

Franchising Update | Parliamentary Joint Committee on Corporations and Financial Services: Main Changes from the Australian Government response

Issue	Expected Change to Franchising Code	Further considering issue or comment but no change
Entering a franchise agreement		
Information and awareness	<ul style="list-style-type: none"> • Public register of franchisors. • Use of a new Key Disclosure Information Fact Sheet. • Franchising specific website to access information and support for the sector easier. 	
Non-financial disclosure	<ul style="list-style-type: none"> • Documents (franchise agreement and disclosure) must be made available in electronic and hardcopy form. • Information Statement must be provided separately and prior to providing the disclosure document and other materials. • Increase transparency regarding retail leases. • Disclosure of leasing arrangements to franchisees. 	
Financial Disclosure	<ul style="list-style-type: none"> • Development of a Key Disclosure Information Fact Sheet for franchisees. 	
Financial Information	<ul style="list-style-type: none"> • Any financial information must be part of the disclosure document and the disclosure document must include a statement of the accuracy and appropriateness of the franchisor's financial information. • Information Statement will advise franchisees of their obligations to obtain information about employment matters and comply with relevant laws (including linking Fair Work Ombudsman's guidance). 	
Supply Arrangements and Rebates	<ul style="list-style-type: none"> • Franchisor must disclose information on supplier rebates, commission and other payments. • Franchisor must disclose any master franchisor controls and/or rebates from suppliers. • Information will be included in a Key Disclosure Information Fact Sheet. • It will be a breach of the <i>Competition and Consumer Act 2010</i> (CCA) if a supplier rebate to a franchisor results in a substantial lessening of competition. 	
Cooling off periods	<ul style="list-style-type: none"> • Cooling off and disclosure periods are measured in calendar days. • The 14-day disclosure period must begin at least 14 calendar days before signing a franchise agreement. • A franchisee must terminate the agreement at any time up to 14 days after the last of certain events to have occurred, such as: <ul style="list-style-type: none"> » the agreement being signed » payment being made » disclosure documents being received » a copy of the terms of the lease are received (if applicable). • Cooling off rights extended to a transfer of an agreement to a new franchisee and where the franchisee enters a substantially new agreement with the franchisor (a deemed transfer) but not to renewals or extensions. 	

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Operating a Franchise		
Capital Expenditure	<ul style="list-style-type: none"> • Franchisors will be prohibited from requiring franchisees to undertake significant capital expenditure, except where <ul style="list-style-type: none"> » it has been disclosed before entering into a franchise agreement » it is legally required » it is agreed to by the franchisee during the term. • Franchisors will be obliged to discuss expenditure prior to entering a franchise agreement. • Franchisors will be required to disclose circumstances under which the franchisee is likely to recoup the expenditure. • Franchisors will be required to specify, as far as practical, the amount, timing and nature of the expenditure to be provided. 	
Marketing and Other Cooperative Funds	<ul style="list-style-type: none"> • Requirements will be amended to clarify regarding the treatment and reporting of cooperative funds where regular payments are required to cover advertising and marketing activities. 	
Dispute Resolution	<ul style="list-style-type: none"> • The Australian Accounting Standards Board will be asked to provide guidance for auditing of marketing and cooperative funds. • The Government will work with the sector to emphasise the importance of developing best practice financial statements. • Information Statement will be amended to improve franchisee understanding that they may lose the benefit of shared funds if the franchisor becomes insolvent. • Current annual financial report regime is appropriate. 	
	<ul style="list-style-type: none"> • Incorporate Franchising Mediation Adviser functions into the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) to provide efficiency of dispute resolution. • Ensure all franchisees can access ASBFEO's dispute resolution services. • Implement a voluntary binding arbitration model by appointing a Franchising Arbitration Adviser (in a model similar to that in the Dairy Industry Code). • Introduce conciliation to complement existing dispute resolution provisions. • Support ASBFEO's power to write to the ACCC and other regulators notifying them of systemic or serious matters that come to their attention. • If a person conducting the dispute resolution process determines it appropriate to conduct a multi-party process, the franchisor cannot refuse to take part in the process. 	
	<ul style="list-style-type: none"> • The Government will provide best practice guidance on timeframes for the commencement and completion of dispute resolution processes. • Ideally parties should not commence litigation pending the finalisation of dispute resolution processes, however they may need to do so to protect 	

