

Name Darryn McAuliff
State Queensland
Stakeholder Type: Other,
CEO of FRANdata Australia, (Providers of research, reporting and ratings on the US and Australian franchise sectors). FRANdata also operates the Australian Franchise Registry and US Franchise Registry

1. What are the critical pieces of information that should be contained in a summary document?

2. If a national franchise register is established, what information should it contain? What would be the benefits and costs of a national franchise register?

Having established and operated the Australian Franchise Registry for more than 5 years, and as long term operators of the US Franchise Registry, we have included our input on the attachment "FRANdata Input to Franchising Sector Reforms Regulation Impact Statement"

3. There are a number of existing educational resources on franchising. What additional education options for prospective franchisees should be made available? If there was an online educational resource which brought together the available franchising education options, what would its costs and benefits be?

We note the Franchise Council of Australia has recently produced a Franchisee Guide and would welcome any extension of that platform to promote increased awareness for prospective franchisees in relation to the risks and opportunities that may be present in running a small business.

Problem 1.1: Disclosure can be hard to comprehend, critical information may be hidden in detail and some information is not provided in the disclosure document.

Option 1.1.1: Status quo (no changes)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata considers that prospective franchisees like any other person establishing or purchasing a business should undertake a thorough due diligence that includes expert professional advice and other independent inputs to supplement their own analysis. Our concern is that a summary document may inadvertently reduce their likelihood to get the appropriate level of advice and compromise the extent of prudent due diligence.

We note that in the US market forces have led to a sharp increase in voluntary disclosure of financial information over recent years as franchise systems compete for higher quality franchisees.

Problem 1.2: The reliability of information provided to prospective franchisees may be difficult to assess

Option 1.2.1: Status quo (no changes)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

Please refer attachment "FRANdata Input to Franchising Sector Reforms Regulation Impact Statement"

Problem 1.3: Information gaps – a potential franchisee might be unaware of which types of information are materially relevant to inform their decision to enter an agreement.

Option 1.3.3: Mandate all prospective franchisees receive legal and financial advice before entering into a franchising agreement

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

We would be supportive of imposing a requirement on every franchise agreement to include a certificate that confirms they have received both financial and legal advice before executing the agreement. We note that an increasing number of franchisors have already adopted this practice and the FCA intends to introduce the requirement on members.

4. What are the practical implications (costs and benefits) for prospective franchisees and franchisors of increasing cooling off or disclosure periods?

FRANdata is supportive of "cooling off" and review periods but feels the current arrangements are adequate.

Our preference is to see well prepared and well advised candidates making informed decisions rather than extending the current provisions.

5. How easy is it for franchisors to provide reasonable estimates of leasing costs before they are finalised?

FRANdata does not have an informed position on this issue.

6. How often are leasing arrangements finalised after the cooling off period expires? What are the implications of having the cooling off period commence after a lease is finalised?

FRANdata does not have an informed position on this issue.

Problem 2.1: Cooling off rights may expire before franchisees and franchisors have adequate time to appropriately reflect on their business arrangements after entering the agreement

Option 2.1.1: Status quo, with clarification of the operation of existing cooling off requirements in the code

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata is supportive of "cooling off" and review periods but feels the current arrangements are adequate.

Our preference is to see well prepared and well advised candidates making informed decisions rather than extending the current provisions

Problem 2.2: Cooling off rights may expire before lease arrangements are finalised

Option 2.2.4: Improve education and awareness around leasing and franchising

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata does not have an informed position on this issue however is aware that retail tenancy and leasing issues have been a significant concern for all small businesses (including franchising).

We support and program that heightens awareness for both prospective franchisees and their professional advisors around this key and often problematic overhead.

Problem 2.3: Cooling off rights in transfers, extensions and renewals can be unclear, including with respect to franchisee to franchisee sales

Option 2.3.1: Status quo (no changes)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

We do not believe this is a major issue with the risks substantially mitigated by the experience of the people involved in the transaction.

7. What would 'meaningful information' look like in terms of marketing fund disclosure?

This may vary across franchise systems but ultimately it needs to satisfy the user group and evidence prudent and transparent use of funds.

There appears to still be some variance so an ongoing education program by the ACCC and the FCA is warranted.

8. How does the benefit of increased frequency of reporting of marketing funds compare to the costs of increased administration?

