

5<sup>th</sup> of December 2019

The Department of Employment,  
Skills, Small and Family Business

By email: [franchising@employment.gov.au](mailto:franchising@employment.gov.au)

**ALNA Submission to the Franchising Taskforce RIS into the Fairness in Franchising Report**

The Franchising Taskforce Regulation Impact Statement (RIS) seeks to obtain stakeholder views on options to address the range of issues identified by the Parliamentary Joint Committee on Corporations and Financial Services (the PJC) in its Fairness in Franchising report

The Australian Lottery and Newsagents Association (ALNA) has a strong interest in the efficient and equitable operation of franchising in Australia as a considerable number of our members are involved in franchise systems and we represent many Lottery Agents who collectively make up one of the largest retail franchise groups in the country.

ALNA submitted to the Senate inquiry into the operation and effectiveness of the Franchising Code of Conduct last year and we made representations on several areas, particularly dispute resolution and Unfair Contract Terms (UCT). We also provided further feedback to the subsequent consultation into the Fairness in Franchising Report this year and its recommendations which we support and believe will positively assist franchising in this country.

Whilst we acknowledge the importance of RIS consultations, the timing of this consultation at the end of the year and with its relatively short window for submissions, is not very helpful for associations like ours who represent many franchisees and who have limited resources to apply to a range of important but competing issues. Maybe future consultations should better consider this and the resourcing limitations of important stakeholders to respond, along with the appropriate timing of consultations if you would like to achieve more effective engagement from all stakeholders.

As the RIS largely covers ground already addressed in the previous consultations and our submissions to them, we have attached our previous submission on the Fairness in Franchising Report and its positive and constructive recommendations to re-state our position on the recommendations made for this RIS process.

We appreciate the government taking on board our views to inform the development of the government's final response and future positive changes to the code.

Kind regards

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20<sup>th</sup> of September 2019

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Australian Government Department of Employment, Skills, Small and Family Business

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### **ALNA Submission on Franchising Taskforce Issues Paper Consultation**

The Australian Lottery and Newsagents Association (ALNA), is a not-for-profit organisation and is the peak industry body that provides advocacy and support services to our member newsagents, lottery agents and news distributors nationally.

ALNA has a strong interest in the efficient and equitable operation of franchising in Australia as a considerable number of our members are involved in franchise systems and we represent many Lottery Agents who collectively make up one of the largest retail franchise groups in the country.

ALNA submitted to the Senate inquiry into the operation and effectiveness of the Franchising Code of Conduct last year. We made representations on several areas, particularly dispute resolution and Unfair Contract Terms (UCT) and we again welcome this opportunity to provide further feedback to this subsequent consultation.

When the Parliamentary Joint Committee on Corporations and Financial Services released the Fairness in Franchising Report following its inquiry into the effectiveness of the Franchising and Oil Codes, the report addressed a range of our concerns. We acknowledge and appreciate that the committee has made strong recommendations in two of the key areas we focussed on including UCT and access to dispute mechanisms like arbitration.

Many of the committee's recommendations appear designed to address some of the power imbalances in franchising which we welcome, and the report also recognises that education and awareness in conjunction with increased transparency continues to be important and necessary.

We have summarised below a list of the key recommendations made by the committee that we strongly support, and we hope that these recommendations will ultimately be adopted by the government in full.

These reforms can greatly improve certainty and will boost the equitable position of franchisees in their dealings with franchisors, which will enhance the overall culture of franchising and in turn benefit both franchisee and franchisor in their business outcomes.

Key recommendations that we support the government taking action to address, including making necessary amendments to the Code where required:

***Whistleblower protections - Recommendation 3.1, The committee's recommendation that the whistleblower protection regime recommended in its Whistleblower Protections report apply to franchisees and their***



employees, and that breaches of the Franchising and Oil Codes by franchisors be included in the definition of disclosable conduct.

