



Consideration of a licensing regime for the franchise sector

November 2024

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Consultation Process

Request for feedback and comments

We invite interested stakeholders to make submissions on the issues raised in this consultation paper. For accessibility purposes, please provide your submissions in a Word, RTF or PDF format.

Closing date for submissions: 8 DECEMBER 2024

You may lodge submissions electronically (preferred) or by post to the following addresses:

Email	franchisingtaskforce@treasury.gov.au
Mail	Licensing Taskforce Justice and Licensing Reviews Branch Small and Family Business Division The Treasury Langton Crescent PARKES ACT 2600
Enquiries	You may direct initial enquiries to franchisingtaskforce@treasury.gov.au

Confidentiality of submissions

We may share submissions with other Commonwealth agencies for the purposes of the Review. We may make all information (including name and address details) contained in submissions publicly available on the Australian Treasury website unless you indicate that you would like all or part of your submission to remain in confidence. Automatically generated confidentiality statements in emails are not sufficient for this purpose.

If you would like only part of your submission to remain confidential, please provide this information clearly marked as such in a separate attachment.

Please note that legal requirements, such as those imposed by the *Freedom of Information Act 1982*, may affect the confidentiality of your submission.

For further information, please refer to Treasury's [Submission Guidelines](#).

Introduction

A mandatory code in some form has regulated the franchising sector since 1998. The *Competition and Consumer (Industry Codes-Franchising) Regulation 2014* (the Code) – a mandatory industry code under the *Competition and Consumer Act 2010* (CCA) – currently provides the regulatory framework for the franchising sector. Despite regular reviews and subsequent strengthening of the Code, there has been discussion within the sector about persistent harms and the need for a shift in the regulatory approach.

On 8 February 2024, the Government released the Independent Review of the Franchising Code of Conduct (the Review), conducted by Dr Michael Schaper. Recommendation 23 of the Review noted that a licensing regime may provide a more efficient and effective way to address persistent issues in the sector, without necessarily imposing a greater degree of complexity or regulatory burden than the current Code.

The introduction of a licensing regime would represent a substantial change in regulatory posture for the sector. A licensing regime would seek to promote positive commercial relationships, fair trade and access to justice, and competition within the sector. However, it is also important to consider the possible limitations of a licensing regime, including increased regulatory oversight and the operational constraints that may apply to the sector, as well as its transitional and ongoing costs.

This consultation paper seeks your views and feedback to consider the merits and assess the feasibility of introducing a licensing regime for the franchising sector.

The Independent Review of the Franchising Code of Conduct

On 15 August 2023, the Government announced the appointment of Dr Schaper to conduct a review of the Code. The Review evaluated previous reforms and brought together several reviews, including a sunset review, statutory reviews of the Franchise Disclosure Register (FDR) and new car dealership protections. The Review also captured a post-implementation review of the 2021 amendments to the Code for New Vehicle Dealership Agreements.

The Review made a total of 23 formal recommendations, alongside findings and 34 implementation suggestions. It found the Code is largely fit for purpose and recommended that it be remade with improvements. The Government agreed or agreed in principle to all 23 recommendations.

The Review also identified that persistent harms in the sector have varied over time and can often change throughout the life cycle of a franchise system. It highlighted that these harms often stem from an imbalance of power and information asymmetry between franchisors and franchisees. Issues can also arise where there is a misunderstanding of goodwill, restraint of trade clauses, or an obligation to act in good faith under the Code. The Review further noted there could be more education around change management, use of marketing funds and voluntary arbitration processes.

Recommendation 23 of the Review stated that the Government should investigate the feasibility of introducing a licensing regime to better regulate most aspects of the franchisor-franchisee relationship. This recommendation was not a direct response to one specific issue, rather it was a result of increased discussion within the sector about the desirability of a more fundamental shift in regulatory approach.

Purpose of this consultation

The Department of the Treasury (the Treasury) has established an internal taskforce (the Taskforce) to assess the feasibility of introducing a licensing regime for the franchising sector. A licensing regime is a form of regulation that creates a prohibition of a regulated activity and establishes obligations that a person must meet to obtain, and continue to hold, a licence to undertake the regulated activity.

This consultation paper (the paper) does not present a proposed licensing regime. Instead, the paper seeks your views on the need for such a regime. We do this primarily by outlining five potential functions of a licensing regime and seek your views on how one or more of these could best address the needs of the franchising sector. These functions may include regulatory oversight, dispute resolution, disclosure of information, business model preconditions to franchise, and education and resources.

