

2023 Franchising Code of Conduct review

Responses to Inquiry Questions – 22 October 2023

Submitted by:

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See responses in blue below each question.

General Questions

1. Are there any general observations you want to make about the regulatory framework?

It has taken 25 years to get the Code to its current level of sophistication. Despite predictions to the contrary when it was first introduced, the Code has not negatively impacted the growth of franchising in Australia. Any changes arising from this review should enhance what is currently in place, rather than dismantle any protections developed or introduced since its inception.
2. Is the Franchising Code fit for purpose? Should it be retained? If so, should it be remade prior to sunseting?

In order: Yes (with some qualification); Yes and No.

The qualified response to “Is the Code fit for purpose?” is yes, however it applies evenly across all levels of potential franchise investor, and there may be an opportunity to create a relaxation of some provisions of the Code (eg. disclosure) for repeat multiple franchisees, franchisees considered to be sophisticated or institutional investors, similar to that under the Franchise Rule in the United States.
3. Are there any emerging trends, such as technology or cultural innovations, which would affect the operation of the Franchising Code?

The rise and regulation of the gig economy may have implications for some service franchise brands. Large intakes of migrants means that Code and Franchise Disclosure Register may need to be available in languages other than English.

Questions – The scope of regulation

4. Does the general scope of coverage of the Franchising Code remain appropriate? Is the scope of coverage flexible enough having regard to the diversity of the franchising industry?

Subject to my comments in Q2 above, consideration should be given to creating a separate Code for automotive dealers to better cater for their specific requirements, although since the exit of Holden from the Australian market and the recent Mercedes Benz case, this may be shutting the gate after the horse has bolted.
5. Have the amendments regarding the exclusion of cooperatives from the provisions of the Franchising Code effectively clarified that they fall outside the scope of the Code?

I am not aware of any confusion among cooperatives that they are impacted by the Code

6. What evidence is available to suggest additional protections in the Franchising Code for new car dealerships should be extended beyond new car dealerships (for example to truck, motorcycle and farm machinery dealerships)?

I am not aware of any evidence to indicate that truck, motorcycle or farm machinery dealerships have been subjected to the same behaviours by franchisors as motor vehicle dealerships. If there has been no harm in these other equipment franchises, then a new auto Code may not need to be extended to these other types of distributorships.

7. Should agreements between automotive manufacturers and dealerships that relate only to service and repair work (which do not cover matters relating to vehicle sales) be considered as franchise agreements and covered by the Franchising Code protections? Why or why not?

Yes, because they would still otherwise meet the definitional requirement under the Code, and regardless of the product or service, are still dealing with the same franchisor as automotive dealerships, whose behaviour led to previous modifications to the Code.

8. Has the amended definition of *motor vehicle dealership* effectively clarified that agency sales models remain within the scope of regulation under the Franchising Code?

No response

Questions – Before entering into a franchise agreement

9. 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 comment on the effectiveness and content required for inclusion in each of the Franchise Disclosure Register, Information Statement, Key Facts Sheet and Disclosure Document.

The needs to be complete consistency between the information provided by franchisors in the Key Facts Sheet, the Disclosure Document, and the Franchise Register, such that the Disclosure Document is the master document containing all information, and the Key Facts Sheet and Franchise Register both contain essentially the same information drawn from the Disclosure Document.

The Code only recommends that a potential franchisee undertake educational courses prior to signing a franchise agreement, but should consider requiring franchisees to provide a statement to confirm they have completed the ACCC's online education program as similarly required for lawyer, accountant and business advisor statements under clause 10(2)(a) of the Code.

This initiative would greatly enhance the uptake of the education program, and refocus franchisors on promoting the education program (and possibly adopting its successful completion as a core franchisee selection criteria. It may go too far to mandate this course for all new franchisees, but there is no real downside in doing so given that it is a free course and takes about an hour to complete.

The Disclosure Register could also be used as a form of control of over non-compliant franchisors, such that any franchisor who does not meet the criteria to register, or who is suspended or removed from the Register is effectively barred from granting further franchises (aside from resales of existing businesses on a franchisee to franchisee basis (versus franchisors onselling company-owned outlets)).

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?

No response

11. Do you have any other comments on how the Franchise Code regulates the relationship between franchisors and franchisees at the point of entry into a franchise agreement?

See comments in response to Question 9

New vehicle dealership agreements

12. What impact have the 2021 changes relating to compensation and return on investment had on franchisors and franchisees entering into new vehicle dealership agreements? Where possible, please provide detail on the costs and benefits the new car dealership sector has experienced because of these changes.

No response, but it is likely too early to tell.

