration, administration and protection of businesses and intellectual property rights.

The Workshop identified the absence of a national IP Policy framework as a barrier for development goals and objectives, policy coherence and guidance on the integration of IP into national and sectoral development policies, exploitation of IP assets, provision of support and promotion of local creative and innovative fields, prevention of loss of valuable assets and benefit sharing relation to traditional knowledge.⁶⁹⁸ It appears that a lack of institutional management of intellectual property is a major barrier for the advancement of intellectual property development in Namibia.⁶⁹⁹ In addition, the current legislation is inadequate and there are a number of shortcomings, such as the continued use of outdated laws, with specific reference to the case of *Gemfarm Investments v Trans Hex Group*⁷⁰⁰. The Court discussed the applicability of regulations by virtue of section 19 of the Proclamation related to patents⁷⁰¹. The Court dealt with the legislative history and interpreted sections 1 and 18 to mean that only inventions in Namibia may be registered as patents and only by persons who are not importers. The Court held that patent legislation is “*probably the most neglected area of statutory regulation in Namibia. In a world increasingly driven by globalised*

⁶⁹⁷ N Halm, RA Kaakunga, and G Mengistie *Intellectual Property Audit Report of Namibia* Multi-Stakeholders Workshop: Validation of the National Intellectual Property (IP) Strategy for Namibia (2016) footnote 30 on 17. Available at <http://bipa.cybernamibia.com/policy/Intellectual%20Property%20Audit%20Report%20of%20Namibia%20for%20workshop.pdf> (accessed on 20 February 2017)

⁶⁹⁸ *Idem* on 14

⁶⁹⁹ *Idem* on 15

⁷⁰⁰ 2009 (2) NR 477 (HC) at 481J-482C. Hereinafter the *Gemfarm*-case.

⁷⁰¹ at 495I-ff

economies and markets; in an age where more technological advances have been made in a single century than in all the centuries which have preceded it combined; at a time when commerce and industries are increasingly based on and benefiting from the power of knowledge converted into ideas, inventions and technologies for the benefit of humankind and its environment, it should be a serious legislative concern that our statutory laws designed to record, preserve and protect those ideas, inventions and technologies are marooned in outdated, vague and patently inadequate enactments passed by colonial authorities in this country about a century ago". Furthermore, some are also of the view that copyright legislation, in its current form, is inadequate as it does not provide for enabling legal framework for the development of creative industries and the digital environment.⁷⁰² Furthermore, the Copyright act expressly deals with neighbouring right but they are not defined in the Act. Current trade mark legislation does not make provision for the protection of collective trade marks nor well-known marks.⁷⁰³ Although some of these issues are addressed in the Industrial Property Act, brand owners, specifically international traders, remain vulnerable to substantial risks, until the necessary regulations are promulgated.

Accordingly, it is of vital importance that the enabling regulations, concerning the Industrial Property Act, be concluded and published as a matter of priority.

6.10 Competition legislation relating to franchise arrangements

The purpose of the Namibian Competition Act 2, 2003 (Competition Act) is to enhance the promotion and safeguarding of competition in Namibia.⁷⁰⁴ The Competition Act aims to promote growth and inclusivity in the Namibian economy by promoting a greater spread of ownership, creating an equitable opportunity for smaller undertakings to participate in the Namibian economy, promoting employment and by providing consumers with competitive prices and product choices.⁷⁰⁵ Franchising may help achieve these objectives, but also has the potential of being anti-competitive by restricting competition. The general approach adopted in the Act is that of traditional antitrust prohibitions in relation to restrictive conduct. These include 'agreements' or 'concerted practices' between firms in a horizontal or vertical relationship which have the "object" or "effect" of substantially lessening competition in the market. It is therefore clear that Namibia generally follows the effects-base "rule of reason" approach, which is in line with the approach followed in the following jurisdictions: Australia, Canada, Japan, the United Kingdom, the USA, the directives of the

⁷⁰² See footnote 26 on 18.

⁷⁰³ Ibid.

⁷⁰⁴ NaCC Act of 2003, Preamble.

⁷⁰⁵ *Idem* section 2.