When preparing your response, you may wish to consider some of the existing determinative dispute resolution systems currently operating in Australia, such as the Telecommunications Industry Ombudsman, or the Australian Financial Service Licence (AFSL) that works in conjunction with the Australian Financial Complaints Authority (AFCA).

We have presented the functions and associated questions below to help guide discussion and submissions, but you do not necessarily need to address them all. When answering questions please provide any examples you have encountered and possible solutions, where applicable.

Understanding the nature of the issue

The Review heard suggestions for the introduction of franchisor licensing regime. Such a system would ordinarily require government authority to approve (or licence) a franchisor to be able to conduct business. This may assist to overcome some of the perceived shortcomings under the current Code where, for example, enforcement action can only occur after a breach has occurred.

Questions

1. What issues have you identified in the current regulatory framework for franchising? How significant are they?
2. Considering the issues you have identified, are they significant enough to require government intervention?
3. Have previous attempts to regulate failed, or failed to keep up with new circumstances?

Regulatory Oversight

The Australian Competition and Consumer Commission (ACCC) regulates the Code. The Review characterised the current franchising regulatory framework as an *ex post* regulatory model, with enforcement and dispute resolution mechanisms operating in reaction to misconduct or problems. Under an *ex post* model, the regulator must wait until harm has occurred before they can intervene. Regulatory enforcement can be time consuming and resource intensive, and franchisors can continue operating unimpeded while involved in enforcement proceedings.

The Review notes that an *ex ante* model would allow the regulator to be proactive in their enforcement approach. As an *ex ante* model, a licensing regime would establish obligations on potential licensees before they can engage in a regulated activity. If a licence holder breaches the terms of their licence, the regulator would then be able to immediately halt the licence holder's engagement in the regulated activity.

Questions

4. Does the regulator currently have sufficient powers to respond to and limit the impact of persistent issues in the sector? What powers could the regulator have to incentivise better outcomes for all participants in the sector?
5. Would an early intervention power more efficiently and effectively address the current issues in the franchising sector?
6. What powers could the regulator have to incentivise better outcomes for both franchisees and franchisors? For example, giving the regulator powers to sanction in response to breaches of the Code.

Dispute Resolution

Under the Code, franchise agreements must provide for a complaint handling procedure that adheres to subclauses 40A(1) to (4) of the Code. The Code outlines processes for notifications for dispute, multiple party dispute resolution, the role of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), and alternative dispute resolution (ADR) processes through mediation or conciliation.

The Code makes it mandatory for the parties to participate in ADR and genuinely try to resolve the dispute in good faith. The Review noted that while stakeholders were generally supportive of the Code's process for dispute resolution, some concern remains about the cost, timeliness and awareness of these existing processes.

The Code also outlines the use of arbitration as a method of ADR, but only through written agreement of both parties. Arbitration is a more formal dispute resolution process that resolves the dispute through a binding determination. Under a mandatory industry code, parties must agree to participate in binding arbitration. However, a licensing regime could require licensees to participate in mandatory binding arbitration as a term of their licence. This would be like other determinative schemes, such as those attached to the AFSL.

The Review notes there are other ways the industry could encourage the use of binding arbitration in franchise agreements. These include using the FDR to publicly disclose franchise systems that self-elect binding arbitration as a dispute resolution process or through the development of a memorandum of understanding, like that established within the automotive sector between the Australian Automotive Dealer Association, Motor Trades Association of Australia and Federal Chamber of Automotive Industries. Implementation could occur separately or as part of a licensing regime.

Questions

7. Does the current dispute resolution framework under the Code offer meaningful, timely and cost-effective dispute resolution?
8. How do you think the current dispute resolution framework under the Code could be improved or enhanced?
9. Are there any barriers to accessing the current dispute resolution options?
10. Do you think there is meaningful engagement and communication between franchisors and franchisees where changes under consideration impact the franchise system?
11. Are there existing internal change management systems that are effective in reducing future disputes that may be beneficial to the sector? Provide examples where possible.

