



Australian Government

Government response to the Independent Review of the Franchising Code of Conduct

May 2024

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Ministerial Foreword

The Albanese Government is committed to delivering a better deal for the thousands of small businesses in the franchise sector, and helping the sector build long-term resilience.

The franchising sector is a key part of the Australian economy, employing around 520,000 people and contributing more than \$135 billion each year. There are more than 1,100 franchisors and 70,000 franchisees operating in Australia, with a majority of franchisors and most franchisees being small businesses.

The Government is committed to supporting Australia's franchisors and franchisees to grow and strengthen their business.



Dr Michael Schaper was appointed to undertake an independent review (the Review) of the Franchising Code of Conduct (the Code) to evaluate the effectiveness of current regulatory settings and provide recommendations on how to ensure they are fit for purpose. I thank Dr Schaper for his extensive consultation with the franchising sector and his considered and comprehensive Review.

We know that there have been challenges in the franchise sector, particularly in relation to imbalances of power between franchisors and franchisees, which is why our Government response is targeted at improving partnerships in the sector.

This will make it easier for small businesses to operate in the sector by streamlining entry requirements so that small businesses better understand the contracts they are entering into, and reducing the compliance burden for franchisors and franchisees who are doing the right thing.

In some cases, franchisees have lost out due to deals that have gone awry or unfair contract terms. That's why we will improve protections for franchisees by requiring all franchise agreements to provide a reasonable opportunity to make a return on their investment, and to ensure that franchisees are appropriately compensated if their agreement is terminated early.

With a view to the medium to long term future of the franchising sector, the Government will establish a Treasury Taskforce to conduct a comprehensive cost benefit analysis of introducing a licensing regime.

This response complements other actions the Albanese Government is taking to deliver a better deal for small businesses, including ensuring small businesses are paid on time, increasing the number of breaches of the Code that attract penalties, making unfair contract terms illegal and establishing a small business designated complaints function.

The Albanese Government recognises that small businesses are the engine room of the Australian economy, which is why we are continuing to deliver a better deal for small business.

A handwritten signature in black ink that reads "Julie Collins". The signature is fluid and cursive.

Julie Collins MP
Minister for Small Business

Introduction

The Franchising Code of Conduct (the Code) aims to ensure fairness in the franchising sector by addressing potential issues resulting from the power imbalance between franchisors and franchisees. Both franchisors and franchisees must follow the Code, and are required to act in good faith in their business dealings with each other. The Code also covers rules relating to:

- the information that franchisees must receive prior to entering an agreement
- cooling-off periods for and early termination of franchise agreements
- dispute resolution processes, including arbitration prior to court proceedings and
- publishing key disclosure information on the Franchise Disclosure Register.

Dr Michael Schaper's Review covered 4 separate review requirements, including:

- a sunset review of the Code
- a statutory review of Part 5 of the Code relating to new vehicle dealership agreements
- a post implementation review of the 2021 amendments to Part 5 of the Code relating to new vehicle dealership agreements and
- a statutory review of the Franchise Disclosure Register.

The Review also considered the role of the Australian Competition and Consumer Commission and the Australian Small Business and Family Enterprise Ombudsman in supporting enforcement and dispute resolution under the franchising regulatory framework.

The Review involved broad consultation that included a public consultation paper, which received 95 responses, more than 40 stakeholder roundtables and meetings, and 2 online surveys. The first survey of franchisees received 381 responses and the second survey on the Franchise Disclosure Register (FDR) received 163 responses. The Review also commissioned the Australian Bureau of Statistics to produce a detailed analysis of the size and characteristics of the sector.

The Review made 23 recommendations supported by findings and implementation suggestions. It found that the Code is generally fit-for-purpose and should be extended beyond its sunset date, with some changes to improve its operation. It also found that non-regulatory changes can be implemented to improve the broader operating environment through enhanced information and guidance on best practice. In addition, the Review recommended the Government consider a comprehensive analysis of whether to shift to a licensing scheme.

