



The Real Estate Institute of Australia

Submission to **The Franchising Code of Conduct Review**

*Prepared by the Real Estate Institute of Australia
February 2013*

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FRANCHISING CODE OF CONDUCT REVIEW

BACKGROUND

The Government has committed to review the amendments made to the Franchising Code of Conduct in 2008 and 2010. The review will also look at other important issues relating to the Franchising Code. A Discussion Paper - Review of the Franchising Code of Conduct – was released in early January 2013 to assist with the development of submissions to the review. The then Minister for Small Business called for submissions from the franchising sector.

REIA represents around 80% of real estate agencies and is an important element of the broader property and construction sector, which makes a significant contribution to Australia's social climate and economic development. The real estate profession employs approximately 77,000 people and contributes \$300 billion annually in economic activity.

The REIA's members are the State and Territory Real Estate Institutes, through which around 80% of real estate agencies are collectively represented.

REIA also represents the major franchisors through its Affiliates' Council. A letter supporting this submission from the Professionals group is attached.

Franchising is said to be one of the genuine engine rooms of the Australian economy, with 70,000 franchised businesses generating \$128 billion in annual turnover and employing over 700,000 employees.¹

Importantly, REIA represents an integral element of the small business sector. According to the ABS statistics, 73% of real estate agency businesses employ fewer than 10 employees (over 50% of this portion employed fewer than 5 employees). Only 0.6% of businesses employ 50 or more persons.

REIA is committed to providing and assisting research and well-informed advice to the Federal Government, Opposition, professional members of the real estate sector, media and the public on a range of issues affecting the property market.

The REIA welcomes the opportunity to provide a submission on the Franchising Code of Conduct.

One set of franchise laws for Australia

Most franchise groups operate across Australia.

Having different laws in different states adds to compliance costs of business without adding a clear net benefit to the community² and causes confusion within organisations operating in more than one state. An example of this in the property sector is landlord/tenant legislation, which has different rules applying in each state.

¹ Franchise Council of Australia *Business Franchise Australia and New Zealand* September 2012:16

² It is particularly noted no regulatory impact statement was prepared for the proposed (or enacted) laws relating to franchises in South Australia and Western Australia.

Having laws that are the same throughout Australia would eliminate unnecessary costs for franchises.

The 'seamless economy' agenda endorsed by the Council of Australian Governments has led to the development of a single set of laws governing business to business and business to consumer transactions.

The latest and most evident change is the creation of the Australian Consumer Law as a schedule to the Competition and Consumer Act 2010.

There is no strong case for jurisdiction specific laws governing to come between the commercial negotiations of franchisors and franchisees.

It is clear the Commonwealth has the capacity to 'cover the field' as it relates to the conduct of what are described as being 'constitutional corporations'³.

There is no doubt, a provision along the lines of section 112 of the Airports Act 1996 should be inserted into the Competition and Consumer Act to make clear the Commonwealth Parliament has exhaustively declared the laws regulating franchising in Australia, through the enactment of laws facilitating the making of the Franchising Code⁴.

This will mean those negotiating franchises will have one set of laws to deal with, as is the case in most areas of business law.

There is no need to change the general approach to the Franchising Code of Conduct

More generally, REIA notes the Franchising Code of Conduct is designed to provide early disclosure to franchisees (or prospective franchisees) about information (including fees and charges that franchisees may face).

This is designed to address the information asymmetry genuinely faced by many franchisees when dealing with sophisticated franchisors.

The current level of intervention provides fairness to small market players without impacting on the dynamic efficiency of the Australian economy.

This is because the structure of the current code provides franchisees with the information necessary to make informed decisions whilst preserving the capacity for franchisors to develop new technology, innovative practices or ideas to provide opportunities to reduce costs or improve the quality of services.

The current code therefore strikes the right balance and should therefore not significantly change.

More particularly, there should not be any change without a regulatory impact statement that is fully compliant with the requirements of the Best Practice Regulatory Handbook, published by the federal Office of Best Practice Regulation.

REIA recommends that there is no change to the general approach to the Franchising Code of Conduct.

Good faith

³ See *New South Wales v. Commonwealth* (the WorkChoices case) 231 ALR 1. See also *University of Wollongong v. Metwally* (1984) 158 CLR 447

⁴ Contained in the *Trade Practices (Industry Codes – Franchising) Regulations 1998* made under the *Competition and Consumer Act 2010* (formally called the *Trade Practices Act 1974*)

REIA also does not believe that a statutory concept of 'good faith' should be inserted into the Franchising Code.

It is important to note the common law concept of 'good faith' is as yet unsettled by the courts, although it is broadly accepted that courts will construe a contract to include:

- an obligation on the parties to co-operate in achieving the objects of the agreement;
- both parties being honest in their conduct; and
- both parties adhering to a standard of conduct having regard to their interests.⁵

The High Court has said the meaning of the term depends on the legal context in which it is used.

In an insurance concept, the term basically encompasses notions of 'fairness, reasonableness and community standards of decency and fair dealing'.⁶

This appears to be how the term 'good faith' is interpreted in most of the statutory codes in which it is used.

Moreover, the concept of 'good faith' bargaining should be recognised for what it is, which is an intention to ensure fairness in any negotiation process.

As has been recognised in the industrial relations environment, the concept of 'good faith':

... generally involve(s) approaching negotiations with an open mind and a genuine desire to reach an agreement as opposed to simply adopting a rigid, pre-determined position and not demonstrating any preparedness to shift⁷.