Disclosure of information

The FDR was established to provide prospective franchise buyers, current franchisees and professional advisers access to information that is important to know when making business decisions. Currently, the FDR provides high level franchisor data, including franchisor details, disclosure information and the ability to upload disclosure documents, key fact sheets and standard form franchise agreements. This information seeks to assist potential franchisees to compare different franchise systems before entering into a franchise agreement.

Data that is fit for purpose can support informed decision making, influence behaviour and allow for detailed analysis. This section of the consultation paper seeks to understand the reasons why people access sectoral data, how they use it, and to assess what additional data would be useful to better inform decision making. Based on results from a survey conducted as part of the Review, improvements could occur to the FDR. Potential changes could improve transparency through a franchise system comparison function, the inclusion of new data fields, such as number of franchise disputes, or more detailed reporting requirements to improve the value of existing data.

Questions

12. Excluding access for reporting purposes, for what purpose would you access data contained in the FDR?
13. What changes could occur to the FDR to improve its functionality as a disclosure portal?
14. Should data collected through the FDR be used to automatically generate information documents? For example, to generate clearly presented plain language comparison documents.
15. Considering all available information, did you have access to sufficient information to make an informed decision before entering into a franchise agreement? If not, what further disclosure would have been beneficial?
16. Are there other alternatives for reporting data about the sector that would better achieve the benefits of disclosure and increased transparency?

Business model preconditions to franchise

If a licensing regime applied to the franchising sector, it would establish a set of obligations that a person must meet to obtain and hold a licence to undertake franchising as a regulated activity. These obligations could set a minimum standard for franchise systems, ensuring franchise opportunities brought to the market possess the required processes and supports to successfully operate as a franchise system in Australia. For example, a potential licensing regime may require a business model to operate for a set time and across 2 or more locations before being eligible to apply for a franchising licence. This approach would allow time for a business model to mature and develop the supports and systems that a franchisee would reasonably expect under a franchise agreement.

Questions

17. Do you think the franchising system you operate in has performed as marketed to you?
18. How developed or mature should a business' operating model be before it can expand through a franchising model?
19. How would a potential franchisor demonstrate that their business model has achieved the appropriate level of maturity?
20. Does your franchise model offer sufficient support to ensure franchisees are able to perform as expected under the franchise agreement? i.e. do you have access to appropriate training, support and guidance to ensure consistency of product and service delivery.
21. Before entering a contract, should franchisors have to provide opportunities to determine whether a potential franchisor-franchisee relationship is suitable for both parties? For example, a requirement for perspective franchisees to work in an existing franchise business as an employee for a specific period before being eligible to enter into a franchise agreement.

Education and resources

The Review found the existing approach to online education and advice resources for the franchising sector were not optimal. While there are resources available for participants in the sector, they are spread across multiple domains. The dispersed nature of available resources increases the search cost to a degree that entrants to the sector often find it difficult to locate information or choose not to engage with all the resources available to them. As a result, some franchisors and franchisee do not have all the necessary information to understand their obligations under the Code, the expectations of a franchise system, or the support systems available to them in the event a dispute is raised within a franchise agreement. The Government response agreed for the ASBFEO to provide enhanced guidance to the sector on these issues, although engagement with these resources is optional for both franchisees and franchisors.

The existing approach to education for the sector relies on industry participants taking the initiative to self-educate. An *ex ante* model could require pre-entry educational requirements for participants or set a minimum standard of guidance and support to be developed by a business before it can obtain a licence to operate as a franchise system. For example, there could be a requirement for franchisees to complete a course focusing on how franchising works, what the Code does and does not cover, and what due diligence they should undertake before signing a franchise agreement. Franchisors could have similar requirements, including the completion of training that outlines the expectations of a business selling franchising opportunities and their obligations under the Code, or that focuses on the skills required to improve the franchisor-franchisee relationship such as negotiation, change management or conflict resolution skills.

Education can improve understanding and provide awareness, increase skills and identify opportunities for development. Requiring entrants to undertake education tailored to their position as franchisee or franchisor, or by enhancing available guidance and supports throughout the life of a franchise agreement, could improve awareness and the franchisor-franchisee relationship under a franchise agreement.

Questions

22. When were you first made aware of the Franchising Code of Conduct? Do you understand your obligations under the Code?
23. If you are a franchisor, do you direct potential franchisees to any external information or educational resources prior to entering into or during a franchise agreement?
24. If you are a franchisee, have you accessed any external information or educational resources relating to franchising? If so, what resources did you access and what prompted you to seek this information?
25. Do you think the current educational resources are sufficient and provide a benefit to prospective franchisees? How could these resources improve to better inform decision making?