Broadly, the Government response will take a staged approach, which seeks to implement quicker changes in the short-term whilst undertaking a comprehensive analysis of the legal and regulatory changes to improve fairness and reduce regulatory burden in the longer term. This includes working with the sector to develop best-practice guidance, and simplifying disclosure requirements so that it's easier for both franchisees and franchisors to understand their roles and obligations. Other measures to improve access to justice include increasing the number of breaches of the Code that attract penalties and publicly naming franchisors that fail to participate meaningfully in alternative dispute resolution.

Ultimately, the Government's response will lead to a fairer operating environment for both franchisees and franchisors.

Australian Government response

The Albanese Government is committed to a fair playing field in franchising, by ensuring a transparent and effective regulatory framework for the sector. Many prospective franchise participants approach franchising with the expectation that they are purchasing an opportunity for collaborative partnership between franchisees and franchisors, with the needs of both parties appropriately considered.

We recognise that the franchising sector has been subject to numerous reviews and regulatory changes throughout the history of the Code, but further steps can be taken to address the imbalance of power and information asymmetry that can exist in franchise arrangements.

That's why our Government is taking steps to provide regulatory stability for the sector by remaking the Code now and looking further at longer-term regulatory changes such as transitioning to a licensing model – both to provide confidence in, and certainty for, the sector.

Findings of the Review

The Review found the Code is generally fit-for-purpose, with the benefits that the Code provides to businesses continuing to outweigh the regulatory costs imposed. The Review recommended that the Code be extended before it sunsets so that the sector can continue to benefit from its protections, with changes such as a clearer statement of purpose to improve its effectiveness.

The Review also found that a significant barrier to addressing persistent issues in the sector is that the Australian Competition and Consumer Commission (ACCC) is only able to act after harm has occurred, not before. The ACCC does not have the resources to pursue enforcement action for every breach of the Code, and instead focuses only on the most significant matters – this means that legal recourse, which not all parties can afford, may be the only option for some cases.

Extending the Code beyond its sunset will provide regulatory certainty for the sector in the short to medium term, while the Government investigates the feasibility of moving to a more preventative form of regulation, in the form of a licensing regime, over the longer term.

Remaking the Code with improvements

The Review considered whether the protections set out in the Code provide the necessary support for industry to guard against misconduct and opportunistic behaviour within franchise relationships.

The Review found that, in general, there is a significant misunderstanding about what the Code is meant to achieve and what it does and does not cover. The Government considers it important that all parties bound by the Code understand its purpose, and will seek to address this by inserting a clear statement into the Code. The Code will also be updated to streamline the pre-entry information made available to franchisees when entering a new arrangement by merging the key facts sheet into the disclosure document provided to franchisees.

The Review recommended that service and repair work conducted by motor vehicle dealerships should be explicitly captured by the Code, and that existing requirements that apply to new vehicle dealership agreements should extend to all franchise agreements. This will mean that all franchise agreements will include the requirement to make a reasonable return on investment, and include provisions for compensation for franchisees in the event of early termination.

The Review also recommended that the next review of the Code should consider whether Part 5 of the Code (relating to new vehicle dealerships) should extend to other subsectors, noting that this was a relatively recent addition to the Code.

Building stronger franchise relationships

The Review considered the lifecycle of the relationship between franchisors and franchisees from entering into a franchise agreement, through to the period of the franchise relationship, and the end of an agreement.

The Government is accepting recommended changes to reduce the compliance burden for both franchisors and franchisees, while ensuring that sufficient protections remain in place to protect both parties' interests. For example, streamlining some of the requirements for entering into a franchise agreement, such as those around disclosure and cooling off periods, will make it easier in situations such as renewing an existing franchise agreement.

The Review recommended that there should be further guidance on good faith requirements, and emphasised the importance of franchisors consulting with franchisees when considering major changes to their franchise system. By sharing learnings with each other, both franchisors and franchisees will benefit from improved business practices and a stronger relationship.

To support these efforts, the Government will task the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) with leading the development of best practice guidance, in consultation with the franchising sector and the ACCC, and working with relevant agencies to improve the comparability and publication of franchising data sets.