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	<p>their position and courts are in the best position to manage the competing interests in these circumstances.</p> <ul style="list-style-type: none"> Existing protections are sufficient to protect dispute resolution bodies from liability. Strengthened dispute resolution framework will improve satisfaction with outcomes and the success rate of dispute resolution processes. 	
End of Term Arrangements		
Exit Arrangements	<ul style="list-style-type: none"> Amend disclosure to clearly specify end-of-term arrangements for franchisee goodwill. Require franchisors to clarify a franchisee's entitlement to goodwill in the franchise agreement and include this information in the Key Disclosure Information Fact Sheet. 	
	<ul style="list-style-type: none"> The Government will consult with the sector to draft amendments that facilitate a negotiated early exit between the parties to enable franchisees to reasonably constrain financial losses. 	
Termination	<ul style="list-style-type: none"> Amend regulation 29 to require the franchisor to provide the franchisee with 7 days' notice of proposed termination in special circumstances so that a mediator or arbitrator can assist the parties to negotiate. 	
	<ul style="list-style-type: none"> Consult with the sector to develop provisions to facilitate a negotiated early exit of parties from a franchise agreement. 	
Restraint of Trade Clauses	<ul style="list-style-type: none"> Changes to regulation 23 will be made to clarify the obligations/rights. Information Statement will be amended to warn franchisees to seek advice on this issue. 	
	<ul style="list-style-type: none"> Increase franchisee awareness of the effect of restraint of trade clauses and clarify what constitutes a breach of regulation 23 of the Franchising Code. 	
Regulatory Framework		
Compliance and Enforcement	<ul style="list-style-type: none"> Significant increase in pecuniary penalties (from 300 penalty units to 600 penalty units). 	
	<ul style="list-style-type: none"> 'Churning' and 'burning' to be addressed under existing legislative provisions (unconscionable conduct, false or misleading representations, good faith and disclosure). Educational materials to draw attention to the risks of 'churning' and 'burning' to recognise risk. Considered regulating franchising as a general partnership co-investment model and decided this was not appropriate. Satisfied with the level of industry compliance with Notices issued under section 51ADD of the CCA. 	
Franchisee Sector Representation	<ul style="list-style-type: none"> No requirement for franchisee representation on boards of franchisors. Continued representation through existing bodies. 	

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'No agent' and 'entire agreement' clauses	<ul style="list-style-type: none"> The Government will educate franchisees on the use of 'no agent' and 'entire agreement' clauses through the Information Statement and ask the ACCC to refer to these terms in its educational material. 	
Ban on passing on legal fees	<ul style="list-style-type: none"> The Government will prohibit (and have pecuniary penalties for) franchisors passing on the legal costs of preparing, negotiating and executing documents to the franchisee (except where it is already incorporated into a joining fee). 	
Wastage and Shrinkage fees	<ul style="list-style-type: none"> The Government will educate the sector regarding wastage and shrinkage payments by franchisees and existing protections on the Franchising Code and the Australian Consumer Law to deal with those issues. 	
OilCode	<ul style="list-style-type: none"> The Government supports consistency between industry codes where appropriate and plans a mid-term review of the OilCode upon finalising amendments to the Franchising Code. 	
Other Actions		
Unfair Contract Terms	<ul style="list-style-type: none"> Unilateral variations of franchise agreements and subsidiary documents will be further considered in the context of developing best practice models within the existing unfair contracts framework. 	
Actions by independent bodies	<ul style="list-style-type: none"> The Government welcomes the ACCC's 2020 compliance and enforcement priority being to ensure small business receive the protections of the competition and consumer laws, with a particular focus on the Franchising Code. 	
Franchisee Training	<ul style="list-style-type: none"> The Government supports pre-entry education and training but does not consider it to be the franchisor's role to ensure that prospective franchisees understand the requirements of the Franchising Code (getting professional advice will not be made mandatory). 	