Broader considerations for a proposed licensing regime

The previous sections of this paper outlined distinct elements and functions that could form part of a proposed licensing regime. This section will outline some broader considerations to implementation that would be relevant regardless of the licensing model structure. The Taskforce welcomes your views on these considerations and how they would interact with any potential licensing regime. Again, these topics and questions are guides only – you do not necessarily need to address them all in your response.

Industry Engagement

The rollout of the FDR demonstrated there are gaps in communication streams between government and the franchising sector. The FDR launched on November 2022, but community feedback indicates there are likely to be franchisors that do not have a profile on the FDR. While there are various exemptions under the Code that mean some franchise-appearing systems do not have a profile on the Register, including those covered under a different industry code, this feedback suggests there is a need for improved information dissemination. For a licensing scheme to be effective, there would need to be an effective awareness campaign to inform franchisors and franchisees of their new obligations to operate in Australia.

Question

26. How can the Government more effectively engage the franchise sector to inform them of changes to regulations, or future consultations that impact the sector?

Funding models

When compared to the current Code, a proposed licensing regime could have increased costs to establish and operate. There are various options for funding a new licensing regime. For example, the Government could fund the establishment of a licensing regime, with costs reimbursed by industry, and ongoing costs met from industry membership, enforcement action and fees associated with dispute resolution. For example, the dispute resolution process and other activities managed by AFCA draw on funds from a combination of membership fees and levies charged to the financial services industry.

Question

27. What do you think would be the most effective funding model to establish and maintain a licensing regime for the franchising sector?

Appendix A: List of Questions

Questions – Understanding the nature of the issue

1. What issues have you identified in the current regulatory framework for franchising? How significant are they?
2. Considering the issues you have identified, are they significant enough to require government intervention?
3. Have previous attempts to regulate failed, or failed to keep up with new circumstances?

Questions – Regulatory oversight

4. Does the regulator currently have sufficient powers to respond to and limit the impact of persistent issues in the sector? What powers could the regulator have to incentivise better outcomes for all participants in the sector?
5. Would an early intervention power more efficiently and effectively address the current issues in the franchising sector?
6. What powers could the regulator have to incentivise better outcomes for both franchisees and franchisors? For example, giving the regulator powers to sanction in response to breaches of the Code.

Questions – Dispute Resolution

7. Does the current dispute resolution framework under the Code offer meaningful, timely and cost-effective dispute resolution?
8. How do you think the current dispute resolution framework under the Code could be improved or enhanced?
9. Are there any barriers to accessing the current dispute resolution options?
10. Do you think there is meaningful engagement and communication between franchisors and franchisees where changes under consideration impact the franchise system?
11. Are there existing internal change management systems that are effective in reducing future disputes that may be beneficial to the sector? Provide examples where possible.

Questions – Disclosure of information

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Questions – Business model preconditions to franchise

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Questions – Education and resources

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Questions – Broader considerations for a proposed licensing regime

26. How can the Government more effectively engage the franchise sector to inform them of changes to regulations, or future consultations that impact the sector?
27. What do you think would be the most effective funding model to establish and maintain a licensing regime for the franchising sector?

Appendix B: Further reading

[Independent Review of the Franchising Code of Conduct Final Report \(treasury.gov.au\)](https://www.treasury.gov.au/independent-review-of-the-franchising-code-of-conduct-final-report)

[Government response to the Independent Review of the Franchising Code of Conduct \(treasury.gov.au\)](https://www.treasury.gov.au/government-response-to-the-independent-review-of-the-franchising-code-of-conduct)

[Franchising Code of Conduct](#)

Glossary

ACCC	Australian Competition and Consumer Commission
ADR	Alternative Dispute Resolution
AFCA	Australian Financial Complaints Authority
AFSL	Australian Financial Services Licence
ASBFEO	Australian Small Business and Family Enterprise Ombudsman
ASIC	Australian Securities and Investments Commission
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
Code	Franchising Code of Conduct (Schedule 1 to the <i>Competition and Consumer (Industry Codes – Franchising) Regulation 2014</i> (Cth)).
FDR	Franchise Disclosure Register
Review	Independent Review of the Franchising Code of Conduct
Treasury	The Department of the Treasury