The Government recognises the important role that guidance material and support for the sector can play in promoting better franchise relationships and it will focus on uplifting guidance material to enhance understanding of Code requirements and best practice.

Strengthening regulatory oversight and dispute resolution

The Review made several practical recommendations on how to achieve better access to justice for franchisees, including ways to improve dispute resolution arrangements.

The Government recognises the importance of an effective dispute resolution system to protect individual and business legal rights, as well as giving people the confidence to enter business relationships and to invest.

The Government agrees with the recommendations to enhance the role of the ASBFEO to support dispute resolution. This will include amending legislation to provide the ASBFEO with the power to

publicly name franchisors that fail to meaningfully participate in alternative dispute resolution. This will incentivise parties to seriously consider alternative dispute resolution to address issues that arise, rather than relying on more expensive legal recourse, in order to protect their brand name.

The cost of legal advice can be a deterrent to smaller businesses who may need it most. That’s why the Government will also expand the ASBFEO’s existing Tax Concierge Service to support access to low-cost legal advice on alternative dispute resolution matters. The Government will consider further changes as part of the independent statutory review of the ASBFEO, which will occur by June 2025.

The Review makes some recommendations for more substantive legal and regulatory changes which require further consultation, including in relation to increasing the value of infringement notices, allowing access to ‘no adverse costs’ orders and considering the feasibility of a licensing approach to regulation. These measures may help to improve access to justice for parties who often struggle with the cost of taking a matter to court, and it sends a stronger message to those whose operations do not align with the behaviours expected under the Code.

The Government will further investigate the feasibility of a licensing regime as recommended. A taskforce will be established within the Treasury to undertake a comprehensive analysis on the possible introduction for a licensing model for the sector, including implementation considerations. The Government will consult with the franchising sector and relevant regulatory bodies such as the ACCC and the Australian Securities Investment Commission as part of this investigation.

Government response to Review recommendations

The Government will determine how best to implement the recommendations of the Review, having regard to – but not limited to – the implementation suggestions of the Review.

Recommendation	Government statement
<p>Recommendation 1: The Australian Government should ensure the provision of more comprehensive, robust statistics about the franchising sector.</p>	<p>Agree.</p> <p>The Government notes the limitations of existing data collected by public and private bodies about the franchising sector.</p> <p>The Government agrees that improved data on the franchising sector will support policymakers and the franchising community to better understand the sector, including the true level of disputation within it and assess the sector’s health and the effectiveness of regulation. In the first instance, the Government will require the ASBFEO to lead on improving comparability and publication of existing data sets held by the ASBFEO, the ACCC, the state small business commissioners and the Treasury.</p> <p>Once a decision on licensing occurs, the Government will revisit enhancements to data collection.</p>
<p>Recommendation 2: The Code should be remade, largely in its current format.</p>	<p>Agree.</p> <p>The Governments agrees that the Code should be remade prior to sunseting in April 2025.</p> <p>The Government will remake the Code, having regard to the changes recommended by the Review.</p>

