

Department of the Treasury

Enhancement to Unfair Contract Terms Legislation

Regulation Impact Statement

Response from:

The Australian Association of Franchisees (AAF)

1. The JPC Inquiry into franchising in its report to Parliament tabled in March last year, called on the franchisee community to create and develop a peak body capable of representing franchisee interests in the public policy debate. Franchisee groups had also reached this conclusion. As a result, the Australian Association of Franchisees (AAF) has been formed and will meet that need. Until now, franchisees have remained largely silent on policy and regulation. This has left a serious vacuum that has been filled by the narrow perspectives and interests of the franchisor lobby.
2. The challenge for AAF is that the very perception of what franchising is, and how it should be governed, has not been the subject of serious consideration. The Code of Conduct, 2104, for instance, which currently governs the sector, fails to define what franchising is.
3. One extreme and cynical view is that franchising is a way of buying yourself a job. However, franchisees are clearly defined in law as business proprietors and are excluded from the protections of employment law.
4. There are other ways of thinking about franchising. It has elements of a partnership, a co-operative or a joint venture. Technically, while it has elements in common with

each of these, franchising does not sit within the definition of any of these business models. It is a business model of its own.

5. AAF experience suggests that, amongst policy makers, the most common way of perceiving franchising is that it is a paternalistic system. A system wherein franchisees live under the umbrella of the franchisor who has created the intellectual property and made the investment. In this construction, franchisors enable less visionary or able folk to benefit from their great initiative. The overarching theme here, is that the franchisor is initially bringing more to the table, and therefore, is the prime consideration in terms of whose needs are a priority. The current code is ample evidence of this world view.
6. The AAF perspective, on the other hand, is that franchising is a co-investment model. It is true that the franchisor has had an idea, developed a system and brand and made some start up investment. However, our analysis shows clearly, that by the time a franchise system reaches maturity, franchisees are far and away the major investors and have been the enabling factor in making the good idea into a commercially viable reality.
7. In our response to the RIS therefore, we are coming from the position that the status and rights of franchisees as both investors, and providers of sweat equity, need to be enshrined in appropriate legislation. Franchising represents nearly 10 percent of the Australian economy. It is three times the size of farm gate agriculture and employs as many Australians as the manufacturing sector. The JPC Inquiry, at Chapter 22 raise the question of whether or not franchising is a co-investment scheme. This should not even be in question, franchisees provide the lion's share, we estimate 80 percent or more, of the total capital investment in franchising.
8. In light of the above, the existence of potential franchisors with ideas and brands is not the major challenge. Hearing so much about the ongoing scandals that plague the

franchising sector, keeping the faith of Australians that they can safely enter a franchising relationship, is now the key policy challenge for government. It is also critically important that financial institutions do not lose any more faith in franchising. At the present time this is a serious risk to the sector.

9. Measured in this way, the Franchising Code of Conduct approach has been a complete failure for more than twenty years and should be scrapped forthwith. AAF is advocating for legislation, reflective of the characteristics of the co-venture arrangement, that is franchising.
10. **It is from this perspective we now comment on Section 11 of the UCT RIS.**
11. From our standpoint, the first point is that under the *laissez faire* nature of the current Franchising Code of Conduct all franchisees live in a relationship characterized by the JPC Inquiry as a “massive imbalance of power” AAF is arguing that this situation is driven by a fundamental misconception. That misconception is that franchising is about business to business contracting. That is not the case. Franchising is very clearly a co-investment scheme. Franchising creates a single venture with two stakeholders and needs to be regulated as such. However, in the context of the current code, the UCT legislation has some relevance, if appropriately modified.
12. In light of the massive imbalance of power recognised by the JPC Inquiry, all franchise relationships should be covered by the legislation. The current case of General Motors exiting the country is a good illustration. No matter how large the individual franchisee, the franchisor will be far bigger and more powerful. It is all relative.
13. The fact that franchising requires a standard form agreement means that any change has an impact on the whole franchisee group. UCT action should be enabled in legislation for groups of franchisees not just individual franchisees. Formal associations of franchisees, where they exist, should be acknowledged in law and

empowered to act on behalf of their franchisee constituency. The cost of any legal action is beyond the means of almost all franchisees. Multi-party dispute resolution is not properly addressed in either the code or the UCT legislation

14. Unfair contract terms should be banned and not allowed to remain in agreements. Where such terms are not removed, serious penalties should be applied. The onus should be on franchisors and their legal advisors to expunge unfair terms where they exist and to not include such terms in any new or revised agreements.
15. Breaches of a UCT ban should include fines in the \$1 million plus range and the banning of the Directors of convicted franchisor entities. Smaller fines or lack of the potential for a ban, reduce penalties to mere irritants.
16. Some large law firms have what they call 'template' agreements. These are, one size fits all, agreements that they peddle to multiple franchisor clients. In one case, a major Australian law firm, claims there are more than two hundred franchise businesses, clients of theirs, operating on largely the same agreement, drafted by them. This template agreement was subject to scrutiny by a QC acting on behalf of AAF members. The resulting report was a summary of the myriad unfair terms contained in this template agreement and went to more than thirty pages. This agreement remains in the market unchanged.
17. In this context, where an unfair term is identified in any template agreement of this type, the exclusion of that term should immediately apply to all of the identical or similar template agreements of the firm concerned, not just that agreement or that franchise business. The removal of such unfair terms should, by law, be required to be at the offending law firm's expense. If that is not the case it just becomes another revenue opportunity and not a deterrent to law firms of this type.

18. In terms of the broader UCT RIS, AAF fully endorses the submission from Professor Buchan from UNSW. Professor Buchan is one of our policy advisors. We would also ask that this contribution to the UCT discussion be read in the context of AAF's response to the Franchising Taskforce RIS. A copy of that document is attached for information.
19. Generally, members of AAF are very concerned that the franchising sector, as a major part of the economy, is very prone to exploitative and scamming behaviours. As previously stated, franchising is clearly a co-investment scheme and needs to be legislated for, as such.
20. The current 'code of conduct' approach has been a complete failure in all of its versions and, as a result, franchising has been a happy hunting ground for the unscrupulous. As an organization with a strong belief in the positive benefits of franchising, we are determined that the franchising sector in future will be properly regulated, but not overregulated. We would welcome any follow up discussion regarding these comments.