**Industry Associations - Recommendation 5.1,** *The committee's recommendation that the Franchising Taskforce examine ... whether it is appropriate for a franchisee representative to be a voting member of the franchisor's board.*

**Disclosure and registration Recommendations 6.1 to 6.16,** *Disclosure is essential, and we welcome the recommendations to provide detailed financial and performance figures, and other key data to help make an informed decision to become a franchisee. The committee recommendation that the Franchising Taskforce investigate options for a public franchise register with franchisors providing updated disclosure documents and template franchise agreements annually in compliance with the Franchising Code is helpful. We say more about this following in this submission (Questions re Draft Principle 1.).*

**Unfair contract terms - Recommendation 9.1 to 9.8,** *The committee's recommendations to make penalties significant and charging the ACCC with investigating standard form contracts and applying penalties where a contract contains an unfair clause is an important and valuable reform. The committee also proposes to give the ACCC more responsibilities, and in certain instances, greater enforcement powers.*

**Goodwill - Recommendation 12.1 to 12.2,** *The committee's recommendation that the Franchising Taskforce consider greater transparency around the allocation (if any) of goodwill in franchise agreements, as well as protections for franchisees when required to undertake significant capital expenditure near the end of the term of a franchising agreement.*

**Dispute resolution - Recommendation 15.1 to 15.2,** *In line with our strong recommendations in our previous submission that arbitration (with costs being borne by the franchisor) become an important tool to address the power imbalance and achieve efficient resolutions and remedies in disputes between franchisors and franchisees, we strongly support the committee's recommendation that the dispute resolution scheme under the Franchising Code include binding arbitration with the capacity to award remedies, compensation, interest and costs. Further, the committee recommended that the Franchising Code be amended to allow a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise.*

**Comparison of industry codes - Recommendation 16.1 & 16.2,** *The committee's recommendation that civil pecuniary penalties and infringement notices should be made available for all breaches of the Franchising and Oil Codes...and further....recommends the inclusion of a ban on unilateral or retrospective variations to terms and conditions in the Franchising Code.*

**Pre-entry education and access to advice - Recommendation 18.1 to 18.3,** *The committee's recommendation for a range of improvements to the education and advice available for franchisees. In particular, the committee recommended that the ACCC develop a FranchiseSmart website for franchises along the lines of the Australian Securities and Investments Commission (ASIC) MoneySmart service.*

**Capital expenditure - Recommendation 21.1to 21.3,** *Given the significant capital expense and impost retail image places on a franchisee's profitability and viability and that they are disproportionately burdened with the costs associated with it as we noted in our previous submission, the committee's recommendation to ensure*

*that franchisees:...are able to make an appropriate return on investment within the remaining franchise agreement, lease or licence terms is an important and helpful reform.*

#### Further responses

There have been significant reforms to the operating relationship our member franchisees have with their franchisor this year, and since we prepared our original submission to the Senate inquiry last year. While complex, they have opened the door for initial access to the digital economy for franchisees through omni-channel sales and a different engagement model to achieve incentivised performance-based remuneration. While these are positive steps, transparency will be the key ingredient to developing genuine trust in these reforms over time and in shared outcomes from them. So, coming out of this inquiry, the positive recommendations by the committee for reforms to the code that drive further transparency and that address power imbalances will be important to support achieving more successful shared outcomes and will be helpful in agreed review processes.

We have responded below to other relevant questions and where we feel we can add additional insights over and above our original submission:

#### *General questions*

While it is very difficult to provide an overarching view of franchising as a whole when as an industry body we are generally looking at specific examples that effect our member franchisees, the committee as a whole have certainly done an admirable job of separating out industry specific issues in their recommendations and addressing what are broad based problem areas in franchising. We believe they have got the balance right in their recommendations of widespread improvements.

The recommendations to change the code are important, as through integration in the code they have a reinforcing effect on the culture of franchising, a strong code and enforcement will deliver a strong franchise culture and more equitable and successful relationships.