EU as applied in certain Member States, Egypt, and the rest of Africa under COMESA.⁷⁰⁶ The relevant provisions for purposes of this discussion is section 23 of the Act, which sets out the prohibited restrictive practices, namely price fixing, division or allocation of markets, collusive tendering, minimum RPM, limiting or controlling production and bundling or tying of products.⁷⁰⁷ Of further relevance is section 25 of the Act, which provides for the determination of a dominant position. Abuse of a dominant position is exploitative, exclusionary and anti-competitive. The determination of a dominant position largely relies upon the discretion of the Namibian Competition Commission, but is largely associated with monetary thresholds and percentages as proclaimed by the Minister of Trade and Industry. The publication of Government Gazette No. 288 and 289 of 2012 on 7 December 2012, changed the threshold and, as such, the authorities have indicated that the abuse of dominance provisions in the Act will only find application in respect of an undertaking whose annual turnover in, into or from Namibia or whose assets in Namibia are valued at or above N\$10 million. Any undertaking whose annual turnover or asset value in Namibia falls below this threshold cannot be found to have abused a position of dominance. The Act does not contain thresholds or criteria for determining when a firm would be considered 'dominant', however, in terms of the Namibian Competition Commission's Rules, a firm: will be considered dominant if it has above a 45% market share; will be presumed dominant if it has between 35-45% market share (unless it can show it does not have market power); or has a market share of less than 35%, but has market power.⁷⁰⁸ If it is found that a franchise has a dominant position in a relevant market, it may necessitate stricter regulation. The factors considered in an application for exemption of certain restrictive practices by an undertaking or association of undertakings is set out in part III of the Act and is largely considered using the 'rule of reason' approach and may also be applicable to franchising agreements.⁷⁰⁹ This is different to certain jurisdictions, for example South Africa, which relies on a *per se* prohibition for certain restricted practices. As mentioned above, a *per se* prohibition refers to actions which are prohibited without determining whether they have produced anti-competitive consequences in a particular situation. A rule of reason approach will only condemn certain actions once it has been established on the facts of the case that they had an anti-competitive effect.⁷¹⁰ Typical restraint provisions applicable to franchising, which may have possible competition implications, are discussed below. Undertakings, or association of undertakings face the

⁷⁰⁶ MJ Currie *Namibia NACC Issues Guidelines On Restrictive Practices* (2016).

⁷⁰⁷ These terms will be further expanded on at point 3 below.

⁷⁰⁸ MJ Currie *Namibia NACC Issues Guidelines On Restrictive Practices* (2016).

⁷⁰⁹ As described on page 3 of the *Franchising Terms of Reference*, the rule of reason is a legal approach by competition authorities or the courts where an attempt is made to evaluate the pro-competitive features of a restrictive business practice against its anticompetitive effects in order to decide whether or not the practice should be prohibited.

⁷¹⁰ P Sutherland; K Kemp *Competition Law of South Africa* (2015) Issue 18 at 5-44.

risk of a pecuniary penalty being imposed for any amount which the Court considers appropriate, but not exceeding 10% of the global turnover of the undertaking during its preceding financial year if they are found to have participated in this restrictive practices.⁷¹¹ It must, however, be noted that the extent to which competition concerns may arise would depend largely on market definition, which the Competition Commission will have to do on a case-by case basis, taking into account both geographic and product dimensions.⁷¹²

(r) Minimum resale price maintenance

RPM is a vertical price agreement where an agreement is reached that a distributor will resell products sold to him by a supplier, at a particular price.⁷¹³ This is a form of price fixing that occurs when a franchisor imposes a minimum resale price on a franchisee, thereby limiting or even excluding a franchisee's ability to offer discounts or to sell at lower prices than what the franchisor imposes.⁷¹⁴ Section 23 (3)(d) of the Act prohibits the practice of minimum resale price maintenance. RPM is anti-competitive because it not only prevents consumers from enjoying lower prices but also undermines competition amongst competitors. In addition, it could possibly facilitate collusion on prices and trading conditions among the franchisees, practices that are also not allowed in terms of the Act. Franchisors should therefore be aware that the Act does not allow them to dictate to franchisees/dealers/retailers minimum prices at which to resell goods, or to determine the maximum discount that can be given to customers. Although not expressly stated, the franchisor should be able to recommend a price if he/she feels that it gives weight to the value and quality of the product or service, but should never bind the retailer or dealer to that price, as this will be a violation of section 23(2)(d) of the Act.

(s) Exclusive territories for the franchise businesses

Arrangements for exclusive territories occur when a franchisor imposes limitations on a franchisee by specifying an area or areas where a franchisee may operate or supply goods.⁷¹⁵ In practice, areas are divided between the franchisor and the franchisees or between the franchisees themselves with the purpose of restricting the franchisee to a territory or a particular group of consumers.⁷¹⁶ These

⁷¹¹ The NaCC Act of 2003 at section 52(2)

⁷¹² FRANCHISING NOTICE The application of certain provisions of the Competition Act 89 of 1998, as amended, to franchise agreements at 4.5 (hereafter "Franchising Notice") (available at <http://www.compcom.co.za/wp-content/uploads/2014/09/layout.pdf>) Accessed 1 December 2016.

⁷¹³ P Sutherland; K Kemp *Competition Law of South Africa* (2015) Issue 18 at 6-7.

⁷¹⁴ Franchising Notice at 4.6.

⁷¹⁵ *Idem* at 4.12.

⁷¹⁶ *Idem* at 4.12.

types of agreements are frequently seen in franchise agreements and may have certain anti-competitive effects. Franchise agreements usually contain such provisions and the immediate competition concern is that they reduce intra-brand competition.⁷¹⁷ The other danger is that other franchisors may be unable to find suitable outlets for their products in those areas.⁷¹⁸ Other competition concerns may be that allocation of territories could have the effect of not only creating monopolies in a market, but that it might also stifle competition.⁷¹⁹ Under certain situations, it may also appear to be a prohibited practice under section 23(3)(b) of the Act, which prohibits the division of markets by the allocation of customers, suppliers, areas or specific types of goods or services. For such an infringement to occur, the effect of such an arrangement must substantially prevent or lessen competition in that market.

