REPUDIATION IN FRANCHISING AND THE FRANCHSING CODE OF CONDUCT

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Introduction

There are many cases where a franchise agreement is breached or may be terminated that are not covered by the *Trade Practices (Industry Codes - Franchising) Regulations 1998 (Cth)* ("Code").

The Code is an industry code introduced in 1998 pursuant to Part IVB of the Trade Practices Act 1974 (Cth) ("the Act"). S51ACA(a) of the Act specifically provides that franchising is an industry.

It is clear from both the wording of the Code and the Act that the legislative intent was that the Code is not meant to "cover the field" [2] in regard to franchising law in Australia. Section 51AEA states:

> "It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part."

C2 of the Code sets out:

> "The purpose of this code is to regulate the conduct of participants in franchising towards other participants in franchising."

Although compliance with the Code is mandatory it is clear that the Code does not attempt to codify the law regarding franchising in Australia.

Consequently, recourse may still be had to common law to determine many issues that arise in a franchise relationship. This paper will deal only with the issue of repudiation of a franchise agreement.

The questions that will be considered are whether the general contractual principles relating to termination for anticipatory breach and damages for the loss of benefit of a contract apply when a franchisee or a franchisor, by words or conduct, repudiates his obligations under the franchise agreement, implied and essential terms in a franchise agreement and the consequences of breach of those terms.

Termination under code

Clauses 21 to 23 of the Code deal with termination as follows:

21 Termination — breach by franchisee

(1) This clause applies if:

(a) a franchisee breaches a franchise agreement; and

(b) the franchisor proposes to terminate the franchise agreement; and

(c) clause 23 does not apply.

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[1] I acknowledge the contributions of Peter Matus, Solicitor, Bywaters Timms whose research was invaluable in the completion of this paper.

[2] Master Education Services Pty Limited v Ketchell [2008] HCA 38

(2) The franchisor must:

(a) give to the franchisee reasonable notice that the franchisor proposes to terminate the franchise agreement because of the breach; and

(b) tell the franchisee what the franchisor requires to be done to remedy the breach; and

(c) allow the franchisee a reasonable time to remedy the breach.

(3) For paragraph (2) (c), the franchisor does not have to allow more than 30 days.

(4) If the breach is remedied in accordance with paragraphs (2) (b) and (c), the franchisor cannot terminate the franchise agreement because of that breach.

(5) Part 4 (resolving disputes) applies in relation to a dispute arising from termination under this clause.

22 Termination — no breach by franchisee

(1) This clause applies if:

(a) a franchisor terminates a franchise agreement:

(i) in accordance with the agreement; and

(ii) before it expires; and

(iii) without the consent of the franchisee; and

(b) the franchisee has not breached the agreement; and

(c) clause 23 does not apply.

(2) For subparagraph (1) (a) (iii), a condition of a franchise agreement that a franchisor can terminate the franchise agreement without the consent of the franchisee is not taken to be consent.

(3) Before terminating the franchise agreement, the franchisor must give reasonable written notice of the proposed termination, and reasons for it, to the franchisee.

(4) Part 4 (resolving disputes) applies in relation to a dispute arising from termination under this clause.

23 Termination — special circumstances

A franchisor does not have to comply with clause 21 or 22 if the franchisee:

(a) no longer holds a licence that the franchisee must hold to carry on the franchised business; or

(b) becomes bankrupt, insolvent under administration or an externally-administered body corporate; or

(c) voluntarily abandons the franchised business or the franchise relationship; or

(d) is convicted of a serious offence; or

(e) operates the franchised business in a way that endangers public health or safety; or

(f) is fraudulent in connection with operation of the franchised business; or

(g) agrees to termination of the franchise agreement.

The clauses are very specific about the circumstances in which each applies. They do not cover all circumstances when a franchise agreement may be terminated. One of those circumstances is repudiation.

What is repudiation?