#### ***Questions re Draft Principle 1. Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor***

Many previous changes to the Code have focussed on better disclosure at the time of entering the franchise system and as we highlighted in our last submission this is an area in franchising that is approached with a high level of caution by franchisors, as there are many unpredictable factors (internal & external) that can influence the performance of a site, particularly greenfield sites. No franchisor wants to inadvertently make false representations, so the information is generalised and sanitised to the point it cannot really be relied upon.

The extent that this is provided varies by system to system and to a degree is only as good as the person seeking the information and their ability to use it properly in their decision making and due-diligence processes.

This information provided focusses on the entry point, but what it does not necessarily provide is any real insights into the viability of the franchise system holistically and importantly, how it compares to other systems across a range of key business and partnership metrics. Additionally, how the system has performed over time i.e. how well do they treat franchisees, what is the culture of the system, have they met all of their



disclosure requirements over time, is the franchise agreement fair, is the franchise financial model fair and sustainable for franchisees, have the key fundamentals of the system changed over time, etc.?

What can happen over time is the franchise model and key metrics for assessing its viability (especially from a franchisees perspective) can change over time as the franchisor gradually changes the business fundamentals which can significantly impact franchisees prospects of success and longer term viability. This can be the result of the franchisor for example slowly ratcheting up fees and charges, stripping away services and shifting the cost to supply these services or business tools to the franchisee. These impacts are sometimes gradually imposed on franchises which are designed to make the franchisor more profitable. These can also be the result of the franchisor adding additional distribution channels (sometimes exclusive) or more sites, etc.

What a prospective franchisee is not able to do is easily assess the trajectory, the franchise fundamentals and their impact on the individual franchisee's prospects for success. Incremental (sometimes appearing harmless) changes to the franchise system and fundamentals can impact new entrants and existing franchisees equally.

Unfortunately, there have been examples of franchise systems which appear to have unsustainable business models (especially for franchisees) which have likely contributed to the franchisees engaging in practices to try to ensure the survival of their business and that have subsequently contributed to them not meeting their obligations in other areas of the business i.e. paying staff correctly. These outcomes were alleged in the issues surrounding 7-Eleven for example.

To benchmark systems and protect against any adverse changes to a system over time (especially for franchisees) there is an opportunity to require franchisors (a Code obligation) to undertake a business 'health check' regularly during the life of the franchise system i.e. every 3-5 years.

Franchise systems could be graded according to a set of meaningful industry and franchise system business benchmarks to allow new and existing franchisees to gauge how well the franchisor is doing in providing a balanced, sustainable, mutually profitable and fair system for both the franchisor and franchisees. How have they performed over time?

These should be conducted under an independent review process and the results should be published with all franchise systems being benchmarked and ranked (i.e. every 3-5 years). There are many examples where businesses are assessed independently on a range of metrics and advice is provided on these businesses This is now very common. Analysts market reviews of businesses are a good example.

This would provide franchisees (new & existing) great insights into the business and its culture and trajectory over time. Are they a system that has practiced continual improvement and have genuinely partnered with their franchisees, or have they been exploiting more vulnerable franchisees to one-sidedly drive profits for the franchisor, etc.

This should also be accompanied by a mechanism for franchisees to collectively challenge the franchisor over the business fundamentals, if as a result of the 'health checks' they fall into a dangerously low scoring category which raises significant risks for the system and more importantly the franchisees viability.

***Questions re Draft Principle 3: Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties***



The question of generating value for both parties in a franchise agreement and verification of this is all the more complicated now by the digital economy and franchisees being allowed fair and equitable access to mechanisms that allow them to engage with existing and future customers who conveniently want to access goods and services through these changing service channels.

Franchisees and franchisors must meet obligations to support each other and equitably generate value through the digital economy as well as the physical bricks and mortar one, with transparent mechanisms and easily available verifiable data. The code must adapt and reinforce mechanisms to achieve digital equity with fair access that all parties can operate within and benefit from.