(t) Exclusive Dealing

Exclusive dealing is a common commercial practice which refers to competition among dealers for different labels, brands and products.⁷²⁰ In a franchising agreement, an exclusive dealing arrangement would involve a situation where a franchisor requires a franchisee to purchase all its requirements of a particular kind of product from the franchisor or selected suppliers.⁷²¹ In essence, the franchisor insists that franchisees buy goods from him and not from a competing franchisor/supplier.⁷²² This amounts to the franchisee being limited to the business of the franchisor, whereby the franchisee may not undertake business operations that compete directly with the franchisor's business.⁷²³ The impact of exclusive dealing arrangements has the potential to lessen or prevent competition if the goods/services supplied by the franchise do not compete with other suppliers.⁷²⁴ The effect thereof is that exclusive dealing arrangements may substantially lessen or exclude competition in a market, which may amount to an infringement of section 23(3)(b) of the Act, which prohibits the division of markets by the allocation of customers, suppliers, areas or specific types of goods or services.

(u) Bundling/ tying of products

As previously mentioned, bundling or tying of products occurs when a franchisor sells one product (the tying product) on condition that the franchisee purchases another product (the tied product).

⁷¹⁷ *Idem* at 4.13.

⁷¹⁸ *Ibid.*

⁷¹⁹ *Ibid.*

⁷²⁰ *Idem* at 4.18.

⁷²¹ *Ibid.*

⁷²² *Ibid.*

⁷²³ *Ibid.*

⁷²⁴ *Idem* at 4.19.

Such provisions require the franchisee to purchase the tying products from the franchisor which are not critical to the maintenance of the franchise. This is contrary to section 23(3)(g), which lists bundling or tying of products as a prohibited practice given that it “makes the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject of the contracts.” If the franchisor is in a dominant market position, it will be a further contravention of section 26(2)(d) of the Act, as it will be an abuse of a dominant position if the conclusion of contracts is made subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject-matter of the contracts.

Intellectual Property as business tool

In knowledge based economies, intellectual property (IP) and human capital play an important role for businesses.⁷²⁵ An increasing share of the market value of businesses appears to derive from their intellectual assets and businesses are managing these assets more actively to further enhance their contribution to the economy and the creation of employment.⁷²⁶ As companies focus on innovation they start to exploit their intellectual property in a wide variety of ways, not only incorporating protected inventions into new products, processes and services, but also licensing them to other entities.⁷²⁷ The importance of protecting intellectual property may be seen against the backdrop of the knowledge based economy, which is sometimes also referred to as the third industrial revolution. The quality, quantity and accessibility of information plays a vital role within this movement, and the protection of intangible assets is a key building block hereof. The know-how and expertise, within a business, has become as important as economic resources, placing an emphasis on the intellectual capital of employees. Drucker makes the distinction between a manual worker and a knowledge worker, setting out that: “*The most valuable asset of a 21st century institution, whether business or non-business, will be its knowledge, workers and their productivity*”.⁷²⁸ Menell refers to research that demonstrated that technological advancement and increased human capital of the labour force in the United States of America, accounted for between 80 and 90 percent of the

⁷²⁵ S Kamiyama, J Sheehan and C Martinez *Valuation And Exploitation Of Intellectual Property- STI Working Paper* (2006) 4. Available at <https://www.oecd.org/sti/sci-tech/37031481.pdf> (accessed on 17 February 2017)

⁷²⁶ Ibid

⁷²⁷ Ibid

⁷²⁸ PF Drucker *Knowledge-Worker Productivity: The Biggest Challenge*. Vol 41. No. 2 Reprint Series. California Management Review (1999) 79. Available at http://www.forschungsnetzwerk.at/downloadpub/knowledge_workers_the_biggest_challenge.pdf (accessed on 19 February 2017)

annual productivity increase in their economy between 1909 and 1949.⁷²⁹ Similar results for the period 1929-1982 showed that 68 percent of an increase in productivity was due to advances in scientific and technological knowledge and 34 percent thereof was due to improved worker education.⁷³⁰

It is therefore widely recognized that technological advancement and enhanced human capital are the principal engines of economic growth in the United States and industrialized countries.⁷³¹ Within the context of important intellectual property being created within companies, it also becomes important to protect these innovations. Intellectual property allows a creator or inventor to benefit from his invention, fosters return on the investment, contributes to the wellbeing and development of society and supports the creation of employment. Intellectual Property is an umbrella term used to describe intangible assets created by the human mind that attain economic value once the conceptual assets are rendered into tangible form. The law recognizes and protects various forms of IP, including trade marks, patents, copyright, design rights, know-how, trade secrets, performances, plant breeders' rights *et al.* Intellectual Property rights may be acquired in particular for the following categories of intangible assets such as Innovative products and processes, through patents and designs; cultural, artistic and literary works including, in most countries, also for computer software and compilation of data, through copyright protection; creative designs, through design rights. distinctive signs, mostly through protection of trademarks including collective and certification marks, but in some cases through geographical indications⁷³² microchips, though the protection of layout-designs or topographies of integrated circuits; denominations for goods of a given quality or reputation attributable to the geographical origin, through protection of geographical indication; trade secrets, through protection of undisclosed information of commercial value.