It is therefore a concept designed to capture and the normative values parties to a franchising agreement should display towards each other in statutory language.

The manner by which clause 11 of the Franchising Bill 2010, defeated in the Western Australian Legislative Council on 2 November 2011, seems to suggest this is what is wanted by those wishing further amendment to current franchise laws⁸.

⁵ From Sir Anthony Mason in his Cambridge Lectures (1993) and his article *Contract, Good Faith and Equitable Standards in Fair Dealing* (2000) 116 LQR 66

⁶ *CGU Insurance Limited v AMP Financial Planning Pty.Ltd* [2007] HCA 36 para.130

⁷ *Public Sector Professional Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission* (1994) 36 AILR 419 at 421 (AIRC, Full Bench, 31 August 2004, Print L4605

⁸ The relevant clause read:

11. Duty to act in good faith etc.

(1) In this section —

act in good faith includes to act fairly, honestly, reasonably and cooperatively.

(2) A person who proposes to be or is a party to a WA franchise agreement must act in good faith —

(a) in any dealing or negotiation in connection with —

(i) entering into or renewing the agreement; or

Creating a provision that could lead to not much more than a legal finding that someone has been 'unfair' whilst negotiating, and that more negotiations should be undertaken.

Given that, many proponents believe that these provisions will ensure 'unfair' outcomes; this may not be a helpful result.

Rather than offer false hope, perhaps the better way forward would be to:

- leave the common law to develop in this area (whilst retaining the laws relating to unconscionable conduct); and
- emphasise the mediation services such as those offered by the Office of the Franchising Mediator where there is a feeling of 'unfair' conduct, perhaps augmented by the development of a National Small Business Tribunal along the lines proposed in the Option 3 proposed in the Department of Innovations 2011 Small Business Disputes Options Paper where parties can conveniently seek arbitration of disputes where mediation fails.⁹

REIA recommends that a statutory concept of 'good faith' should not be inserted into the Franchising Code.

Penalties

Finally, given that the Franchising Code of Conduct is designed to facilitate commercial negotiations between parties so that a particular franchise arrangement can either commence or continue (as the case requires) imposing civil or criminal penalties for breaches of the Code would not be appropriate. Such penalties can only be viewed as disproportionate.

REIA notes the observations made on page 29 of the Discussion Paper, which says:

However, the government did not amend the CCA to provide that the ACCC can seek a civil pecuniary penalty for breach of an industry code, including the Franchising Code. The reason for this is tied to the nature of industry codes. Industry codes, like the Franchising Code, are '...co-regulatory measures, designed to achieve minimum standards of conduct in any industry where there is an identifiable problem to address. Industry codes can be used as an alternative to primary legislation in instances where a market failure has been identified.' Further, industry codes are 'complementary to general prohibitions on unfair practices that may occur in trade or commerce, and should encourage compliance and focus on remedies rather than simply seeking to punish contraventions.'

Further, the imposition of large penalties on a franchisor may have the potential to affect the viability of the franchisor's business. While this may be a reasonable repercussion insofar as the franchisor is concerned, there is potential for flow on effects to franchisees. For example, support from the franchisor might be

(ii) the agreement; or

(iii) resolving, or attempting to resolve, a dispute relating to the agreement; and

(b) when acting under the agreement.

(3) A contravention of subsection (2) is not an offence.

⁹ Department of Innovation, Industry, Science and Research *Resolution of Small Business Disputes Options Paper* (2011): 17 – see <http://www.innovation.gov.au/SmallBusiness/SmallBusinessCommissioner/Pages/default.aspx> accessed 29 January 2012

reduced, or the franchisor might increase franchise fees to accommodate the extra risk created by the possible imposition of pecuniary penalties. (Footnotes omitted)

and agrees with the observations made as to the place of an industry code within an overall regulatory structure as well as the possible effect imposing either a civil or criminal penalties regime will have on franchisors.

REIA recommends that the penalties not be changed.

REIA Recommendations

The REIA recommends that

- ***There is no change to the general approach to the Franchising Code of Conduct.***
- ***A statutory concept of 'good faith' should not be inserted into the Franchising Code.***
- ***The penalties not be changed.***

Prepared by:
REIA Secretariat
February, 2013



Your Ref:

Our Ref: IJMcD:PGLSEC:REIA:Sbmission FCC:07.02.13

7th February 2013

Ms Amanda Lynch
 Chief Executive Officer
 The Real Estate Institute of Australia
 PO Box 234
DEAKIN ACT. 2600

Dear Amanda

Re: **Submission to The Franchising Code of Conduct Review**

I refer to the Discussion Paper – Review of the Franchising Code of Conduct.

I subscribe to the Business Franchising Newsletter; Franchising Research papers at Griffiths University and the ACCC Franchising Code Publications.

I confirm that on behalf of Professionals Global Limited and the associated Professionals Companies I constantly review this area.

Our position in relation to the Review is as follows:-

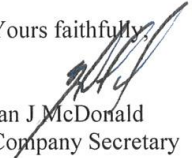
1. We recommend that there is no change to the general approach to The Franchising Code of Conduct
2. We are not supportive of a Statutory Concept of “good faith” be inserted into The Code
3. We recommend that the penalties not be changed.

Our thinking and recommendations are really exactly the same as yours and therefore we can be recorded by the REIA as totally supporting your submission.

We always welcome the opportunity to participate in any matters pertaining to Real Estate on behalf of our Members.

With kind regards.

Yours faithfully,


 Ian J McDonald
 Company Secretary



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