Repudiation can be an ambiguous word and is used in various senses[3]. Here we are only interested in cases where there is a valid, binding contract or franchise agreement in existence between the parties whether that agreement is in writing or implied from the conduct of the parties.

The law on repudiation is generally well understood and many cases have considered the definition of what constitutes repudiation. It was very clearly set out by Gibbs CJ[4] when he stated that repudiation occurs when one party renounces liabilities under the contract. That party evinces an intention no longer to be bound by the contract[5] or shows a clear intention to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way[6]. In such a case the innocent party is entitled to accept the repudiation, thereby discharging himself from further performance, and sue for damages[7].

That definition incorporates a number of situations in which an innocent party may terminate including:

- showing a clear intention at the time that performance is due of being unwilling or unable to perform a contract; or
- indicating before the time for performance is due that when the time arrives, the party will be unwilling or unable to perform the substance of his obligations or to perform an essential term of the contract[8].

If the innocent party accepts the defaulting party's repudiation, the contract may be terminated or rescinded by the innocent party although it is not rescission ab initio.

For the innocent party to be entitled to rescind an executory contract on account of the other's repudiation, the innocent party must show not only the other's repudiation but his own readiness and willingness up to the time of rescission to perform his essential obligations under the contract[9]. In other words, he must show that he is ready and willing to perform the contract[10]. If he cannot then he will lose. It is up to the party who claims there has been repudiation to prove that repudiation in fact exists at the time of the acceptance and termination.

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[3] Lord Wright in Heyman v. Darwins Ltd. (1942) AC 356, at p 378
[4] Shevill v Builders Licensing Board [1982] HCA 47; (1982) 149 CLR 620
[5] Freeth v. Burr (1874) LR 9 CP 208, at p 213
[6] Ross T. Smyth & Co. Ltd. v. T. D. Bailey, Son & Co. (1940) 3 All ER 60, at p 72
[7] Heyman v. Darwins Ltd. (1942) AC, at p 399
[8] Mr Justice McGarvie, "The Discharge of Contracts", Current problems in Law (Leo Cussen Institute forContinuing Education), Vol 2 (1980) p1 at p 9
[9] Rawson v Hobbs (1961) 107 CLR at 480-481
[10] Savoy Investments (Qld) P/L as trustee v. Global Nominees P/L as trustee [2008] QCA 282

If however the party accused of repudiation can point to an existing good ground for the refusal to perform the contact, they may be taking the point that the "innocent party" had in fact failed to perform a condition and therefore was not entitled to rely on the repudiatory conduct or that the "innocent party" brought about the breaches also disentitling them to rely on the conduct as being repudiatory.

Further, a party may be in constant breach of a contract but continue to maintain that they are bound by and will observe the terms of that contract. That leads to a difficult situation where "though maintaining a claim to the benefit of a contract, a party may repudiate it or commit a fundamental breach of it by refusing to perform his obligations according to its terms"[11].

The best way to understand when a party may have or have not repudiated a contract is to look at some of the cases.

Azzi

Sometimes it is difficult to know if the conduct was in fact repudiatory. *In Azzi & Ors v Volvo Car Australia Pty Ltd* [12] *Azzi* carried on a Honda Car dealership at 3 locations. In 2002 Azzi was appointed dealer for the Sydney south eastern region. The agreement started on 1 July 2000 and was documented in a representation letter that was finally signed on 16 September 2000 when the parties also signed a Dealer Agreement for a term of 1 year.

The representation letter stated:

> "The initial Dealer Agreement will be for a period of one (1) year, which Agreement will be replaced by a Dealer Agreement for a term of five (5) years, prior to the expiration of the one (1) year Agreement.
>
> "The conditions for renewal, non-renewal and termination will be clearly established within both the one (1) year and five (5) year Agreements".

By the end of the first year and before the 5 year agreement was executed the relationship between the parties had soured. Volvo's complaints about the franchisee's performance were disputed.