⁷²⁹ PS Menell "Intellectual Property: General Theories" in B Bouckaert and G Geest (eds) *Encyclopaedia of Law & Economics* Vol 2 (2000) 134. Available at <http://levine.sscnet.ucla.edu/archive/ittheory.pdf> (accessed on 20 February 2017). Menell refers to studies of Robert M. Solow that were published during 1957. See RM Solow 'Technical Change and the Aggregate Production Function', 39 *Review of Economics and Statistics*, 312-320.

⁷³⁰ Menell here refers to data from Edward Denison where he studied trends in American economics. EF Denison *Trends in American Economic Growth, 1929-1982*, Washington, Brookings Institution.

⁷³¹ Menell refers to the publication of FM Scherer and D Ross *Industrial Market Structure and Economic Performance* 3 ed Boston, Houghton Mifflin (1990).

⁷³² Namibian Trade Mark Law does not yet make provision for the protection of geographical indicators.

6.11 Franchising and Intellectual Property

Franchising is intrinsically linked to and connected with intellectual property, since it is based on a license of intellectual property rights and know how.⁷³³ With regards to franchising, franchises are in essence business systems where the intellectual property of the franchisor is licensed for use, under very specific conditions and performance criteria, to franchisees in return for the payment of royalties. IP related to franchises generally includes trade marks, copyright, promotional material, business systems, marketing systems, confidential information, know-how, processes and shop fit-outs.⁷³⁴ IP rights provide powerful rights that allow the owner to commercialize a certain invention, design, copyright protection or trade mark.

6.11.1 Trade marks

The purpose of a trade mark is to distinguish goods and services of one enterprise from goods/services of other enterprises. The less descriptive of the nature of the business or the kind, quality or any of the characteristics of the goods, the stronger monopoly will be obtained. Whilst common law rights can be acquired through the use, promotion and exposure of a trade mark, the advantages of registration are substantial. The benefits may be summarised as follows namely that a registered mark provides the exclusive right to use, promote and expose the mark in the country of interest; it protects graphic design elements and the corporate identity; protects the investment in the trade mark and provides protectable rights for a substantive income stream; trade mark owner, by being in a position to offer statutory protection of a registration, is more likely to attract licensees and other forms of commercial interest and activity; provides blanket protection in the country of interest; provides umbrella rights for protecting trading names and brands against companies, trading names and domain names; if a trade mark has been filed, the Proprietor can claim priority for a period of six months in other jurisdictions, in terms of the Paris Convention. It furthermore acts as a deterrent to potential infringers; provide an easy remedy (the action for infringement) whereby third parties may be restrained from using the same or confusingly similar marks; can assist against counterfeit goods and it can be recorded at customs and could be more difficult to enforce rights if a business does not have registered trade mark protection, as an acquired reputation in the trade mark would have to be shown. An important business tool, related to trade marks, is brand

⁷³³ European IPR Helpdesk *Commercialising Intellectual Property: Franchising* 2 ed (2015) 2. Available at <https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-Commercialising-IP-Franchising.pdf> (accessed on 20 February 2017)

⁷³⁴ J Otieno-Odek *The Role of Intellectual Property in Franchising Arrangements* WIPO – KEPSA Seminar on Intellectual Property and Franchising For Small And Medium Sized Enterprises (2006) 3. Available at http://www.wipo.int/edocs/mdocs/sme/en/wipo_kepsa_ip_nbo_06/wipo_kepsa_ip_nbo_06_3.pdf (accessed on 19 February 2017)

valuations. The value of a brand can be used, for example, to obtain finance and generate additional income. Some of the major breakthroughs for SMEs within recent times relate to business that acquired significant brand value opposed to physical or tangible assets.

6.11.2 Copyright

Copyright is a creature of statute which means that it is a right created by law. For copyright to exist, certain basic conditions have to be met, such as the work needs to be one of the recognized copyright protectable works. In Namibia, literary works, musical works, artistic works, sound recordings, cinematograph films, broadcasts, published editions and programme carrying signals are all recognised as works of copyright. The layout of a store-front, as an artistic work, the content of client listings and other documentation, being literary works, can be subject to copyright. Some of the basic requirements for copyright protection (as addressed above under Intellectual Property Legislation in Namibia), are that the work needs to be reduced to material format and it has to be original. Copyright ownership provides the owner with exclusive rights to reproduce the work in any manner or form and to distribute, export, import, sell, hire and communicate the work to the public. Furthermore, copyright can last for 50 years, even after the death of the copyright owner.