We do not see excessive auditing as being beneficial. In the event that breaches or inefficiencies are apparent we believe repeat audit costs should be for the account of the franchisor not the fund (perhaps for an extended period).

Problem 3.1 Marketing funds are not always transparent

Option 3.1.3: Increase awareness and provide guidance around existing legal obligations

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

There appears to still be some variance so an ongoing education program by the ACCC and the FCA is warranted.

9. What information should franchisors disclose in relation to supplier rebates? Are there any barriers to providing this?

FRANdata notes that current arrangements include disclosure or rebates and incentives.

FRANdata recognises this is an area of great complexity and commercial sensitivity for suppliers as well as franchise systems. Our observation is that quality franchise systems leverage supplier relationships for the benefit of franchisees and brand standards which in turn benefits the franchisor and all franchisees respectively.

FRANdata fears that increased disclosure in this area may actually weaken the bargaining ability of franchisors on behalf of their franchisees.

10. If franchisors are required to ensure franchisees get a return on their significant capital expenditure, how might this be done in practice?

FRANdata does not have specific input on this area.

11. If franchisees are given a right to review capital expenditure business cases (which must be presented to franchisees by the franchisor under clause 30(2)(e) of the Franchising Code for

expenditure that the franchisor considers is necessary for capital investment), how would this right be exercised?

FRANdata does not have specific input on this area.

Problem 4.1 Supplier rebates can lead to conflicts of interest

Option 4.1.1: Status quo (no change)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata notes that current arrangements include disclosure or rebates and incentives.

FRANdata recognises this is an area of great complexity and commercial sensitivity for suppliers as well as franchise systems. Our observation is that quality franchise systems leverage supplier relationships for the benefit of franchisees and brand standards which in turn benefits the franchisor and all franchisees respectively.

FRANdata fears that increased disclosure in this area may actually weaken the bargaining ability of franchisors on behalf of their franchisees.

Problem 4.2 Conflicts of interest in the context of capital expenditure

Option 4.2.3: Clarify franchisee rights when significant capital expenditure is required

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

A financial projection or payback period is difficult to accurately calculate. We are supportive of defined franchisee rights and perhaps an element of shared risk when there is a requirement for significant capital expenditure.

Problem 4.3 Unilateral variations can lead to conflicts of interest and exploitation

Option 4.3.1: Status quo (no change)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

There is existing protection under UCT legislation and a commercial necessity for franchise models to be innovative and agile.

12. A number of stakeholders have told the Taskforce that the cost of arbitration can be comparable to going through the court system, and that conciliation may be a preferable alternative alongside mediation. In what circumstances could conciliation be an effective alternative dispute resolution process?

FRANdata observes the current mediation framework to be well supported and effective and does not support any change.

13. Would you consider including arbitration to resolve disputes in your franchising agreement, if a clear voluntary option were provided?

Not applicable.

Problem 5.1: Some disputes are not being resolved in a fair, timely and cost effective manner.

Option 5.1.1: Status quo (no change)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata observes the current mediation framework to be well supported and effective and does not support any change.

14. Under what circumstances should franchisees be allowed a no-fault exit from the franchise system?

FRANdata does not have any specific input in this area.

15. If goodwill was required to be fully clarified in the franchise agreement, how might this be done in practice? What would be the costs and benefits of this approach?

FRANdata does not have any specific input in this area.

Problem 6.1 Reasonable exit arrangements may not be, or may not be perceived to be, available or accessible for some franchisees

Option 6.1.1: Status quo (no change)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

Problem 6.2 Excessive restraint of trade clauses may inhibit lawful pursuit of subsequent business interests

Option 6.2.1: Status quo (no change)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata does not have any specific input in this area.

Problem 6.3 There are different expectations around the treatment of goodwill in franchise arrangements

Option 6.3.1: Status quo (no change)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata does not have any specific input in this area.

16. What are the implications of amending the Oil Code of Conduct to increase the number of common provisions between the Oil and Franchising Codes? What would be the costs and benefits of this approach?

FRANdata does not have any specific input for this area although it would seem to make sense to align if possible to reduce duplication for impacted franchise systems.

17. What are the implications of repealing the Oil Code of Conduct and adding specific fuel retailing provisions to the Franchising Code?

FRANdata does not have any specific input for this area although it would seem to make sense to align if possible to reduce duplication for impacted franchise systems.

