

Review of Franchising Code of Conduct – Consultation Paper September 2023

Australia Post Submission 28
September 2023

1. Background

The Australian Postal Corporation (**Australia Post**) is an iconic and trusted Australian Government Business Enterprise which has for over 200 years been an integral part of the Australian community, facilitating communication and delivering consumer and business services to all Australians.

Australia Post appreciates the opportunity to make this submission to the Australian Government's Review of the Franchising Code of Conduct (**Code**).

Australia Post is governed by its own statute, the *Australian Postal Corporation Act 1989* (Cth) (**APC Act**), the strict performance standards imposed by the *Australian Postal Corporation (Performance Standards) Regulations 2019* (Cth) (which include requirements regarding the availability and accessibility of our network of retail outlets) and use and management of public resources, governance, reporting and disclosure obligations are imposed on Australia Post by the *Public Governance, Performance and Accountability Act 2013* (Cth) and related regulations. The regulatory constraints, commercial obligations and community service obligations contained therein present unique challenges.

Australia Post operates a national network of 4,271 post offices that provide access, sales and distribution channels for Australia Post's products and services across all Australian States and Territories. Our network comprises 700 corporate owned post offices, 2,804 licensed post offices (**LPOs**) and 767 Community Postal Agents.¹

Our LPOs are of vital importance to the Australian postal system, providing the customer interface and local involvement that has made Australia Post part of the fabric of the Australian community. This business model symbiotically combines the brand, systems and resources of Australia Post with the energy, connections and service ethic of a committed and locally engaged owner-operator.

LPOs vary from stand-alone post offices, to 'in-conjunction' post offices located within or operated together with other businesses (such as newsagencies, general stores, pharmacies, supermarkets, Tattersalls agencies, convenience stores and gift shops). Approximately 60% of all Australia Post licensees operate their LPO in an 'in-conjunction' format – Australia Post does not control, nor does it seek to control, the scope of operation or management of a licensee's broader business. Australia Post remunerates licensees for services provided on behalf of Australia Post and licensees derive revenue from their resale of Australia Post products.

Although Australia Post views its relationship with its LPOs as distinct from the traditional franchise model (our unique structural features impact on the legal and business relationship between Australia Post and its licensees), it is acknowledged that LPOs are 'franchises' and 'franchised businesses' for the purposes of the Code. As such, Australia Post, its LPOs and licensees are directly affected by any regulatory change to the Code.

2. Submissions on Questions in Consultation Paper

¹ At 30 June 2023.

Australia Post takes this opportunity to confirm its general support for the submission lodged by the Franchise Council of Australia (**FCA**). The FCA's commentary accurately reflects Australia Post's sentiments on the questions raised by this review.

Consistent with our prior submissions concerning the Code, Australia Post considers the Code as it is currently drafted strikes an effective balance between the rights and responsibilities of franchisors and franchisees alike (providing significant protection for franchisees). The Code imposes substantial compliance obligations on franchisors – it is primarily in this area that we believe it would benefit from simplification designed to reduce associated compliance costs without materially reducing the protections available to franchisees under the Code.

The remainder of this submission focuses on responding to those questions of particular interest to Australia Post. We do not propose commenting on:

- questions relating to the automotive industry (namely questions 7, 8, 13, 14, 15 and 17); or
- questions where we have no substantive commentary to add in addition that that shared by the FCA (namely, questions 4, 11, 16, 18, 19 and 22).

Should the Review wish to further discuss the information provided in this submission, we would welcome the opportunity to engage with appropriate representatives and provide any further information as required.

| Question | Response |
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| <p>1. Are there any general observations you want to make about the regulatory framework?</p> | <p>Australia Post considers the Australian franchise industry heavily regulated (and possibly suffering from regulation fatigue). This industry would not benefit from increased regulation.</p> <p>The Code has been subject to continual change since its inception, which has the potential to create uncertainty and confusion in the industry. As it currently stands, we consider the Code:</p> <ul style="list-style-type: none"> adequately supplements the contractual relationship between franchisors and franchisees – it includes an obligation to act in good faith, along with prescriptive disclosure requirements and cooling off rights; already contains a penalty regime that can see significant penalties imposed for breaches (although, as we discuss elsewhere in this submission, it is arguable some of these penalties are disproportionate with the breach to which they apply); and to be effectively enforced by the Australian Competition and Consumer Commission. <p>The application of other regulatory regimes to the franchising sector, including the Australian Consumer Law (ACL), bolster the franchise framework to ensure fair business dealings within the industry. However, some obligations placed on franchisors under the Code appear inconsistent with other legislative / regulatory / community expectations. For example:</p> <ul style="list-style-type: none"> The <i>Fair Work Act 2009</i> (Cth) contains provisions through which franchisors can be held liable for certain breaches of their franchisees. Despite this, the Code does not provide a franchisor with the ability to terminate a franchise agreement for a franchisee's serious breach of laws (or multiple / repetitive breaches). Where a breach of law is considered so serious a franchisor is exposed to liability for the acts of their franchisees, it is a reasonable expectation that a franchisor have the statutory right to terminate a franchise agreement for those serious breaches. The Code does not provide a franchisor with the ability to terminate a franchise agreement for franchisee behaviour not pursued criminally, but considered fundamentally at odds with the franchisor's behavioural expectations (as shared with franchisees through policies etc) and the community's expectations of the franchisor – for example, instances of substantiated sexual harassment and/or sexual assault. <p>For franchise agreements entered into, extended or renewed after 1 July 2021, the termination in special circumstances provisions of the Code require that a franchisor give a franchisee no less than 7 days' notice of their intention to terminate (a period during which the franchisee is afforded the opportunity to dispute the termination and refer the dispute to an alternative dispute resolution process; if disputed, the franchisor is prohibited from terminating the agreement until 28 days from the date of their original notice of termination; during this period a franchisor can only direct a franchisee to cease operating the business if such a right exists on</p> |