6.11.3 Other forms of IP

In addition to trade marks and copyright, design law can protect the way a product or design looks and prevent third parties from creating or using the same or substantially similar design. Patents can protect inventions for 14 year terms in Namibia (these forms of intellectual property are addressed in more detail above under Intellectual Property Legislation in Namibia). Another important form of intellectual property, is confidential information, trade secrets and know-how. In a recent South African case, *JRMM Technologies (Pty) Ltd and another v RD Ball and J Morgan* (8595/2015), the High Court of South Africa, Pretoria Division, granted an urgent interdict where a client database was used without authorisation. In this matter the Respondents were restrained from divulging confidential information and trade secrets, using confidential information for canvassing or soliciting business and soliciting business from customers of the Applicant. The Court held that confidential information has to be useful, not public and of objective economic value. Furthermore, a party claiming that information is confidential must have proprietary, quasi-proprietary or other legal interest therein. This case is indicative of the value that intellectual property, in the form of confidential information, has for businesses and may also find application in Namibia.

6.12 Intellectual Property and the application thereof for commerce

The WIPO SME division sets out that: “If the innovative ideas, creative designs and powerful brands of your SME are not legally protected by, then these may be used by other enterprises without limitation. However, when they are protected by IP rights, they acquire concrete value for your enterprise as they become property rights which cannot be commercialized without your authorization”.⁷³⁵ Commercialisation is the process of bringing intellectual property to the market, in order to be exploited.⁷³⁶ Some of the more common forms are franchising and licensing, assignment and joint ventures.⁷³⁷ Franchising is intrinsically linked connected with intellectual property, since it is based on a license of intellectual property rights and know how.⁷³⁸ Companies are also using intellectual property as so-called “bargaining chips” in negotiations with other businesses, and leveraging them to attract external financing from banks, investors and other sources.⁷³⁹ Owning Intellectual Property lets companies develop very favourable partnerships and licensing relationships.⁷⁴⁰ The appropriate use of IP may contribute to bring high rates of return on capital, which is crucial in order to attract capital investors. Not only does an intellectual property right serve as legal assets, but also as financial instrument. It therefore performs a dual function of protecting a valuable income stream and attracting possible investment. For investment, the intellectual property needs to be expressed in a way that investors will want to support the business. Therefore, having appropriate IP rights, specific to the business, will make the proposition more attractive to potential investors. Whilst it is important that businesses protect their intellectual property, it is also important that the innovation of a business is managed. The potential applications for the IP in the technology or product and the market should be defined to get a better idea of the opportunities and challenges, so as to exploit the IP. Therefore, having an intellectual property strategy does not only mean that IP has to be identified, but it also has to be developed, protected and, where possible, exploited. For Namibian businesses, having unique intellectual property rights, which pertains to socio-economic or technological problems, such as for example an internet solution for rural areas, can provide a business with a competitive market advantage and also attract potential investors.

⁷³⁵ *Intellectual Property for Business* at 6.

⁷³⁶ *Idem* on footnote 11

⁷³⁷ *Ibid*

⁷³⁸ *Ibid*

⁷³⁹ *Idem* on footnote 1

⁷⁴⁰ D Kline and KG Rivette *Discovering New Value in Intellectual Property* January-February Harvard Business Review (2000) 58. Available at <https://hbr.org/2000/01/discovering-new-value-in-intellectual-property> (accessed on 20 February 2017)

6.13 Conclusion

In the beginning stages of a business, franchise or start-up, the value of intangible assets will often surpass the monetary capital at hand. Therefore it is important to understand where the invention, innovation and intellectual property fits into the market and assess the existing competition. The protection of intellectual property should be strategically planned and managed. IP protection is therefore only the first step to commercial exploit intangible assets. As set out above, intellectual property rights are essentially exclusive commercialization rights, in that the owner of an intellectual property asset, is in full and exclusive control over the use of the asset, whether a trade mark, an invention, a design or a trade secret. The effective creation and/or acquisition, management, exploitation and commercialization of valuable IP assets, are key cornerstones upon which today's successful businesses are built and developed. Intellectual property assets can give a business a competitive edge in an increasingly competitive business environment.

6.13.1 Findings emanating from the franchise survey

Research carried out in terms of this franchise study in late 2016 and early 2017, delivered important findings. These are set out below. It was found that franchised brands are everywhere but closer examination reveals that they operate as master licensees or franchisees of foreign franchisors. The bulk of these concepts originate from South Africa. We were unable to locate any locally developed franchise concepts. Furthermore, Relying on foreign-based franchise concepts alone can create several various difficulties, including the following:

6.13.1.1 Franchise-related problems

The supply chain for prescribed goods is long and expensive. Problems with clearing through customs exacerbate the situation and make goods expensive for local consumers. Restrictive clauses in some franchise agreements prevent franchisees from purchasing goods locally, even though they could obtain goods of the same quality at significantly lower prices. Franchisee support is a long distance away. This sometimes results in the untenable situation of franchisees not receiving meaningful ongoing support. This notwithstanding, they are still expected to pay similar percentages in management services fees and royalties as their foreign counterparts for the duration of the franchise agreement.

Some franchisors appear to be guilty of not adhering to internationally accepted best franchise practices. While some fail to give proper ongoing support, others inflate prices for prescribed goods. Another complaint emanating from certain franchisees is that they are contractually obliged to pay

monthly contributions to the network's marketing fund but the money is spent on promotional activities primarily benefitting franchisees in the franchisor's home market.