Problem 7.1: Some franchisors experience additional regulatory burden from having to comply with both the Franchising Code and the Oil Code

Option 7.1.2: Increase the number of common provisions between the Oil and Franchising Codes to reduce the regulatory burden for some franchisors

- (f) Ensure that industry codes remain aligned over time (Recommendation 17.2)

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

It would seem to make sense to align if possible to reduce duplication for impacted franchise systems.

Problem 7.2: Compliance with the Franchising Code, Oil Code and where relevant the Competition and Consumer Act and the Australian Consumer Law, remains imperfect

Option 7.2.3: Improved education and guidance on expectations around compliance with the code

Please give an explanation of your choice(s). This includes the reasons an option may not be suitable. What are the costs, benefits and risks of your choice(s), and what other options could be considered?

FRANdata does not have any specific input for this area.

Are there any other comments you would like to make?

Franchising Sector Reforms – Regulation Impact Statement

FRANdata Australia is the franchise sector's leading source for objective information and analysis. We maintain a substantial library of information and are in close contact with many leading Australian brands.

This input to the Regulation Impact Statement forms part of our online response 5th December, 2019.

Our comments below refer specifically to Question 2 under Principle 1.

Principle 1, Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor

Q2. If a national franchise register is established, what information should it contain? What would be the benefits and costs of a national franchise register?

Background

We established the Australian Franchise Registry™ in Australia in 2014 to be a convenient and readily accessible mechanism for prospective franchisees, regulators and others to obtain general guidance on key issues. The Registry also gives the ACCC the ability to intervene proactively across the whole sector (such as in relation to the updating of disclosure documents), rather than wait for complaints to be made as is their current practice.

In the last five years 163 brands (refer appendix A) covering 24,320 businesses (of which 21,974 or 90% are franchised) have lodged their documentation with the Registry.

Registrations have come from a mix of new, emerging and established brands with a common goal of trying to promote higher standards in franchising. At the same time they have taken the opportunity to flag their own commitment to transparency.

Since the inception of the registry, a key and reasonable concern for franchise systems has been how their highly sensitive information will be held. There are many commercial risks with sensitive information being freely available in the marketplace; not only to franchisors, but also to the many independent small business owners that rely on the support of a healthy franchisor.

The Australian Franchise Registry™ has delivered on its undertakings to hold their information securely and continues to build on the trust it has already earned from franchise systems and other key stakeholders.

FRANdata believes, that a stronger connection between an independent franchise industry registry, such as the current Australian Franchise Registry, and ACCC enforcement would be very beneficial. As a simple example the ACCC could use the Registry to check who had not updated disclosure documents by the due date (typically October 31). In our experience an early warning sign of franchisors that have something to hide, or are experiencing issues, is failure to update.

The Registry could also use collected disclosure documents to produce more detailed industry analysis, as happens in the US. This information would also be of considerable utility to franchisors in benchmarking, and

indeed is already used for that purpose. Increasing, by industry initiative or Government mandate, the number of franchise systems that are registered and therefore provide their current disclosure documentation (on a confidential basis), would improve information in the franchise sector.

Similarly, our Franchise Ratings initiative which is modelled on the US ratings framework, is another industry initiative that is already providing objective information to prospective franchisees and others.

Turning to the specific questions in relation to a National Register

What information should it contain?

Based on our experience in the United States and the evolution of the Australian Franchise Registry™ we believe a registry **should contain**:

- The name of the franchise system;
- A registration number or identifier;
- Confirmation that baseline compliance documentation has been provided and is current; and
- Additional information that supports™ the transparency of franchise systems.

We believe it **should not contain** or provide public access to the system's documentation as this would present an unacceptable commercial risk to the individual franchise system (many of which are small businesses themselves). FRANData knows that public access to the actual Disclosure Document, as opposed to confirmation that the document had been updated and was available, would meet with great resistance from franchisors given those documents typically contain a significant level of confidential and commercial information. Those risks to the franchisor could then manifest directly into commercial risks for individual franchisees that have bought into the system.

The Australian Franchise Registry™, which does not provide access to the actual Disclosure Document, is already producing meaningful and increasing levels of information.

What would be the benefits and costs of a national franchise register?

We do not believe a new national franchise register provides any additional benefit to the Australian franchise sector.