Volvo made a number of assertions that it was not bound to give the replacement 5 year agreement but then totally resiled from that situation. Volvo's solicitors in 2 letters made it abundantly clear that the 5 year Dealer Agreement was to commence 1 July 2001. That letter stated that although Volvo thought the franchisee was not meeting some of its obligations, the agreement remained on foot and Volvo would continue to honour its obligations in accordance with the agreement.

That was a clear unequivocal statement of Volvo's intention to abide by the contract and grant the 5 year term. Because this statement was made before repudiation was accepted, there was not then any repudiatory conduct to accept. Before the solicitor's letter the conduct could have been regarded as repudiatory.

The draft 5 year agreement contained a term that Volvo could terminate on 120 days notice. When the franchisee received the draft document they claimed it was repudiation of the terms of the agreement, accepted the repudiation and terminated.

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[11] Progressive Mailing House Pty Ltd v Tabali Pty Ltd [1985] HCA 14; (1985) 157 CLR 17
[12] [2007] NSWSC 319

There is much discussion in the *Azzi* case about the type of representation made by Volvo. The court held in terms of *Masters v. Cameron*[13] that the representation letter fell within the fourth class namely that the parties intended to be immediately bound but contemplated that the Dealer Agreements might include by consent additional or different provisions. The representation letter had contemplated that provisions would be included regarding renewal, non-renewal and termination. Therefore the inclusion of the 120 days termination clause was not outside the scope of what was anticipated by the representation letter.

If Volvo included in the Dealer Agreement renewal or termination terms that were not acceptable to the franchisee the representation letter would continue to cover the situation until the final terms were agreed. The franchisee could object to the clauses that were not acceptable.

Volvo had the obligation to grant the franchisee a dealership for a term of 1 year to be replaced by a 5 year agreement.

The court stated that when considering repudiation "the question is what one party's allegedly repudiatory conduct conveys to the other, not what the first party knows or intends in respect of the contract".

Leaving *Azzi* for a moment, one must take into account the remarks of Deane and Dawson JJ in *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*[14] when they cited Lord Herschell L.C. from *Carswell v Carswell*[15]:

> "…an allegation of repudiation of contract in a civil case does not involve an assertion that the alleged repudiator subjectively intended to repudiate his obligations. Thus, it is of little assistance in the present case to identify reasons why the lessor was unlikely to have subjectively desired to repudiate its agreement to grant a lease. An issue of repudiation turns upon objective acts and omissions and not upon uncommunicated intention. The question is what effect the lessor's conduct 'would be reasonably calculated to have upon a reasonable person'."

So it can be seen that the subjective intentions of Volvo in the *Azzi* case were irrelevant to the decision. What was relevant was the communication or non communication of those intentions to the franchisee.

The inclusion of the 120 day termination clause was consistent with class 4 of *Masters v Cameron*. Provisions different from or even inconsistent with the original agreement can be included by consent in the final agreement. In this case, the representation letter had been clear that terms regarding termination would be included in the dealer agreement. For the franchisee to contend that the inclusion of the 120 day termination clause was repudiatory was inconsistent with the basis on which the representation letter was enforceable – namely under class 4 of Masters v Cameron.

The parties had not negotiated all the terms of the 5 year agreement and there was no reason to assume it would be identical with the 1 year agreement. It was therefore at the time not open to the franchisee to terminate for repudiation.

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[13] (1954) 91 CLR 353
[14] (1989(166 CLR 623
[15] (1893) 20 L.R. (HL) 47 at p.48

Of course, the situation would have been different if the franchisee had terminated before the solicitor's letter was sent.

Since repudiation can only be accepted if a party shows a clear intention not to be bound by a contract, even if a party does engage in repudiatory conduct, if they clearly and unequivocally resile from that conduct before the other party accepts the repudiation, there is no repudiatory conduct on which to rely and terminate. That is because they have shown clearly they do intend to be bound by the terms of the agreement.