6.13.1.2 Market-related problems

Foreign brands are not always well known in Namibia. One could argue with some justification that this initially dilutes the benefits of investing in a franchise. The product mix offered by a foreign-based concept is not always optimally suited to local market conditions. Constraints arising from clauses in the franchise agreement prevent franchisees from exploiting the full potential of their market by, for example, modifying goods or adding goods to the range, to meet local demand.

6.13.1.3 Limited access to opportunities

A frequently-heard complaint, although largely based on anecdotal evidence, suggests that some individuals, often expatriates, secure a master licence for Namibia from a foreign franchisor. In terms of accepted franchise practice, master licensees are expected to pilot the concept in Namibia and then offer franchises to others. In reality, this rarely happens. Probably because Namibia is a relatively small market, some master licensees are content to operate one business unit only. This means, of course, that they fail to exploit the full economic potential of the brand. Others expand through a network of "branches". Either way, the rest of the population may be precluded from investing in what they consider to be desirable brands. Nevertheless, this is an accepted franchising practice.

6.13.1.4 Limited understanding of the concept

Prospective franchisees are seemingly unaware of the characteristics that distinguish a fair franchise opportunity from a risky one. Increasing awareness of the pros and cons of investing in a franchise would go a long way towards avoiding difficulties. It appears that business owners do not understand the potential of franchising. They could use the concept to create a national, perhaps even international, presence for their brand by offering franchises. Here again, education would go a long way towards addressing this shortcoming. A word of caution, although the complaints outlined above should be taken seriously and acted upon, prohibiting the acquisition of foreign master licenses may lead to attempts to reinvent the wheel. The introduction of many of the goods and services foreign franchisors offer could provide a boost to the Namibian economy and many opportunities.

6.13.1.5 Established franchisees

Franchised brands active in Namibia are almost exclusively of South African origin. Some Namibians consider the presence of foreign brands as controversial. As we will demonstrate in Chapter 7, the

integration of foreign brands and business systems can provide a positive influence on the development of the Namibian economy. International franchises often have well-developed business systems that can benefit a franchisee who is starting a new business. Big brands also have the potential to draw customers. However, foreign franchisors should adhere to the tried and tested principles of ethical franchising as they are practised the world over.

6.13.1.6 Franchise formats

A number of franchisees complained about the fact that they have to deal with a franchisor that is based outside Namibia. They expressed that view that it would assist them if foreign franchisors would establish offices in Namibia or appoint local master licensees in the country. In their opinion, this would provide Namibian franchisees with improved support, particularly since a local office or master licensee would be at the coalface in Namibia and would obtain first-hand knowledge of the local conditions and challenges experienced by franchisees.

6.13.1.7 Franchise sectors

Our research extended into a wide variety of business sectors including: fast foods and coffee shops; retail; industrial supplies and services; body culture; motor vehicle sales and maintenance and petrol stations. In addition, we also met with representatives of major commercial banks, accounting firms, business organisations and the media.

6.13.1.8 Initial impressions

Our findings revealed that although some franchisors provide excellent initial and ongoing support others are less diligent, especially when it comes to local brand building initiatives and ongoing franchisee support. We also established that some franchisors appear to take unacceptable shortcuts while others force their franchisees to purchase goods at inflated prices. We believe that carefully targeted interventions by the NACC could result in significant improvements for the franchise sector, both in terms of accessibility and commercial viability. On the upside, most established franchisees agree that to operate under a known brand using tried and tested systems and procedures has helped them to become established quicker than would otherwise have been possible. They also concede that in most instances, initial training and support has been excellent but are less enthusiastic when it comes to ongoing support. As mentioned previously, some foreign franchisors offer superb ongoing support while others are less diligent. Indeed, several of the franchisees we interviewed were adamant that within their networks ongoing support offered at local level is virtually non-existent. To obtain meaningful assistance from their franchisors requires them to visit the franchisor's head office. Some franchisees mentioned that they underwent initial training, but received no follow-up store visits from their franchisors' personnel. Another difficulty

widely mentioned by franchisees is the widespread practice of forcing franchisees to purchase prescribed core items from the franchisor. The original justification for inserting such a clause into the franchise agreement is to enable the franchisor to uphold quality standards and consistency throughout the network. In some cases, this clause appears to be misused. Franchisees argue that it forces them to purchase goods at inflated prices. Because competitor activity limits selling prices this impacts negatively on profit margins. This practice also causes supply and stock level issues. Many franchisors are based outside Namibia and most of the prescribed core items have to be ordered from South Africa. This involves long lead times and substantial delays. These issues affect Namibian franchisees' ability to operate their businesses effectively and to provide high levels of customer service. While it might make sense to order branded goods or products that are unique to a specific franchise system from a franchisor or nominated party, significant challenges are created for franchisees if they have to wait for products to arrive from South Africa when those products could have been sourced locally in Namibia. Import duties, quotas and transport costs also compound the problem. Although most franchise agreements seem to contain an "escape clause" in franchisees' favour, allowing them to purchase from alternative sources should the need arise, conditions linked to this clause make implementation impractical. Examples are the requirement that the price offered by an alternative supplier must be lower by a specified percentage. Moreover, the onus is on the franchisee to prove that the goods are of at least equal standard. Franchisees we interviewed consider these requirements to be too onerous, so they give in and continue to purchase from the prescribed supplier. Lastly, some franchisees of foreign franchisors are unhappy about being forced to pay contributions to their network's marketing fund without any meaningful advertising or marketing activities taking place in Namibia. Those franchisees who raised complaints would like to see the following relief measures implemented:

Changes to agreements

Most franchisees stressed that they understand and accept the need to uphold network-wide quality standards. They are therefore not opposed to the contractual requirement to purchase goods exclusively from prescribed sources but want an assurance that pricing will be fair. These franchisees also believe that their franchisors should assess local suppliers and accredit them subject to the network's standards being met.

Fair application of marketing contributions

Franchisees would like to see an obligation placed on foreign franchisors to spend marketing monies originating from Namibia on marketing and brand-building activities within Namibia. Some franchisees mentioned that they are required to contribute to marketing funds but never receive

any benefit from those funds. In fact, they have to pay for their own marketing and the creation of marketing materials.

Meaningful ongoing support

Namibian franchisees want the same level of ongoing support as is enjoyed by their counterparts who operate within the network's home market. Examples are regular store visits, assistance with target setting and planning, ongoing training of franchisees and their staff etc.

Some flexibility regarding the product range

Franchised networks the world over will typically take a cookie cutter approach. They insist that their core product offering is what the brand stands for and must be preserved. Several Namibian franchisees disagree with this approach. They maintain that Namibian consumers differ from, for example, South African consumers and that their franchisor should grant them the freedom to adapt the range to local expectations.

Easing of government-imposed restrictions

- This is not a franchisor / franchisee issue at all but affects government regulations. All respondents within this sample, regardless of whether they were happy or less happy with their lot as franchisees, complained about government-imposed restrictions on doing business. Apart from the usual complaint about taxes being too high, they would like to see an easing of government restrictions on two main fronts namely the need to apply for import permits for essential goods on a case-by-case basis. This affects operations, reduces sales and causes delays and additional costs. As a result, profitability is reduced and with it franchisees' ability to pay taxes and create jobs. Franchisees would like to see import permits granted for periods of six to twelve months. A second front is the need to obtain work permits for foreign nationals with skills that are in short supply in Namibia. Franchisees would like to see government take a two-pronged approach: (a) As a short-term solution, a simpler process for obtaining work permits for foreigners with specialised skills. (b) As a long-term solution, the stepping-up of training to create a local pool of skilled workers.

6.14 Enforcement of competition law

Some interviewees mentioned examples and situations that could point to competition law contraventions. Specifically, there might be circumstances that involve price fixing or collusion. The NACC might wish to motivate persons to file complaints, where appropriate. Investigations may be necessary in some cases.

(a) Established franchisors

Best effort notwithstanding, the team of researchers were unable to locate any franchisor operations originating from Namibia. Anecdotal evidence exists that a major retailer tried to go the franchise route. However, implementation of the programme was patchy at best and eventually fizzled out.

(b) Prospective franchisors

Although handicapped by time constraints, the researchers could identify several businesses that may be ready for expansion through franchising. This indicates that potential for the development of a sound home-grown franchise sector does indeed exist. In the course of the interviews, we sourced various suggestions relating to franchise systems that might have potential for Namibia. A number of persons suggested the development of franchises that are aimed at the lower end of the market or that provide services such as shoe repairs, plumbing, electrical services and related trade services. The view was expressed that such franchises would present an opportunity to individuals to become entrepreneurs and start their own businesses and that this would improve employment levels. These types of businesses do not require substantial capital and can often be started by individuals on their own. While a number of fast food franchises operate in Namibia, the relevant outlets are aimed at people with higher income levels. It was suggested that there is space for fast food franchise systems that cater for the lower end of the market, and that there might be potential for such franchises to become successful in smaller towns and villages. As is the case in other emerging markets, unlocking this potential may require assistance by government. We asked our respondents to identify roadblocks which, in their view, hinder the development of franchises. We also asked them to indicate what format they believe government assistance should take. The feedback we received is arranged below in random order.

(c) Lack of awareness about franchising

There is a general lack of awareness about franchising. The negative impact this has on the development of franchising is two-fold: firstly, prospective franchisors are largely unaware of the potential of franchising to grow their businesses into national, eventually even international, networks secondly; prospective franchisees are largely unaware of the advantages of investing in a franchise and the potential pitfalls they need to watch out for.

(d) Access to franchise know-how

While some of the entrepreneurs we spoke to are keen to expand their businesses by granting franchises to others, they readily admit that their understanding of the concept is limited. They require access to professional services of the highest standard but at affordable fees. This in turn

would require interventions designed to build local capacity in all facets of developing and maintaining a sound and prosperous franchise sector.