***Questions re Draft Principle 4: A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest***

We agree strongly with the above statement. Stronger relationships will flow from shared risk and reward, equitable access to opportunity and mutually supportive frameworks. Shared co-investment in the franchise system is vital, costs should be shared and not shifted downwards to the franchisee for example. Sometimes investment will be required by the franchisee, sometimes by the franchisor and sometimes mutually, the aim is to have mechanisms in the code that support this and discourage exploitation. In recent times we have been able to deliver more mutually beneficial and positive outcomes on shared costs in relation to shop fits and required equipment with our members major franchisor, the code should continue to adapt to support this kind of very encouraging activity.

***Questions re Draft Principle 5: Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties***

We believe the current dispute resolution process contained within the FCOC is not effective for a range of reasons and importantly, because it does not address the evident power imbalance between large (sometimes national) franchisors and franchisees (small business operators).

We believe it is appropriate for the government to implement a broader range of prescribed controls with more instruments for it to set standards and apply measures to manage the practices and conduct of the franchisor in its dealings with its franchisees around disputes.

As such, the government should adopt in the code an obligation on the franchisor to ensure that a prescribed and ultimately mandatory arbitrated dispute resolution process is incorporated into franchise agreements. This resolution model that can be more equitably accessed by both parties rather than the courts, is also likely to have the effect of delivering fairer, timelier and more cost-effective outcome from mediation as well.

This should be a new uniform and importantly, national operating standard focussing on the conduct and relationship between the operator and its franchisees relating to disputes. The cost of mediation and arbitration should be borne by the franchisor as this will address power imbalances and responsibly place greater onus and accountability on the franchisor. *(we have provided further information on a detailed model in our previous submission)*

To support this, disclosure documents, operations manuals and franchise agreements should incorporate and be transparent about all available mediation and dispute resolution models available to franchisor and franchisee in all jurisdictions both federal and state/territory.

In our submission to the Senate inquiry, we recommended to this end, the establishment of a National Franchising Tribunal to adjudicate and arbitrate franchise disputes and which could be incorporated into or



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replace the Office of the Franchising Mediation Adviser and adopt its roles. This body could have powers to set and adjust standards, and manage practices to achieve outcomes and could report regularly on this activity to the government.

***Questions re Draft Principle7: The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency***

Enforcement of the Code is critical to setting the culture of franchising and achieving equitable outcomes and access to justice for all participants. The ACCC is tasked with enforcing the code and the Office of the Franchising Mediation Adviser is tasked to administer mediation services for the industry. Both organisations do excellent work to support outcomes from the Code.

However, where mandatory codes are imposed on industry by government and especially when there are now more codes already being developed, the resource models available to achieve enforcement need to change.

The Australian Competition and Consumer Commission (ACCC) is not a complaint administration agency and while it is responsible for the code, its range of responsibilities is ever increasing and broad across the whole economy. This results in its resources, while they may be increased for different broad enforcement priorities, being stretched when it comes to individual breach policing. For example, the commission may not take action on what a franchisee sees as important and what may be a clear breach and which the franchisee may consider is inequitable and requiring enforcement under the code.

To resolve this and to ensure the code is always operating effectively, we recommend that a Code Enforcement Administrator be established to investigate breaches and serious breaches and who is responsible for this activity for all industry codes and who can take enforcement action itself. They would have close ties to the ACCC and make recommendations to the commission for broad enforcement and similarly, make recommendations to a proposed National Franchising Tribunal to utilise arbitration as an enforcement facility.

Consistency of access to the franchising code

We are of the view that where similar market power imbalances exist and where models are like franchising, then the franchise code should be accessible and apply. For example, all Agency arrangements should be covered by the code and where Government Business Enterprises (GBE's) are in effect operating like franchise models, that best practice should dictate that these businesses should adhere to and operate under the code and relevant state/territory and federal governments should seek timely agreement on this model.

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We appreciate the government taking on board our views to inform the development of the Regulation Impact Statement (RIS). We thank you for your time and consideration.

Kind regards

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