The only mention of the Code in *Azzi* was in regard to disclosure and the c11 statement. It is therefore clear that the Code had no application in this case whatsoever. That was because the repudiation fell outside the situations covered by C21 to 23 of the Code.

Tone 'n' Tan

However the question of whether or not there has been repudiation of a franchise agreement it is not always so ambiguous. Sometimes the repudiation is so clear that no one can doubt that it exists.

Such a case is *Tone 'n' Tan Pty Ltd v Bailey & Ors* [16]. In that case Mr and Mrs Bailey were the first franchisees of the Tone 'n' Tan System in May 2002. The agreement was terminated by the Baileys by a letter to the franchisor in December 2003. The terms of the letter made it clear that the Baileys no longer intended to be bound by the franchise agreement. In January 2004 they opened a business at the same premises offering the same services as they had offered under the Franchise Agreement. They simply changed the name.

The franchisees put up a number of spurious claims. They claimed lack of training. The court held the franchisor had not breached their training obligations. The franchisees claimed the franchisor had failed to conduct special advertising campaigns which the court found had not been breached.

In what appeared almost as a last resort, the franchisees also claimed misrepresentation regarding figures but these claims were also dismissed by the court.

The franchise agreement actually had a term that the franchisees could terminate on giving 6 month's notice. They chose not to do that. They terminated immediately and without cause and opened the competing business.

The court understandably held that the franchisees had repudiated the franchise agreement by their letter of termination and opening the competing business. Those actions clearly indicated an unwillingness on the part of the franchisees to perform the franchise agreement.

The actions of the franchisees in ceasing to carry on the business caused an automatic termination of the agreement. Because of the franchisee's wrongful repudiation, the franchisor lost the expectation that the franchise agreement would be performed. The expectation was to receive the annual fee for the final 3 years at the fixed rate of $12,000 per annum therefore the franchisor received judgement for $36,000.

[16] [2007] WADC 97

The court may have granted an injunction in these circumstances because Yeats DCJ was satisfied that damages alone may not be adequate to compensate the franchisor for its loss in the circumstances because the franchisees had wrongfully used and profited from the business methods and procedures provided under the franchise agreement. The only reason the injunction was not granted was because the business had been sold.

There is no mention of the Code in *Tone 'n' Tan*. Again, the termination provisions in the Code just did not apply in these circumstances.

Essential terms

Both *Azzi* and *Tone 'n' Tan* dealt with the wrongdoer indicating that they would not perform the contracts at all. A repudiation of a contract may also occur when there is a breach of an essential term giving the wronged party the right to terminate and seek damages.

That raises the issue of what is an essential term of a contract. If one is to consider the termination of a franchise agreement for the breach of an essential term, then it must be clear what those essential terms are.

Some franchise agreements contain definitions of essential terms. Like leases, there is a list of clauses that are to be considered essential terms. There may be clauses such as: what products are to be marketed or distributed, use of intellectual property, devoting of sufficient time to the business, compliance with the operations manual, assignment, payment of money or insurance. Any list of essential terms in any franchise agreement must be tailor made to relate to a particular franchise system. For example the appearance of a vehicle would be very essential in a mobile franchise but irrelevant to a static location. Whereas compliance with fit out requirements or a menu board could be essential to a static location.

> "The parties to a contract may stipulate that a term will be treated as having a fundamental character although in itself it may seem of little importance, and effect must be given to any such agreement" see *Wickman Tools v. Schuler A.G.[1973] UKHL 2; (1974) AC 235, at p 251*[17].