(e) Improved access to funding

Prospective franchisors are well aware that standard banking requirements exclude otherwise suitable candidates from obtaining funding. They call for the introduction of schemes that provide prospective franchisees of approved franchisors with easier access to funding. Security also poses a challenge, since banks usually require franchisees to provide suretyships or to provide property that can be bonded as security for repayment of loans.

(f) Removal of import restrictions

This topic came up once more in discussions with prospective franchisors as well as existing franchisees. Whilst dissatisfaction with import restrictions appears to be widespread, it is of specific concern to fast food operators with chicken-based menus. They claim that ruling prices for local chicken are 30% higher than imports of comparable quality. Chicken farmers admit this but claim that their input costs are higher because they have to import maize from South Africa.

(g) Protective legislation

In keeping with the mindset of typical entrepreneurs, those prospective franchisors we interviewed expressed concern that the introduction of legislation might stifle entrepreneurship.

They did agree, however, that legislation designed to curb excesses by irresponsible or even fraudulent franchisors would level the playing field and would, therefore, be in the interests of the sector. Some of the larger franchise businesses did not believe that legislation was necessary and were concerned that if this was introduced, it would result in difficulties and additional costs.

6.15 Bankers

In compliance with local banking legislation, the Namibian branches of South African banks operate relatively independently. Although they make their own lending decisions, they are happy to fund the establishment of franchises originating from South Africa provided that their head office recommends it. This can be seen as yet another important benefit of “importing” well-developed foreign brands. However, although the representatives of the major banks appear to have a reasonable grasp of the potential advantages of franchising, they are nevertheless reluctant to grant funding to franchisees of relatively unknown brands. In such instances, they apply standard assessment criteria. This means that they expect loan applications to be backed by adequate assets. It is easy to see that this disqualifies many otherwise deserving applicants from obtaining funding. Bankers respond by contending that the markets differ widely. For example, not all products and

services that are successful in South Africa are equally successful in Namibia. They add that some foreign-based franchisors neither provide the necessary level of support to their franchisees to ensure optimal operations nor do they exercise sufficient control. This, combined with high rentals in retail centres, may derail new franchisees. They have also, in certain instances, simply run out of capital before they reach profitability. Bankers expressed the opinion that as matters stand government does not adequately support the SME sector. They further believe that the introduction of legislation that controls the franchise sector would be beneficial as long as it does not stifle entrepreneurship. South Africa's Consumer Protection Act was cited as an example of useful legislation to consider. Overall, we did not identify any specific negative perception regarding franchising from bankers' side. It appears that a bank would evaluate a potential franchisee on the same basis as any other potential client. Accordingly, the potential franchisee would have to be able to display business skills, must be able to provide security and the business plan must be sensible and financially sound.

6.16 Accountants

Accountants appear to have a good grasp and understanding of franchising. Their views include that compliance with the business system is critical for the sustainability of the franchised business. Basic business planning, including financial planning and the execution thereof, as well as business continuity planning and supply chain management, are important. Whilst most franchisors provide good initial support and training, certain franchisors offer little ongoing support. Consideration should also be given to education and training regarding franchising, as well as to a functioning franchise association, as well as legislation similar to that of the South African CPA. Steps should also be taken to develop and facilitate the sourcing of products locally, where possible and appropriate.

6.17 Representatives of organised business

Statements made by representatives of organised business essentially reflect what has been said above. One of them added that the Namibian SME Bank seems to lack familiarity with the concept of franchising. Asked what government could do to address this, the interviewees suggested the following: introduction of programmes designed to popularise franchising; easier access to funding for qualified franchisees of approved franchisors; a speeding-up of the business registration process and the removal of legal and statutory restrictions that impede the operation of businesses according to free enterprise principles.

6.18 SME facilitators

We met with consultants that focus on developing small and medium sized businesses. The input received during the meeting mirrored what came up in other interviews. It appeared that some franchises are successful, while others falter. Namibia is a unique market and some international brands are not suitable to the local environment. It is very important for a business to be able to attract customers and it seems that some business battle with this. The consultants were of the view that there is potential for franchising in Namibia, but appropriate business types should be identified. They suggested businesses that provide services such as plumbing and repairs.

6.19 The media

As matters stand, Namibia's media largely ignore franchising. In fact, the only references to franchising we could find presented the concept in a negative light. It appears that this approach is largely based on a lack of understanding of the concept and the potential it holds for the development of Namibia's economy. This assumption is backed up by an actual experience. We conducted an exploratory interview with the publisher of a long-established coastal newspaper and explained the basic principles of franchising. The interview ended with an undertaking that the newspaper would publish a series of five introductory articles on franchising. We also secured agreement in principle from the chairman of the local Chapter of the Chamber of Commerce to publish articles on franchising in future editions of their newsletter. This is encouraging.

6.20 The status of enterprise development and job creation in Namibia

There are many franchise and similar business operations in Namibia. Annexure "B" is a list of franchises and possible franchises identified. There are varying levels of interest in entrepreneurship in Namibia. There are a few success stories. We did not find any local successful franchised businesses. Certain businesses certainly indicated potential.