The Australian Franchise Registry already provides several key benefits for the Australian franchising community including:-

- The Registry database contains the vast majority of Australian franchise systems, and is regularly updated;
- It is possible, at no cost, to search Australian franchise systems by name and key words;

- Searches of franchise brands can discover whether the brand is registered, and therefore has provided current franchise documentation. This not only provides comfort to prospective franchisees in relation to base level legislative compliance, but enables regulators and others to verify quickly and at no cost identify current compliance status. If franchise systems have “Confirmed” status they have provided updated documentation. (Although the Registry does not provide conclusive evidence that a franchisor has failed to update its disclosure document, it provides a basis for the ACCC to initiate a “please explain” process targeted at franchisors that may be in breach.) Additional categories can be easily added. For example, franchisors could be required to disclose if they have a marketing fund. If so, they could be required as a condition of registration to provide a copy of the annual Marketing Fund Statement;
- Aggregated data is able to be accessed from the disclosure documents of registered franchise systems, and made available to interested parties including industry bodies, regulators and Government;
- Additional information related to a franchise system is available to prospective franchisees, including whether bank finance reports are available that are likely to make it easier for a prospective franchisee to secure finance or whether the system has been independently rated through the Australian Franchise Rating Scale™.
- It is possible (and indeed contemplated) to include additional optional features for franchise systems, including verification and audit of documentation;
- The registry has been established, and the above benefits provided, at no cost to Government or regulators and minimal cost to franchise brands.
- Although there is currently no vetting of documentation, verification of base level compliance is important. Failure to comply with fundamental Franchising Code compliance obligations, such as updating of disclosure documentation, is an excellent early warning sign of possible broader non-compliance. For example the decision of Ultra Tune Australia Pty Ltd v Australian Competition and Consumer Commission handed down noted that Ultra Tune had failed to update disclosure documentation for several years. A widely used registry would facilitate earlier proactive intervention.

Potential issues (and costs) with the creation of a government run registry

While the decision to establish a central or government run registry is a matter for policy makers to decide, FRANdata respectfully raises the following issues which it believes would need to be considered to support this decision.

1. Which government department or agency would run the registry? The ACCC has already indicated it does not wish to do so, as this would conflict with its investigative and enforcement role. It also is contrary to the ACCC’s desired oversight role which does not include operational or sector wide administration. The ASBFEO is in a similarly conflicted position.
2. What would the registry look like, what functionality would be put in place and who would fund the capital expenditure and set up costs?
3. What level of staffing and expertise would be required to run the registry, and how would that be funded?
4. We note that the US franchise sector does not run a central national registry. Rather it has used independent organisations such as FRANdata to do so. (FRANdata has operated the US Franchise Registry since 1998).
5. Would the registry simply be a compliance function to confirm documents are being updated in line with obligations under the franchising code? Or would it be designed to support better information on the sector? The latter objective appears more consistent with the objectives of raising standards and enhancing the credibility of Australian franchising.
6. If the registry was designed to provide better information to support better decisions, what information would be extracted and how would that be interpreted and reported? The Australian Franchise Registry™ has the benefit of

insights from FRANdata's US operations that have been collecting and interpreting franchise data for more than 30 years.

7. How would the relevant documents be obtained, stored and used, noting current expectations of franchisors for confidentiality?

8. What level of additional "red tape" would be acceptable to franchise systems of which the majority would be small businesses themselves?

9. What assurances could or would be provided around who was permitted to access the filed information noting that Disclosure Documents contain a significant level of confidential and commercially sensitive information.

10. What level of funding would be required to establish the registry? For information, FRANdata estimates it has invested more than A\$1 million dollars to date in the establishment and operation of the registry. We understand the Western Australian Government investigated the cost of establishing a registry some years ago as part of a State inquiry into franchising, and estimated the establishment cost at multiple millions of dollars.

11. Would the franchise sector agree to fund the establishment and operating costs, noting that such proposals in the past have been strongly opposed and there appears to be strong industry opposition to the dispute resolution level also mentioned in the Franchising Inquiry Report?

The utility of the existing and industry led Registry will only increase as more franchise brands register, and as franchisee, public and advisor awareness of the Registry increases. Government funding to raise awareness would be very valuable in this context.

FRANdata, operators of The Australian Franchise Registry™, would be pleased to provide any further information or clarification if the Taskforce thought this would be helpful.



Darryn McAuliffe
CEO FRANdata Australia

December 5th, 2019