



**Australian
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29 September 2023

Dr Michael Schaper
Franchising Code Review Secretariat Unit
Small and Family Business Division
Treasury
Langton Cres
Parkes ACT 2600

Via email: franchisingreview@treasury.gov.au

Dear Dr Schaper

RE: Review of the Franchising Code of Conduct

The Australian Chamber of Commerce and Industry (ACCI) welcomes the opportunity to provide comment to the review of the Franchising Code of Conduct (the Code).

ACCI represents hundreds of thousands of businesses in every state and territory and across all industries. Ranging from small and medium enterprises to the largest companies, our network employs millions of people. ACCI strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

Since its beginning, the Code has played a crucial role in rectifying the power imbalance between franchisees and franchisors while promoting best practices among them. ACCI strongly backs the Code's ongoing existence and advocates for it to be remade in a similar fashion. Ensuring the Code's continuation in a comparable format is essential for upholding accountability and transparency within the franchise sector, as well as providing support to both current and aspiring franchisees in their business endeavours.

ACCI does not endorse the imposition of further regulatory burdens on small businesses through the Code. Small businesses are currently grappling with escalating operational expenses, diminishing business confidence, and limited time and resources. They are already contending with a progressively intricate industrial relations framework while being expected to uphold their obligations to employees amid changing laws and regulations while simultaneously managing their businesses. Given that the majority of businesses in the franchise sector are small, ACCI does not advocate for additional reporting requirements under the Code at this juncture.

While the Code in its current form is working reasonably well, there are some improvements which could be made to improve effectiveness and support for those operating in the franchise sector.

Automotive franchising

The Code currently recognises that different and specific protections are needed for new vehicle dealership agreements compared to other franchises, which ACCI welcomes. To

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strengthen the Code, ACCI supports widening Part 5 of the Code to extend the current protections to truck, farm machinery and motorcycle franchisees.

ACCI acknowledges that since 2021 there have been separate protections for new car dealers under Part 5 of the Code. We note that there have been a number of high-profile automotive franchising disputes in recent years, and we urge the Government to strongly consider issues around protection of goodwill, security of tenure, good cause requirements for non-renewal, and dispute resolution.

The establishment and operations of truck, farm machinery and motorcycle franchises are comparable to new car dealership franchises, yet truck, farm machinery and motorcycle franchisees have fewer protections under the Code. Automotive franchises of all vehicle types share similarities regarding the capital investment and infrastructure required to establish the franchise and their business operations, yet this is not currently taken into consideration by the Code. There are no quantifiable or qualitative differences to suggest that some franchisees warrant fewer protections, but unfortunately this has been the case for too long.

Noting the similarities shared by automotive franchises, ACCI believes that extending Part 5 of the Code to incorporate truck, farm machinery and motorcycle franchises is an appropriate and long overdue measure.

Role of ASBFEO and ACCC

ASBFEO

It should be noted that the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is mostly effective in its dispute resolution operations however, there may be scope to increase the effectiveness of their educative resources and awareness of their role in assisting with franchise-related disputes. Improved recognition of ASBFEO's role under the Code will be especially important when the legislated changes to Unfair Contract Terms (UCT) come into force from 10 November 2023.

ACCI understands that the UCT changes will likely result in increased demand for dispute resolution services as parties work to understand the effect of the changes and, for some, their altered responsibilities under the Code. Given this possible rise in demand, ACCI would welcome additional practitioners being appointed to ASBFEO's specialist panel. This is not to say that the current panel of dispute resolution practitioners are not suitable nor qualified. Instead, ACCI is recommending options to pursue additional practitioners of a high calibre to assist with the amount and complexity of disputes in response to changes in the sector.

The appeal for some practitioners to engage with ASBFEO may have been reduced as a result of having their fees prescribed rather than set by them. To encourage more expert practitioners to participate on ASBFEO's panel, ACCI would, in principle, support mediators to be able to set fees for their services, insofar as those fees are reasonable and do not result in poorer services for those who cannot afford to pay a higher rate. It will be important to put in place a mechanism whereby a reasonable fee could be imposed for services which provides value for more expert practitioners to become involved through the panel, yet maintains a manageable cost for each party to a dispute. This will be an important consideration given the cost of pursuing litigation is incredibly high, as are the usual costs of running a franchise.



Increasing the range of practitioners available will allow both franchisees and franchisors to resolve disputes in a more expedient manner. It will also allow ASBFEO to focus on other areas of responsibility as needed. We strongly support dispute resolution under the Code as opposed to litigation where possible and believe that encouraging more practitioners to become involved with the Code's dispute resolution process will assist in achieving this.

Under the Code it is expressly outlined that ASBFEO has a dispute resolution function however, this does not appear to be well known. There could also be more advocacy of activities franchisees or franchisors can undertake ahead of reaching any position where dispute resolution is required. These activities are available on the ASBFEO website for those who wish to look for them however, this information is not automatically provided to franchisees when entering into a franchise agreement, for example. More widely promoting ASBFEO's operations and the tools they have available for those in the franchise sector may support businesses in the sector to resolve issues where possible more quickly, and for significantly less cost and effort.