Questions – Enduring obligations in franchise relationships

13. How well does the Franchising Code support franchisors and franchisees during the term of the franchise agreement? In particular, does the Franchising Code provide adequate minimum standards relating to structural and/or operational change management?

It depends on the nature of the change, and should not be prevent a system's necessary evolution to survive in a competitive environment.

The Code could mandate that franchise brands must introduce a Franchise Advisory Council once they have reached say 40 outlets or 40 franchisees (whichever comes first and which is a common tipping point for franchisors to establish an FAC), which must also be consulted prior to the introduction of any major change likely to impact the franchise network. (This is established best practise in any event, so including this in the Code would not be particularly onerous).

14. How effective are the 2021 reforms which restricted the franchisors' capacity to require a franchisee to undertake significant capital expenditure?

It is too early to tell.

New vehicle dealership agreements

15. What impact have the 2021 amendments to the obligation to act in good faith in relation to new car dealerships had? Where possible, please provide detail on the costs and benefits the new car dealership sector has experienced because of these changes.

No response

Questions – Ending a franchise agreement

16. How effective are 2021 reforms to the Franchising Code which created a process for franchisees to formally request early exit from their franchise agreements?

They make no difference other than create a potential risk for the franchisor if the franchisor is argued to be unreasonable in withholding their consent. A franchisee could previously request an early exit before this provision was introduced into the Code.

New vehicle dealership agreements

17. Where possible, please comment on the impact, or expected impact, of reforms to the Franchising Code which seek to ensure franchisees are paid compensation if the franchisor terminates a new vehicle dealership agreement early. Where possible, please provide detail on the costs and benefits (or expected costs and benefits) to the new car dealership sector resulting from these changes.

No response

Questions – Enforcement and dispute resolution

ACCC and enforcement

18. Is the current role of the ACCC in relation to enforcement of the Franchising Code appropriate?

I have always believed that the ACCC needs to act more quickly in its enforcement activity. Its speed of response may improve if had a dedicated franchising team who have a established level of franchising knowledge and prior industry experience.

The ACCC has shown that it can act more swiftly and commercially through the use of infringement notices, however these are issued far less frequently than they could be because the penalty units threshold is too low and did not increase when the penalty units were doubled throughout the Code (which means the threshold desperately needs to be increased).

Also, the ACCC would be faster in their response to franchising issues if they had a trained and dedicated team franchise team.

19. How useful and effective are the educational resources provided by regulators (such as from the Australian Competition and Consumer Commission)? Do they ensure prospective entrants to the franchising sector are sufficiently aware of their rights and responsibilities? Is the level of industry engagement appropriate?

Unfortunately the ACCC's pre-entry franchise education program for potential franchisees is the best-kept secret in franchising. It is only passively promoted via reference in the Information Statement and the Code, and the ACCC website. In conjunction with the franchise sector, much more could be done to ensure that potential franchisees are aware of – and actually undertake – the program before they sign a franchise agreement.

This course is ideal for potential franchisees. Commercial providers such as myself are the sole providers of education to start-up franchisors, and these vary in quality and consistency (eg. My [Introduction to Franchising](#) is conducted four times a year regardless of group size, whereas other providers will conduct only annual events, or set even dates only when they have enough bookings – and often these events are loss-leaders for franchise consultancies seeking new clients who aspire to franchise their businesses.)

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?

It was noted when these penalties were first developed that they were targeted at large multi-national franchisors, particularly auto manufacturers, but when they were adopted into the Code no such distinction was made, meaning small family-owned franchisors are equally at risk. Any penalties need to be proportionate to the wrong-doing and the offender's capacity to comply.

Dispute resolution

21. Is the role and activity of the ASBFEO in relation to supporting dispute resolution under the Franchising Code appropriate?

Yes, I believe the ASBFEO is working well in supporting dispute resolution.

22. Do the dispute resolution provisions in the Code provide an effective framework for the resolution of disputes? In particular, are you aware of whether 2021 reforms relating to multi-party dispute resolution and voluntary arbitration have been utilised by participants in the franchising sector? If not, why not?

I am not aware of any franchisor or franchisee seeking to arbitrate a dispute following this method of ADR being included in the Code.

I do believe that there needs to be a greater awareness and of mediation, and it should be used far more often than it is. To this effect, the Code could be amended that every Breach and/or Termination notice could include a concurrent invitation to mediate the issues at hand. This would be an important early circuit breaker in the escalation of disputes between the parties as typically mediation would only occur AFTER a breach or termination notice has been issued, and then only at the specific request of one of the parties (usually the franchisee).

