**Franchising Taskforce – Regulation Impact Statement**

<https://docs.employment.gov.au/system/files/doc/other/ris_franchising_fact_sheet.pdf>

Extract - “The questions below are taken from the RIS for ease of reference. You may respond to any or all of the questions, and if you would like you can also provide any additional information for the Taskforce’s consideration.”

**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.

Options considered under this principle include simplifying disclosure by requiring franchisors to provide important information to franchisees in a summary document, and government establishing a national franchise register where franchisors would be required to lodge their disclosure documents and template franchise agreements.

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

***Discussion*** *–*

**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?**

***Discussion*** *– A national franchise register where existing franchisees can express opinions of the franchise, the franchisor and other franchisees would be a very valuable resource for the franchise industry.*

*Whilst there is some risk of adverse content i.e. trolling, it is proven that a review facility such as a national register can have a strong beneficial influence on the organization. A well-managed franchise would receive overwhelming support from satisfied franchisees as this is in their best interests.*

1. 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?**

***Discussion*** *– Experience has demonstrated that a strong well managed franchisee member organization is the best channel of support and education for a franchise providing assistance advise on day-to-day operational issues.*

*Action – Establish a support framework as an extension of the national register for franchises i.e. links from the register. With modern technology this would be a minimal being managed by volunteers or a contracted management paid from small levies from franchisees such as (Reference APRA AMCOS).*

**Principle 2.** Franchisees should have time to consider whether the relationship is right for them before committing to an agreement. Options considered under this principle discuss changes to the current seven day cooling off period in the Franchising Code. This cooling off period is separate to the 14 day disclosure period which operates before a franchise agreement is entered into, renewed or extended.

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

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

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?

***Discussion*** *– Leasing costs are a function of business opportunity i.e. consumer traffic delivery. In the case of an on-sold franchise this cost should be in the business financials supplied by a business vendor or the franchisor. Where the franchisor is pitching a new franchise to a potential franchisee this would be a central element of the financial viability of the proposed franchise prepared by the franchisor.*

***Action*** *– For new franchise opportunities a lease cost analysis to be included in the franchisor’ sales pitch.*

**Principle 3**. Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties. Many franchise systems have a central marketing fund, made up of fees paid by franchisees to franchisors, to support marketing and advertising activities. Options considered under this principle include changes to the way marketing funds operate.

**7. What would ‘meaningful information’ look like in terms of marketing fund disclosure?**

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

***Discussion*** *– ‘Meaningful information’ is predominantly related to expenditure of funds. Franchisees are well positioned to evaluate the outcome of this expenditure as it directly relates to their revenue outcome.*

*With modern accounting systems preparing a financial report by downloading expenditure from a bank account is a matter of seconds. Entering this data into a modern accounting program such as ZERO or QuickBooks requires a few minutes.*

*It will become quite evident from this reporting if the franchisors expenditure of these funds is not for the purposes it is paid or the expenditure is not delivering a measurable outcome commensurate with the franchisees’ contributions.*

*Preparing financial reports from these programs are a matter of standard procedure and require little time to complete.*

*Franchisors may argue that submitting marketing planning and outcomes to franchisees could entail a ‘cost’ however this work should be undertaken as diligent business practice. Thus, providing this information to franchisees would be a minimal cost.*

**Action** *- Preparing a quarterly financial report of marketing expenditure and posting to all franchisees would require a labor cost in the order of 1 hour per quarter. This is an insignificant cost.*

*Providing franchisees with marketing program overviews should be obligatory so they can support the program at the customer engagement level.*

**Principle 4.** A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest.

Options considered under this principle address supplier rebates (where a franchisor receives rebates based on the purchases made by its franchisees from suppliers), significant capital expenditure (which is generally understood as relatively large sums of money the franchisee is required to reinvest in the business some-time after entering the franchise agreement), and unilateral variation (where the franchisor changes the franchise agreement without the explicit consent of the franchisee).

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

***Discussion*** *–There are no legitimate barriers to providing this information to franchisees. Suppliers argue that this may result in the disclosure of privileged information.*

*Response - It is the franchisees who fund these rebates by undertaking the commercial risk in purchase and payment of the goods thus they are a critical and fundamental participant. They are entitled to led to know all relevant components associated with their purchase costs and share in the commercial benefits realized.*

*Where suppliers and/or franchisors refuse to provide information to franchisees this is essentially a covert arrangement between those two parties. If this arrangement entails a third party (franchisee) being coerced into taking action that is to their disadvantage or against their will, the arrangement must be seriously questioned.*

***Definition*** *- “Bribery is the act of*[*offering*](https://www.collinsdictionary.com/dictionary/english/offering)*someone money or something*[*valuable*](https://www.collinsdictionary.com/dictionary/english/valuable)*in order to*[*persuade*](https://www.collinsdictionary.com/dictionary/english/persuade)*them to do something for you.*

*It must contravene Australian bribery laws when a supplier pays a franchisor a rebate which is linked to enforced punitive conditions on franchisees. These conditions may include compelling franchisees to purchase items via a specific supply channel at a higher than market general cost; stock these items against their will and sell them at less than the franchisees’ Cost of Goods’, under threat of legal action.”*

* *Parliamentary Commission previously defined ‘Cost of Goods’ to including the cost to take to market.*

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

***Discussion*** *– A core rationale of a franchise is that the franchisor will deliver a profitable business opportunity to a franchisee. A return on capital expenditure is primarily a factor of underlying profitability of a business.*

*A franchise agreement, where the franchisor disclaims any responsibility for a franchisee’s profitability, is a fundamentally flawed relationship. Such a franchise agreement places absolute authority in the hands of the franchisor without accountability.*