Recommendation	Government statement
<p>Recommendation 3: A clear statement of purpose should be inserted into the Code.</p>	<p>Agree.</p> <p>The Government agrees that it is important for there to be a common understanding of the purpose of the Code and what it is intended to achieve for franchisees and franchisors.</p> <p>When remaking the Code, the Government will insert a clear statement of the purpose into the Code. This will provide clarity to the franchising community and assist in future reviews of the effectiveness of the Code (see Recommendation 5).</p>
<p>Recommendation 4: Service and repair work conducted by motor vehicle dealerships should be explicitly captured by the Code.</p>	<p>Agree.</p> <p>Service and repair work is an essential part of motor vehicle dealerships. When remaking the Code, the Government will clarify that service and repair work performed by motor vehicle dealerships is within the scope of the Code.</p>
<p>Recommendation 5: Reviews of the Code should be conducted in five yearly cycles in the future.</p>	<p>Agree.</p> <p>The Government agrees there should be future statutory reviews of the Code every 5 years to ensure the Code is delivering on its updated purpose and operating efficiently and effectively.</p> <p>When remaking the Code, the Government will implement this recommendation.</p>
<p>Recommendation 6: Simplify and consolidate the pre-entry information given to prospective franchisees.</p>	<p>Agree.</p> <p>The Government supports streamlining information made available to franchisees in a way that will reduce unnecessary compliance burden and cost, but at the same time maintain important protections for franchisees. The Government will amend the Code to effectively merge the key facts sheet into the disclosure document.</p>
<p>Recommendation 7: Franchisor obligations under the Code in relation to existing franchisees should be simplified.</p>	<p>Agree.</p> <p>The Government recognises there is an opportunity to streamline requirements in the case of established relationships, such as where a franchisee is renewing or extending an existing agreement. When remaking the Code, the Government will simplify disclosure obligations in relation to existing franchisees.</p>
<p>Recommendation 8: The existing requirement that new vehicle dealership agreements must provide a reasonable opportunity to make a return on investment should be extended to all franchise agreements.</p>	<p>Agree.</p> <p>The Government agrees that all franchise agreements should provide a reasonable opportunity for the franchisee to make a return on their investment. When remaking the Code, the Government will extend this requirement to all franchise agreements.</p>
<p>Recommendation 9: The existing requirement that new vehicle dealership agreements must include provisions for compensation for franchisees in the event of early termination should be extended to all franchise agreements.</p>	<p>Agree.</p> <p>The Government agrees that franchise agreements should include provisions for compensation in the event of early termination. When remaking the Code, the Government will extend this requirement to all franchise agreements.</p>
<p>Recommendation 10: Enhance the public visibility and usage of the Franchise Disclosure Register.</p>	<p>Agree.</p> <p>The Government notes widespread support for the Franchise Disclosure Register to remain a part of the regulatory environment. The Government's immediate priority is to leverage existing mechanisms to promote the public visibility and use of the Franchise Disclosure Register.</p> <p>Once a decision on licensing occurs, the Government will consider if there are other initiatives that could enhance visibility and usage, such as mandating the disclosure of franchise agreements.</p>

Recommendation	Government statement
<p>Recommendation 11: Additional information should be included on the Franchise Disclosure Register relating to dispute resolution and adverse actions brought by enforcement agencies.</p>	<p>Agree.</p> <p>The Government agrees there may be value in requiring the inclusion of additional information on the Franchise Disclosure Register.</p> <p>The Secretary to the Treasury has discretion to require the inclusion of additional information on the Franchise Disclosure Register by determination in accordance with Part 5A of the Code. Implementation of this recommendation will occur in accordance with the established legislative arrangements.</p>
<p>Recommendation 12: Franchise systems should be encouraged, through education, to consult franchisees regarding any major change to the business model during the term of the franchise agreement.</p>	<p>Agree.</p> <p>The Government acknowledges there is an opportunity to support improved franchise relationships through improving the nature and access to education and guidance materials for the sector.</p> <p>The Government will require the ASBFEO to lead the development of best practice guidance in consultation with the sector and the ACCC.</p>
<p>Recommendation 13: Provisions relating to termination for serious breaches should be simplified. Changes made in 2021 relating to termination under clause 29 of the Code should be revisited.</p>	<p>Agree.</p> <p>The Government recognises there is an opportunity to simplify provisions relating to termination for serious breaches and the importance of doing this in a way that will not diminish protections for franchisees.</p> <p>When remaking the Code, the Government will work with the sector to simplify termination provisions relating to serious breaches by franchisees.</p>
<p>Recommendation 14: Best practice guidance should be provided to franchisees and franchisors regarding franchisee-initiated exit, to enhance the effectiveness of clause 26B of the Code.</p>	<p>Agree.</p> <p>The Government acknowledges there is an opportunity to improve the nature of, and access to, education and guidance materials for the sector.</p> <p>The Government will require the ASBFEO to lead the development of best practice guidance, in consultation with the sector and the ACCC.</p>
<p>Recommendation 15: Further work should be done to limit the use of unreasonable restraints of trade in franchise agreements.</p>	<p>Agree.</p> <p>The Government will direct the Competition Taskforce to consider how restraints of trade and other uncompetitive terms in franchise agreements may be affecting franchise workers, as part of the Taskforce’s review into the use of non-compete and related clauses that restrict workers from shifting to a better-paying job.</p> <p>The Government will also request the ACCC to consider providing further guidance on when a restraint of trade provision may constitute unfair contract terms.</p>
<p>Recommendation 16: A comprehensive online government resource should be created, in the nature of ASIC’s MoneySmart website (‘FranchiseSmart website’).</p>	<p>Agree in principle.</p> <p>Education and awareness-raising are important elements of an effective regulatory regime.</p> <p>Once a decision on licensing occurs, the Government will revisit creating an online resource on franchising.</p>
<p>Recommendation 17: Australian Government agencies should work with relevant sector participants to improve standards of conduct in franchising by developing best practice guidance and education.</p>	<p>Agree.</p> <p>The Government agrees that small businesses need greater support to recognise and act against unfair contract terms and prospective new unfair trading practices under Australian Consumer Law.</p> <p>The Government will require the ASBFEO to lead the development of best practice guidance in consultation with the sector and the ACCC.</p>
<p>Recommendation 18: ASBFEO should be given additional powers to name franchisors who have not participated meaningfully in alternative dispute resolution.</p>	<p>Agree.</p> <p>The Government recognises there are benefits in allowing for the naming of franchisors who have not participated meaningfully in dispute resolution, such as encouraging active participation.</p> <p>The Government will amend relevant legislation to provide the ASBFEO with the power to publicly name franchisors that fail to participate meaningfully in alternative dispute resolution.</p>