The educative and informative franchising resources that ASBFEO produces could also be promoted further by industry groups and associations. They could create general materials, in addition to those that already exist, which can then be tailored for individual industry groups and associations to distribute to members.

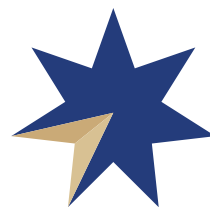
ACCC

The role of the Australian Competition and Consumer Commission (ACCC) as regulator of the Code could be enhanced by enabling more access to enforcement and through consultation.

At present, the ACCC will typically pursue a franchise matter only where there is a prima facie breach of the Code, such as use of an UCT, or where a systemic breach is identified. The need for the ACCC to prioritise their obligations and their other duties is understandable, however, this approach means that some important issues arising under the Code may not be pursued at all if not by the ACCC on account of litigation costs and any power imbalance between the parties to the dispute.

We note a 2023-24 Budget measure was for the ACCC to create a 'super complaints' pathway for small business representative bodies to fast-track grievances to the ACCC. Under this pathway, it will be important to ensure that a variety of representative bodies are elevated to the 'super complaints' pathway, not just consumer-facing bodies. Along with ASBFEO, industry representative bodies such as ACCI should be a nominated super complaint body. More timely consideration of relevant complaints made by representative bodies under the pathway may assist businesses in the franchise sector to resolve issues involving serious contraventions of the Code.

ACCI also believes that the ACCC's consultative committees can operate more effectively. This will be particularly important if changes are made through this review process but also important ensure the Code continues to work effectively.



Access to justice

Where dispute resolution is not successful, businesses in the franchise sector, particularly small franchisees, are often deterred from litigating a matter due to the time and money required to pursue it.

ACCI has previously advocated for an avenue specifically for businesses to take legal action where dispute resolution does not arrive at an agreed outcome. The establishment of a body such as a tribunal for small business claims could provide access to justice with due consideration for small business-specific issues. It would be a lower-cost option to bring grievances, and would seek to unclog the existing court and remedy-seeking mechanisms so that franchisees, franchisors and other small businesses can obtain an outcome in a more expedient manner. Further, there should be an avenue for all franchisees regardless of size to be able to have their matter handled in the same manner.

Importantly, there would need to be a consistent definition of 'small business' for such a body to be effective. There is increasing complexity for businesses who are considered to be a small business under one scheme or program and not for another. Ensuring some stability under a legal mechanism as proposed will be imperative to its efficiency, as without it considerable resources will be required to determine which businesses qualify for its use.

Unfair Contract Terms

In addition to the measures recommended throughout this submission, ACCI believes that the threshold for UCTs should be eliminated.

ACCI notes that changes to the UCTs will apply to standard form franchise agreements with 100 or fewer employees, or for those that make less than \$10 million in annual turnover.¹ As many businesses in franchising are small businesses and would not meet either of these thresholds, it is unlikely that the changes will impact many in the sector.

However, ACCI recognises that it is not uncommon for franchise businesses to reach either threshold identified during any given period, noting that staffing levels and turnover may fluctuate from time to time. Accordingly, we would welcome the UCT provisions reaching all in the franchise sector regardless of size and turnover.

Franchise Disclosure Register

ACCI welcomes the introduction of the Franchise Disclosure Register (the register) however, believes improvements can be made.

The register's existence is not widely known, which limits its effectiveness. A more extensive promotion of the register would assist to increase its use, to incentivise franchisors to maintain accurate records on the register, and to act as a disincentive for franchisors to act poorly.

The current disclosure requirements under the Code are appropriately balanced. Franchisors are required to publicly list characteristics of their business via the register, such as establishment costs, ongoing costs and other payments that may be required throughout the duration of the franchise agreement. This information is available regardless of whether

¹ The Australian Government the Treasury 2023, *Review of the Franchising Code of Conduct: Consultation Paper*, August 2023, page 15.



someone is a prospective franchisee or otherwise, and by virtue of being public, is available to competitors as well. Franchisors who voluntarily provide information above the prerequisite level should be welcomed but requirements should not be changed without further consultation.

Separately to the register, there is concern that the Key Fact Sheet, which was introduced in 2021, has grown to require information above and beyond the original intent. In line with the recommendation to consult before further information is required under the register, ACCI would suggest that consultation be undertaken prior to requiring further disclosures on the sheet.

Cooperatives

ACCI welcomes the previous amendments to the Code which saw cooperatives excluded from the scope of the Code, and the current drafting adequately clarifies this exclusion, having removed legal ambiguity regarding this operational model.

Changes to cooperatives under the Code were made on the basis that true cooperatives are owned and controlled by their members and have voting rights based on memberships instead of shareholdings, as opposed to franchises. This difference also suggests that inherent power imbalances experienced by franchisees and franchisors are not shared by cooperatives, and negated the need for cooperatives to be covered by the Code.

Accordingly, ACCI recommends that the amendments as they relate to cooperatives should remain.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'David Alexander', with a stylized flourish at the end.

David Alexander
Chief of Policy and Advocacy