*This is a document of ‘****All authority no accountability’.***

*A franchisor would claim that without this clause the franchise be unviable. This clause however disavowals the fundamental rational of a franchise that the franchisor offers the franchisee the opportunity to run a profitable business for which the franchisee pays a substantial commencement and ongoing fees to the franchisor.*

*The second part of this failure by the franchise industry is that it disavows the need to include any recompense to franchisee principles for the labor they undertake for the day-to-day operation of the business.*

*The typical franchisor rational, is that the franchisee is recompensed by ‘profit’, however with no responsibility for ‘profit’ the franchisor disavowals responsibility for franchisee wages for day-to-day work.*

***Action*** *- Simply vetoing the franchisor’s right to disclaim responsibility for a franchisee’s profitability.*

* *This action would not necessarily make the franchisor responsible for a franchisees’ profitability.*
* *Such a dispute or claim by a franchisee would need to be proven under standard law practices.*

*This action would motivate a franchisor to prioritize franchisees profitability – which is after all the purpose of a franchise business model.*

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?   
  
***Discussion*** *–This would be in line with good corporate governance as excessive, ill-advised capital expenditure directed by a franchisor can collapse a franchise resulting is complete financial loss by franchisees.*

*It is not uncommon for a franchisor to mandate capital expenditure as a blanket mandate without any due diligent or commercial outcome rational being submitted to franchisees.*

***Action*** *– Franchisors would be required to advised the franchisees of planned capital expenditure relating to the franchise. This would include a due diligence report detailing factors such as purpose, benefit to franchisees, costs from franchisee funds either cash outlay or ongoing financing costs.*

*A report on the outcome meeting expectation upon completion of the expenditure would appear to be a required corporate responsibility.*

**Principle 5**. Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties

Options considered under this principle discuss alternative dispute resolution models such as arbitration, where an arbitrator can make a binding decision about a disagreement, and conciliation, where a conciliator directs parties towards an agreement.

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?

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

***Discussion*** *– There appear to be two types of disputes across the franchise industry.*

1. *Relatively minor disputes more based on personal views and opinions*
2. *Disputes that encompass important business principals.*

*Case A) - A low cost conciliation process would resolve the majority of these issues. This could be serviced by a Skype interface facility from a single location with the conciliator directing the process.*

*Case B) – This would require an experienced arbitrator funded by the franchise industry who can make a binding decision. If a party wish to continue with the matter the arbitrator’s decision would weigh heavily on the outcome of future actions.*

*Both these processes could be administered by retired lawyers (Reference – Justice of the Peace) who would be assured of unbiased guidance and rulings. A realistic fee for their participation can be funded by a very minor industry levy based on number of franchisees a franchisor has.*

**Principle 6.** Franchisees and franchisors should be able to exit in a way that is reasonable to both parties

Options considered under the principle discuss franchisees exiting their agreements, including on a ‘no fault’ basis where the business is unviable.

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

***Discussion*** *– A poorly performing or failing franchisee is not only of no value to the franchise it can be a very real threat to the commercial viability of the franchise and the other franchisees. A small percentage of failing franchisees can result in damaging outcomes such as undermining the confidence of consumers, suppliers and commercial financial institutions.*

*It is sound commercial governance and the responsibility of the franchisor’s board to close elements of its business that are unsound. Some of the obvious reasons for a franchisee to exit at no fault include:*

* *Franchisee is at risk of, or actually is, in a state of insolvent trading*
  + *Certified by a registered accountant.*
* *Unsustainable business operation*
  + *Certified by accountant or business analysist*
* *Personal circumstances such as death, ill health, when supported by variable medical support.*
  + *E.g. Death or incapacitation of a business key-man, family or partner.*
* *Abnormal events, financial or physical, impacting the franchise operation.*
* *If franchisee has attempted to sell the franchise for a period of 12 months with a registered business agent.*

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

***Discussion*** *– A fundamental assertion of Franchisors is that they have unique attributes such as branding, processes, equipment and products that provide franchisees with a clear and distinct market advantage. If these attributes are genuinely unique and deliver a distinct market advantage they are effectively protected in law by trademark, copyright and patents.*

***Definition - Trademarks****, copyrights, and patents****protect****different types of intellectual property. A****trademark****typically****protects****brand names and logos used on goods and services. A copyright****protects****an original process, artistic or literary work. A patent****protects****an invention.*

*Franchisors may intermate that they have these protection rights when, in fact, they do not.*

***Action*** *– The franchise agreement specifically list, what attributes the franchisor brings to the franchise that are appropriately registered under the relevant statutes. As stated in the RIS this will protect franchisees against unreasonable restraints of trade clauses within their franchise agreement.*

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?

***Discussion*** *- Determining Goodwill is a standard business practice based on commonly accepted parameters.*

*Goodwill has tax implications which is typically determined by the relevant accountant according to accounting processes. There are two scenarios for franchise organizations, being:*

1. *For new franchises the franchisor is, in very real terms, selling a business an element of which is ‘goodwill’ due to the franchise brand association which can be determined as below.*
2. *For an existing operation* *it is carried out by professional organizations at a time when it is relevant such as a sale.*

*Tax laws do not define ‘goodwill’ however a generally accepted determination is:*

*To calculate goodwill, the fair value of the assets and liabilities of the acquired business is added to the fair value of business' assets and liabilities. The excess of price over the fair value of net identifiable assets is called goodwill.*

*This work it is carried out by professional organizations, the current cost is in the order of $4,000.*

**Principle 7.** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency Options considered under this principle discuss the Oil Code of Conduct. Like the Franchising Code, the Oil Code of Conduct is a mandatory industry code prescribed under Part IVB of the Competition and Consumer Act 2010 (Cth) that applies to fuel wholesalers and retailers.

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?

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