| Question | Response |
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| | <p>their franchise agreement). These arrangements continue to be of concern to Australia Post – the underlying ‘special circumstances’ at play here (a franchisee no longer holds the required licensing, is considered to have engaged in fraud, has abandoned the relationship, has become bankrupt or insolvent, is convicted of a serious offence, is operating the business in a way that endangers public health and safety) are circumstances that warrant a franchisee’s immediate removal from the franchised business and we consider the court the best place for franchisees seeking urgent interlocutory relief in instances where they believe their franchisor to have acted in error or without merit. This concern would be heightened were the Code extended to provide for ‘immediate termination’ in the event of demonstrated wage underpayment or sexual harassment / assault – in such situations, to delay leaves franchisee employees at risk of further mistreatment or coercion.</p> <p>Australia Post considers the compliance burden imposed by the Code significant and excessive. We facilitate the assignment of approximately 200 LPOs each year – the voluminous nature of the prescribed disclosure materials impacts the effectiveness of the disclosure and a franchisee’s ability to access advice in a cost-friendly manner; achieving compliance with associated Code obligations is costly and time consuming.</p> <p>Australia Post considers its experience of disputes and complaints consistent with the view expressed by the FCA – they are not a regular occurrence.</p> |
| <p>2. <i>Is the Franchising Code fit for purpose? Should it be retained? If so, should it be remade prior to sunset?</i></p> | <p>Australia Post does not consider major structural change of the Code is required, but there are minor improvements that would be of great benefit – including the adjustments to franchisor disclosure obligations and statutory termination entitlements otherwise discussed in this submission.</p> |
| <p>3. <i>Are there any emerging trends, such as technology or cultural innovations, which would affect the operation of the Franchising Code?</i></p> | <p>Australia Post supports the view of the FCA that paperless transactions need to be better facilitated by the Code. Our experience as a franchisor of a network of considerable size is consistent with that expressed by the FCA – we find the voluminous nature of disclosure materials generally incompatible with digital processes; we would support increased flexibility in relation to electronic disclosure (e.g. a data room model) if it would facilitate the easy exchange of disclosure materials to both a franchisee and their advisors.</p> <p>Australia Post would be supportive of a ‘fitness for purpose’ review of both the suite of disclosure documents a franchisor is obliged to share and the format in which certain annexures are required to be delivered.</p> |
| <p>9. <i>How effective are the requirements of the Franchising Code that ensure franchisors make information available to franchisees prior to entry into a franchise agreement? If possible, please</i></p> | <p>Australia Post supports the views of the FCA regarding amendments to the Code that create greater flexibility with disclosure and allow disclosure to be tailored to specific categories or franchisees.</p> <p>With regards the following disclosure documents, Australia Post notes:</p> |

| Question | Response |
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| <i>comment on the effectiveness and content required for inclusion in each of the Franchise Disclosure Register, Information Statement, Key Facts Sheet and Disclosure Document.</i> | <ul style="list-style-type: none"> • [Key Fact Sheet] We do not consider this document achieves its policy objective of providing meaningful disclosure in a more concise format. It simply represents a duplication of compliance obligations. • [Information Statement] We do not consider the Information Statement provides much benefit to the disclosure experience. Further, the imposition of a penalty for failure to provide this document within 7 days of a prospective franchisee expressing interest in a franchise appears to be disproportionate to the benefit derived from this document in its current format. |
| 10. How have changes to unfair contract terms laws impacted franchise agreements? Is the approach in the Franchising Code to regulating certain types of contract terms still appropriate? | <p>Australia Post supports the views of the FCA concerning the intersection of the Code and the unfair contract terms (UCT) regime and the uncertainty created by the latter's application through a general reference to the ACL (as opposed to express prohibitions in the Code).</p> <p>Franchise agreements often include terms that would ordinarily be at risk of being deemed unfair, but are considered necessary by a franchisor to protect its legitimate business interests – franchisor flexibility and the ability to act in a timely and efficient manner is often necessary (particularly in a large network) to avoid or minimise damage to brand or the relationship of trust and confidence within a network (considerations that go to the very heart of franchising).</p> |
| 20. What has been the impact of 2022 reforms which increased certain penalties available under the Franchising Code? Particular comment is sought on penalties which were increased to the greater of \$10 million, three times the benefit obtained, or 10 per cent of annual turnover? | <p>While penalties of this significance may be appropriate for the automotive sector, Australia Post considers the current penalty regime disproportionate and heavy handed in the context of the broader franchise industry.</p> |
| 21. Is the role and activity of the ASBFEO in relation to supporting dispute resolution under the Franchising Code appropriate? | <p>Australia Post appreciates the role the ASBFEO plays in facilitating mediations and finds the process to be effective as an alternative dispute resolution process. Through this channel, we've participated in a number of mediations with preeminent mediators, whose effectiveness in driving a resolution is unparalleled.</p> <p>That being said, Australia Post would support ASBFEO-facilitated measures designed to improve consistency / quality across the pool of possible mediators, like training on Code fundamentals, commercial contract principles and effective mediation practices. It is at best unhelpful and at worst can be irretrievably destructive to an ongoing franchise relationship, for a franchisor and franchisee to attend a mediation with a mediator that has little or no understanding of franchising and/or appear to have very little mediation experience (the mediation experience should not see a mediator behaving obstructively and actively trying to renegotiate terms following</p> |

| Question | Response |
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| | the reaching of in principle agreement between a franchisor and franchisee). |