Recommendation	Government statement
<p>Recommendation 19: The Australian Government should assist franchisees to access low-cost legal advice on prospects prior to formal ADR.</p>	<p>Agree.</p> <p>Being able to obtain low-cost assistance for resolving franchising disputes is important for supporting access to justice for franchisees.</p> <p>The Government will expand the ASBFEO’s Tax Concierge Service to support small businesses, including franchisees to access low-cost legal advice on alternative dispute resolution prospects.</p>
<p>Recommendation 20: The Australian Government should consider an appropriate role for franchise interests when implementing its commitment to a designated complaints function for the ACCC.</p>	<p>Agree.</p> <p>The Government has progressed its commitment to establish the designated complaints function within the ACCC.</p> <p>There will be a process for interested parties that represent the interests of small businesses (such as franchisees) to apply to become a designated complainant.</p>
<p>Recommendation 21: Franchisees should be able to seek a ‘no adverse costs’ order when bringing a matter against a franchisor for breach of the Code or the Australian Consumer Law.</p>	<p>Agree in principle.</p> <p>The Government supports improving access to justice for franchisees and low-cost means to resolve franchising disputes. However, the Government notes that ‘no adverse costs’ orders are not common in Commonwealth legislation.</p> <p>The Government will consult further on extending arrangements for seeking access to ‘no adverse cost orders’ for franchising matters to assess the efficacy of such arrangements in the context of the administration of justice and ensure there are no unintended consequences.</p>
<p>Recommendation 22: The scope of penalties under the Code and associated investigation powers and infringement notice regime in Part IVB of the Competition and Consumer Act 2010 (CCA) should be increased.</p>	<p>Agree.</p> <p>The Government will increase the scope of penalties to all substantive obligations placed on parties under the Code and set those penalties at 600 penalty units.</p> <p>The Government will consider the suitability of increasing the amount of penalty units to 60 penalty units for infringement notices issued under the CCA for a breach of the Franchising Code.</p>
<p>Recommendation 23: The Australian Government should investigate the feasibility of introducing a licensing regime to better regulate most aspects of the franchisee-franchisor relationship.</p>	<p>Agree.</p> <p>The Government will establish a Taskforce in Treasury to conduct a comprehensive cost benefit analysis of introducing a licensing regime for the franchising sector.</p> <p>The Taskforce will consult widely and provide advice to Government.</p>