If there is such a list and a franchisee breaches an essential term then a franchisor may be entitled to rely on a breach of the essential term and treat that breach as repudiation. However, the drafting of such a list would need to be done with extreme care. It would require very clear words to bring about the result, which in some circumstances would be quite unjust, that whenever a franchisor could exercise the right given by a clause to terminate a franchise agreement, he could also recover damages for the loss resulting from the failure of the franchisee to carry out all the covenants of the franchise - covenants which, in some cases, the franchisee might have been both willing and able to perform had it not been for the termination.[18]

Even if the parties are free to stipulate the terms to be regarded as essential, all the terms in the franchise agreement cannot be listed as being essential. That would create a situation where a minor breach of covenant such as an insignificant term like the requirement that all employees wear name badges, could bring about termination and damages for the loss of the bargain. In a case such as that, the franchisor would

[17] Shevill v Builders Licensing Board [1982] HCA 47; (1982) 149 CLR 620

[18] Shevill v Builders Licensing Board [1982] HCA 47; (1982) 149 CLR 620 – adapted from Gibbs CJ discussion regarding leases.

clearly be in breach of their implied obligation to exercise their rights with reasonableness and good faith.

If a franchisor did take the drastic step of termination of a franchise agreement on the basis of repudiation and was found to be incorrect, that would leave the franchisor open to a claim for damages from a franchisee.

Defining essential terms in franchise agreements

How then should essential terms of any franchise agreement be determined? Basically on the same basis as essential terms are defined in any contract or are held by courts to exist in contracts. What needs to be considered is:

> "A fundamental term of a contract is a stipulation which the parties have agreed either expressly or by necessary implication or which the general law regards as a condition which goes to the root of the contract so that any breach of that term may at once and without further reference to the facts and circumstances be regarded by the innocent party as a fundamental breach"[19]

This test was been accepted in Australia in *Associated Newspapers Ltd. v. Bancks (1951) 83 CLR 322, at p 337*, where the court stated it was necessary to decide whether the term "is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor."

An essential term in a franchise agreement must be distinguished from a warranty or non-essential term the breach of which would only entitle the innocent party to damages, not to terminate and sue for damages for the loss of the contract. The difference between a condition or essential term and a warranty was discussed in *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd*[20]

> "It was a term of the contract which went so directly to the substance of the contract or was so "essential to its very nature that its non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all." The breach of such a term by one party entitles the other party not only to obtain damages but also to refuse to perform any of the obligations resting upon him.
>
> "The essential character of the clause in question appears both from its own terms and from the circumstances in which the contract was made."…"Reference to these [external] statements is permissible because, when the question is whether a promise is a condition or a warranty, "there is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the

[19] Suisse Atlantique Societe d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale (1967) 1 AC, at p 422 , per Lord Upjohn
[20] [1938] HCA 66; (1938) 61 CLR 286

> substance and foundation of the adventure which the contract is intended to carry out" (per *Bowen* L.J. in *Bentson v. Taylor, Sons & Co. (No. 2)*[21]; and see *Halsbury's Laws of England*, 2nd ed., vol. 7, p. 333. A discontinuous and irregular display is a different thing from a guaranteed continuous and regular display. For these reasons, in my opinion, the clause was a condition and not a mere warranty. Accordingly any breach of the clause would entitle the defendant to determine the contract."

Looking from a franchisor's point of view an essential term may be that the franchise business be under the direct supervision of someone with a substantial interest in the business as in *Masterclass Enterprises Pty Ltd v Bedshed Franchisors (WA) Pty Ltd*[22]. In that case it was held that it was not unreasonable for the franchisor to withhold consent to the sale of the business where the purchaser proposed to appoint a manager and not have the business under the direct supervision of a person with a substantial interest in the business.

Another example in a franchise situation of a term which could be considered an essential term but that is generally expressed as a warranty is regarding ownership of intellectual property. Normally a franchisor will warrant that they own the intellectual property. From a franchisee's point of view, the franchisor's ability to grant a licence to use the intellectual property is absolutely essential. Any breach of that term by the franchisor perhaps involving the loss of the right to grant the licence to use the intellectual property, must result in the franchisee being able to terminate for breach of an essential term. However, generally this clause is not listed as an essential term in a franchise agreement. Therefore the necessary implication would be that it be regarded as a condition which goes to the root of the contract so that any breach of that term would entitle the franchisee to treat it as a fundamental breach therefore giving the franchisee the right to terminate and sue for damages.