CHAPTER 2

WHAT DOES THE FRANCHISING CODE OF CONDUCT REALLY MEAN FOR FRANCHISEES?

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ABOUT THE AUTHOR

Jason has more than 30 years' experience in the franchise sector and is the founder of the Franchise Advisory Centre, and publisher of Franchise News, Australia's leading email news bulletin on franchise trends and issues.

He is an experienced non-executive director of franchise brands, as well as past chairman of the World Franchise Council and past board member of the Franchise Council of Australia.

Jason is also a longstanding member of the ACCC's Small Business & Franchising Consultative Committee. He teaches best practice in franchising to both franchisors and franchisees, and has delivered franchise education throughout Australia, as well as New Zealand, the United States, Canada, the United Kingdom and the Philippines.

What is the Franchising Code of Conduct?

The Franchising Code of Conduct (the Code) is the national set of regulations that govern franchising in Australia. It has been in force since 1 July 1998 and has been amended and updated in one form or another nearly a dozen times in the last 25 years. (Even as this article goes to press, the Code is undergoing yet another review.)

The original intention of the Code was to regulate the behaviour of franchisors toward potential and existing franchisees, and this is still its primary purpose today, however it also has some elements which touch former franchisees as well.

How does it protect franchisees?

The Code seeks to protect franchisees from poor practices by franchisors which are incompatible with a healthy and mutually-beneficial franchise relationship. There are three main elements to the Code which are:

1. Access to specific information about the franchisor and the franchise opportunity that must be provided at least 14 days before a franchise agreement can be signed. This is known as Disclosure, and all franchisors must follow the same template for their disclosure document regardless of how big or small their network, and regardless of how young or old their brand. Since November 2022, franchisors have also had to list certain information about themselves on a government website called the Franchise Disclosure Register (www.franchisedisclosure.gov.au – see more details below).
2. The second primary element of the Code sets guidelines on what franchisors can and cannot do before, during and sometimes even after the franchise relationship has ended to protect franchisees from poor or exploitative behaviours.
3. The third element of the Code are processes for dispute resolution that can help resolve disputes more quickly, often at lower cost, and for generally quicker and more equitable outcomes compared to slow and costly litigation via the court system.

Who is responsible for enforcing the Code?

The Australian Competition and Consumer Commission (ACCC) has overall responsibility for enforcing the Franchising Code of Conduct. The ACCC can receive and investigate complaints from potential, existing or former franchisees. It can also impose fines for relatively minor breaches of the Code, or seek more substantial penalties through the courts for serious and potentially deliberate breaches of the Code.

The ACCC has produced various information resources for potential and current franchisees and franchisors to help better understand the Code, including a compliance guide (for franchisees) and a free online course for potential franchisees (see below for more details).

What do potential franchisees need to know about the Code?

The Code protects existing and potential franchisees from poor behaviour in the franchise relationship. Every potential franchisee should know that the Code exists for

their protection, but also to focus them on having access to better information about a franchise investment, and a better understanding of franchising more broadly before signing a franchise agreement.

The Code does not absolve franchisees of the responsibility to undertake their own due diligence before investing in a franchise. Nor does it absolve franchisees of the obligation to adhere to the terms and conditions of the franchise agreement (assuming it complies with the Code), simply because the franchisee later decides they don't like certain clauses.

The Code does not cover every possible instance of poor behaviour that might cause difficulties in a franchise relationship. Neither does a franchisor's compliance with the Code guarantee that a franchisee will have a profitable and rewarding business, as the Code only regulates conduct in franchise relationships, and not the commercial outcomes of the relationship itself. There is a risk involved in any business venture, and while a franchise mitigates those risks, it can't eliminate risk altogether.

Early proponents of the Code argued that it would give people greater confidence to invest in a franchise, and that the franchise sector in Australia would grow as a result. While the sector has grown since the Code was introduced, there is no evidence that the existence of the Code has led to the franchise sector in Australia growing at a rate any faster than in countries such as the United Kingdom and New Zealand which do not have any kind of national franchise regulations.

Information overload?

There is generally a very low level of awareness of the Franchising Code of Conduct among potential franchisees in Australia. Most only learn about the existence of the Code some time after they have started their search for a franchise, and often only at a very late stage of the process when they receive an Information Statement or a copy of the Code from a potential franchisor along with a disclosure document and franchise agreement for signing. (By law, franchisors must provide a copy of the Code with these other documents).

As a result, a potential franchisee may easily feel overwhelmed at the sheer volume of documentation they receive. Although most reputable franchisors will require franchisees to get legal advice before signing a franchise agreement, there is no reliable data to indicate that potential franchisees will actually read the documents for themselves, although anecdotally less than 10% may actually do so.