Implying essential terms into Franchise Agreement

The Courts have shown that they are willing to imply essential terms into franchise agreements. See for example *The Cheesecake Shop v A and A Shah Enterprises*[23] where the court held that the franchisee had repudiated the implied term requiring reasonable notice to terminate the agreement. In that case, the franchisee gave immediate notice of termination under a franchise agreement where the original term had expired by the franchisee was still conducting the business. The court said it was akin to a holding over although there was no holding over clause in that agreement.[24]. The franchisee could have terminated on complying with the implied term that a party could terminate on giving reasonable notice. The franchisee choose not to give reasonable notice and therefore was found to have repudiated the franchise agreement.

Courts have considered for some time the conditions needed to be satisfied to imply terms into contracts. The accepted view is:

> "The conditions necessary to ground the implication of a term were summarised by the majority in *B.P. Refinery (Westernport) Pty. Ltd. v. Hastings Shire Council (1977) 52 ALJR 20, at p 26* : "(1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy

[21] (1893) 2 Q.B., at p. 281
[22] [2008] WASC 67
[23] [2004] NSWSC 625
[24] Many franchise agreements now contain holding over clauses.

> to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract." (at p347)[25]".

Courts would be very reluctant to imply a term into a franchise agreement that did not comply with those conditions.

In *Burger King*[26], the court was prepared to imply an obligation of reasonableness and good faith into the Development Agreement on the part of Burger King with which they had failed to comply.

There have also been obligations implied that a franchisor should exercise their rights reasonably, in good faith and not capriciously: *Bamco Villa Pty Ltd v Montedeen Pty Ltd; Delta Car Rentals Aust Pty Ltd v Bamco Villa Pty Ltd* [27]. In Bamco Villa the franchisor had purported to accept the franchisee's repudiation of the franchise agreement claiming that repudiation had occurred because of a large number of breaches by the franchisee.

However, the court held that the main reason the franchisee was in breach was because of the actions of the franchisor in opening a competing business and diverting telephone calls. It determined that the breaches (if there were any) did not show any intent not to perform or to repudiate the franchise agreement or amount to a failure to perform any fundamental or substantial contractual requirement.

In the circumstances, the franchisor's purported acceptance of repudiation was ineffective as being either in breach of the implied term of good faith and fair dealing or unconscionable conduct. The court stated:

> "The franchisor is not reasonably entitled to expect that the franchisee should raise finance to spend monies on upgrading its fleet and premises while the franchisor continues to foster competition against its franchisee in breach of the agreement and remains liable to the franchisee for substantial damages and costs."

Bamco Villa is a clear case where the franchisor basically got it wrong when it tried to rid itself of the franchisee. The result was that the franchisor was bound to pay substantial damages to the franchisee. The implied term of good faith in that case acted to the benefit of the franchisee. It falls squarely into the category mentioned above of a party accused of repudiation being able to point to an existing good ground for the refusal to perform the contract, and taking the point that the "innocent party" had in fact failed to perform a condition and therefore was not entitled to rely on the repudiatory conduct or that the "innocent party" brought about the breaches also disentitling them to rely on the conduct as being repudiatory.

One could wonder why the courts are so ready to imply a term of good faith and reasonableness into franchise agreements. It seems it is because although a franchise agreement is not a fiduciary relationship it involves a real degree of trust and confidence between the parties.[28]

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[25] Codelfa Construction Pty Ltd v State Rail Authority of NSW [1982] HCA 24; (1982) 149 CLR 337
[26] Burger King Corporation v Hungry Jack's Pty Limited [2001] NSWCA 187
[27] [2001] VSC 192
[28] Bamco Villa Pty Ltd v Montedeen Pty Ltd; Delta Car Rentals Aust Pty Ltd v Bamco Villa Pty Ltd

Courts have also been prepared to imply an obligation to give reasonable notice or that reports must be attended to in a reasonable time.[29]

In *Greenwood v All States Food Service* [30] the court implied a term of co-operation between franchisor and franchisee and held that the franchisee was in breach of that implied term.

It is apparent from the decided cases that the category of situations where the courts will imply essential terms into franchise agreements is only limited by the facts that come before the courts in any particular circumstances.

Conclusion

Of the two specific types of repudiation discussed in this paper, it appears that the application of the Code could be different.

It can clearly be seen that the termination provisions of the Code are not applicable where there is repudiation of a franchise agreement in regard to anticipatory repudiation: that is where one party evinces a clear intention not to be bound by the terms of the franchise agreement at all or the clear intention to fulfil the contract only in a manner substantially inconsistent with his obligations and not in any other way. That is clear from the many cases discussed in this paper.

That conclusion is reached because the actions by the "repudiating party" are not strictly in breach of the terms of the franchise agreement. If there is no breach of the terms of the franchise agreement, then there is no obligation under the Code to give a notice to the franchisee requiring the breach to be remedied or otherwise comply with C21 to 24 of the Code.

In the cases where there is a breach of an essential term set out in the franchise agreement, it could be strongly argued that the provisions of C21 of the Code will apply. Provided the essential term does not fall into one of the categories listed in C24 of the Code, a prudent franchisor would give the franchisee notice specifying the breach and notice of the franchisor's intention to terminate the franchise agreement because of the breach. The notice should tell the franchisee what the franchisor requires to be done to remedy the breach, and allow the franchisee a reasonable time to remedy the breach up to 30 days.

Situations can arise where there is termination of a franchise agreement because of a breach and although notice is not given it is not a breach of the Code. That situation arose in *Bonds Real Estate Sales Pty Ltd v Ray White (Vic) Pty Ltd*[31]. The damage that could have been done to the franchisor's reputation and goodwill justified immediate termination when the franchisee breached the law.

But what if the breach by the franchisee is a breach of an implied term in the franchise agreement? Is notice then required to be given under C21? Or is it a case where because the term is not actually set out in the franchise agreement, it is not necessary to comply with C21?

Because the term is implied into the franchise agreement, surely it is a breach of the franchise agreement thereby requiring that the notice under C21 be given by the

[29] e.g. Mr Whippy Pty Ltd v Oceanwalk Pty Ltd [2008] NSWCA 8
[30] Unreported decision 29 Apr 1994; Gleeson CJ; Handley JA; Cole AJA
[31] [2005] VSC 221

franchisor. It would probably be a more prudent course of action by the franchisor to give the notice.

From a franchisee's point of view, the same principles apply. Normally franchise agreements contain a term that if the franchisor is in breach of the agreement, the franchisee must give the franchisor notice specifying the breach and allowing a time to remedy the breach. If the breach complained of is an implied term, then the franchisee would also be prudent to comply with the specific term in the agreement and give the notice.

If however, the conduct of the franchisor amounts to anticipatory repudiation then the franchisee would have the same right as the franchisor to accept the repudiation and terminate the franchise agreement. That action by the franchisee may however lead to significant loss to the franchisee by the loss of the business and the benefit of rights granted under the franchise agreement. The termination obligations under the agreement may well be invoked meaning that the franchisee would be required to cease operating the business. That would leave the franchisee with a claim for damages and most probably a substantial legal bill.

Of course there would always be the argument that because the franchisor had repudiated the agreement, the franchisor is not entitled to rely on any further performance by the franchisee of its obligations under the agreement. From a lawyer's point of view that would be an interesting case to run!

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Endnotes

Reference material:
CCH Contract Law Commentary – Termination for Repudiation
G Gunasekara, 'Good faith, repudiation and franchise agreements' [2002] NZLJ 453
C Turner, Australian Commercial Law, Lawbook Co, 2006 – The Franchise Agreement
P Hamilton, Business and Franchise Practice Manual – Termination