The Code itself is a document of 106 pages from start to finish, but this includes 16 pages outlining the template for a disclosure document (which the franchisee should receive anyway, but filled with relevant information about the franchisor and the franchise offer), plus around a dozen other pages including a table of contents, endnotes, and a table outlining the history of amendments to the Code.

Meanwhile, the Disclosure Document might be up to 70 pages, and the franchise agreement itself could run to more than 100 pages, which, combined with the Franchising Code could result in a potential franchisee being confronted with around

300 pages of information (plus anything else required to be provided, such as a copy of the lease of the premises from which the business will operate).

The sheer volume of information provided, plus the legal language in which it is written can be challenging for even the most enthusiastic reader to digest, and has often led to claims that potential franchisees are overloaded with too much information before buying a franchise. Even if this was true, providing potential franchisees with less information upfront is not possible under the Code, and so potential franchisees must make the effort to work through the volume of information they are given.

Start at the beginning and rush slowly

The journey to becoming a franchisee will be different for different people.

Some people start their journey subconsciously as customers of a brand, then later decide they like the products or services so much that they can see it as a business opportunity for themselves and make inquiries accordingly. Usually this means they focus on just the one brand during their franchise journey.

Other people come to franchising in response to a desire to work for themselves in an industry they already know, or a completely new industry altogether. Unlike the enthusiastic customers who may only consider one brand, the potential franchisees driven by a desire to be their own boss may instead look into two or three different brands simultaneously (especially as there are so many different franchises across so many industry segments now operating in Australia).

In the first instance, a potential franchisee may visit the website of a franchisor, then perhaps Google additional information about their franchise offer, or visit various online commercial directories.

However, since November 2022 another highly useful information resource that allows potential franchisees to compare one franchise against another is the Australian Government’s online Franchise Disclosure Register at www.franchisedisclosure.gov.au

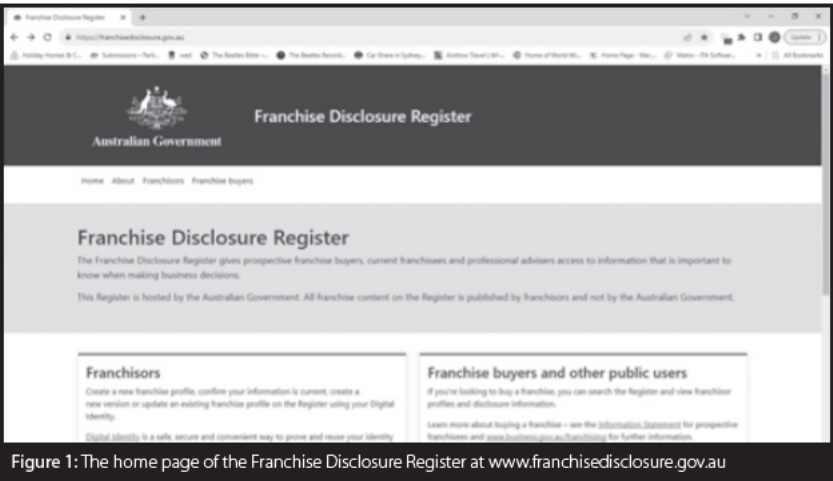


Figure 1: The home page of the Franchise Disclosure Register at www.franchisedisclosure.gov.au

The Disclosure Register website is a free public information resource developed by the Australian Government to allow potential franchisees to more easily compare franchise offers. It does not have pop-up ads, animated gifs or videos unlike privately-operated online franchise directories.

Potential franchisees will need to click on the Search button on the front page of the website, then agree to the Terms of Use before proceeding.

The user will then land on a page that might look like the following:

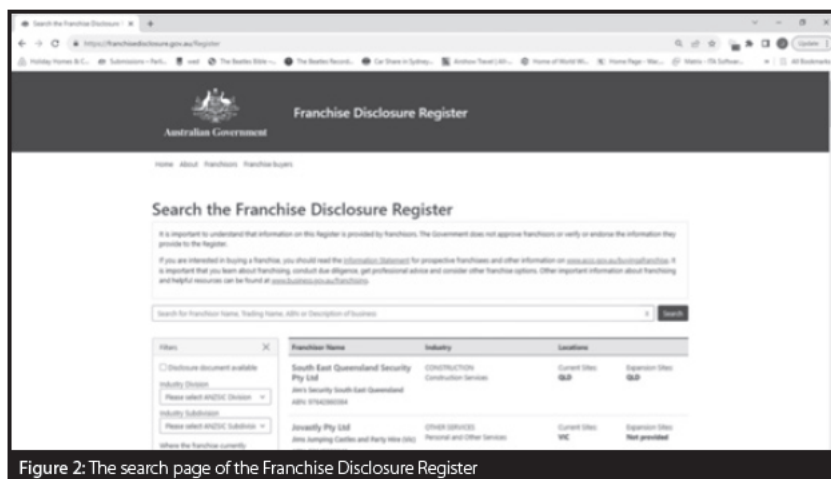


Figure 2: The search page of the Franchise Disclosure Register

The Register lists every business that offers franchises in Australia, even if they are franchisors and master franchisees of the same brand (eg. XYZ Franchisor Australia Pty Ltd, and a state master franchisee - eg. XYZ Queensland Pty Ltd - as the franchisor may offer franchises in states other than Queensland, where another company has the right to grant franchises).

Because the Register lists all businesses that offer franchises, there are far more listings on the register (1,719 as at the time of writing this article). After allowing for multiple listings for brands which operate via master franchises, there are about 1,200 different franchise brands listed on the Register.

The Register classifies brands according to the ANZIC (Australian and New Zealand Standard Industrial Classification) categories for businesses used by the Australian Bureau of Statistics, with a major classification heading followed by a sub classification heading to help narrow down the search results. (This includes classifications in which no franchise businesses operate, such as Mining). A search for a franchise opportunity can be further refined to include states or territories in Australia where the brand currently operates, or where it intends to grow.

Some classifications may not be immediately apparent and need patience to find. For example, a potential franchisee interested in a fitness business would need to select the main industry division of "Arts and Recreation Services", and then a subdivision of "Sports and Recreation Activities" to shortlist around 85 results.

The Register also includes the ability to search by brands which have provided their Disclosure Document, however as it's voluntary for franchisors to provide this document and the document itself often contains commercially sensitive information, only a very small number of franchisors have provided this information (less than 4% of all listings as at the time of writing).

Once a user has identified a listing of interest, clicking on it will provide more details about the franchisor and the franchise offer, including:

- The number of years it has been operating;
- How many franchised and corporate outlets exist;
- The states in which it operates or intends to expand;
- The anticipated setup cost for a new franchise;
- Fees and royalties payable under the franchise agreement;
- The length of an initial franchise term;
- Contact details for the franchisor and other basic information about the franchise.

The listing should also include a link to download the franchisor's Key Facts Sheet (ie. a template summary of information about the franchise offer to be read alongside the Disclosure Document), and may also include links to download their disclosure document and standard form franchise agreement (if these have been provided to the Register as it is not compulsory to do so).

What is the Information Statement and online course?

The Information Statement for Prospective Franchisees is a government-mandated five-page handout containing generic information about franchising that must be given by franchisors to potential franchisees as soon as possible after receiving an initial franchise inquiry.

The purpose of the Information Statement is to alert potential franchisees of the sorts of questions they should explore when considering a franchise, provide an overview of the process, and provide details of additional sources of information such as the free online course for potential franchisees at www.accc.gov.au/franchising-education-program.

This free course is an updated version of one launched in 2010, and which had been undertaken by more than 20,000 potential franchisees before its recent relaunch. It takes only 90 minutes to complete but provides vital insights for potential franchisees to consider before committing to a franchise. Australia was the first country in the world to offer a free online course for potential franchisees, and set a precedent which several other countries have since followed.

What next?

If you are seriously considering investing in a franchise, be sure to learn as much as you can about franchising before signing on the dotted line. Links to all the resources mentioned in the article, plus additional resources can be found online here: <https://www.accc.gov.au/by-industry/franchising>

Other useful online resources include:

www.business.gov.au

This is an Australian government website full of tips and tools for new and existing small business owners.

www.franchiseadvice.com.au/best-practice-for-franchisees/

The Franchise Advisory Centre has an online library of more than 50 advice articles for potential franchisees. Its regular interactive online course Introduction to Franchising (www.franchiseadvice.com.au/introduction-to-franchising/) is also very useful for potential franchisees to rapidly increase their understanding of franchising and small business, including how to avoid common mistakes.

The last word

Finally, just take your time. You should never rush into a potentially life-changing decision. The more effort you put in to researching your proposed franchise investment, as well as franchising and small business more broadly, the more likely you are to avoid unpleasant surprises along the way, and to enjoy a profitable relationship with your franchisor.

As a rule of thumb, consider taking up to an hour of your time on research and self-education for each \$1,000 to be invested. It might feel like this initially slows things down at the start of your franchise journey but it will be worthwhile to know that you have gone into business with your eyes wide open and have given yourself the greatest possible chance of success.

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