



STRENGTHENING THE FRANCHISING CODE FOR FRANCHISEES, FRANCHISORS & THE PEOPLE WE SUPPORT

Submission to the Review of the
Franchising Code of Conduct

September 2023

ACKNOWLEDGEMENT

FCA would like to acknowledge the contribution of members, committee members and staff throughout the process. FCA has worked with supplier members in across the elements of design, production, and data compilation, which including the commissioning of FRANdata as FCA's strategic partner.

This report references data from the September 2023 "Franchise Pulse Check" which is the 15th successive quarterly survey undertaken for the Franchise Council of Australia by FRANdata.

In line with historical averages, responses received covered 124 franchise brands, operating 21,095 small businesses and employing 97,000 Australians. The survey provides the FCA and other stakeholders insights into trading conditions, challenges, issues and sentiment across a diverse range of industries.

FRANdata, headquartered in Arlington, Virginia in the United States has been providing independent research and reporting services to the franchise sector since 1989. They are the major research partner of the International Franchise Association (IFA) and commenced Australian operations in 2013.

Endorsed and authorised by:

Brendan Green, Chairman and Matthew Monaghan, Chief Executive Officer.

All information is correct at the time of publishing. Where sources are not the Franchise Council of Australia, they are represented in good faith on the basis of due diligence carried out by the source provider.



Franchise Council of Australia acknowledges the Traditional Owners of the land on which we work, the Wurundjeri peoples of the Kulin Nation, and pay our respect to Elders past, present and emerging. We acknowledge the continuing connection to land and waters. Sovereignty was never ceded.

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STRENGTHENING THE FRANCHISING CODE



FOR FRANCHISEES, FRANCHISORS AND THE PEOPLE WE SUPPORT

With more than 94,000 franchise outlets across Australia employing almost 600,000 Australians, franchising continues to be the primary facilitator of the success of predominantly small businesses across the country.

Franchising remains one of the best ways of allowing small business to compete against larger corporates regardless of sector.

The resilience and benefit of being part of a franchise network were dramatically showcased during the challenges of COVID. Being part of a franchise network unlocks access to recruitment and staff development, marketing, HR, technology and IT, as well as business expertise.

The review of the Franchise Code is an important opportunity to objectively examine what works well and address those areas of the Code which are problematic including as a result of clearly unintended consequences.

The FCA has actively and extensively canvassed our franchisor, franchisee and advisor membership. Details of the extent of these activities, and the franchise networks that have provided input to this submission, are contained in Appendix 1. Appendix 3 contains data from member surveys.

Franchising is the heartbeat that keeps Australia's economy and communities ticking, and this review is a timely opportunity to ensure the Code is fit for purpose and reflects the current reality of the marketplace. As the peak industry body, the Franchise Council of Australia (FCA) is proud to make this submission which incorporates extensive consultation with our members, both franchisor and

franchisee, and those advising and working closely with franchising in Australia.

The FCA and its members are proud to continue to drive change to entrench and promote excellence at all levels to support the best possible outcomes for franchisors, franchisees, the people who work for us and the communities we support.

This year marks 40 years of the FCA and we are proud of our track record of championing best practice and innovation in small business. We continue to be the national voice on franchising, representing both franchisors and franchisees, as we work together with our members to promote the highest standards of excellence in governance in franchising in Australia.

We are grateful for the opportunity to make this submission and thank all our members and advisors working in franchising who took the time to help us collate this submission which captures what is currently working well, what needs improvements and where the emerging gaps are that need addressing for the benefit of all those within the franchising ecosystem in Australia.

Brendan Green | Chairman

Matthew Monaghan | Chief Executive Officer

Stephen Giles | Board Director and Chair Governance

FCA MARKETING & ENGAGEMENT ACTIVITIES



During the course of preparing our submission, the following marketing and engagement activities we conducted with members:

- » Hosted two webinar events with over 250 attendees, featuring the presence of both Stephen Giles and Brendan Green.
- » Shared a series of six LinkedIn posts, reaching an audience of over 5,000 followers.
- » Posted six updates on our Facebook page, reaching an audience of over 2,200 dedicated followers.
- » Conducted a series of email communications, sending a total of six emails over a six-week period to our database of 5,100 recipients, resulting in a combined engagement reach of 30,600 email recipients.
- » Organised in-person consultation events across multiple locations, with the following attendee counts: 25 in Victoria, 30 in Adelaide, 24 in Brisbane, and 20 in Perth.

WEBINARS

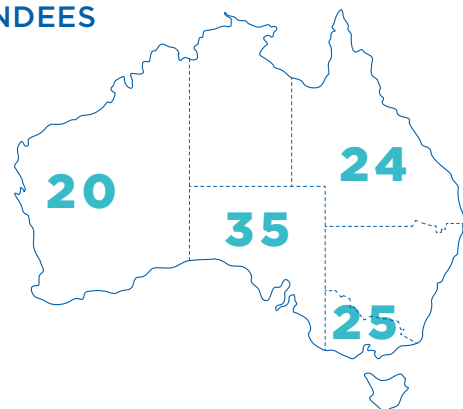
250+ 
ATTENDEES OVER

2 WEBINAR
EVENTS



IN-PERSON EVENTS

ATTENDEES



LINKEDIN POSTS

6 POSTS **5,000**  

FACEBOOK POSTS

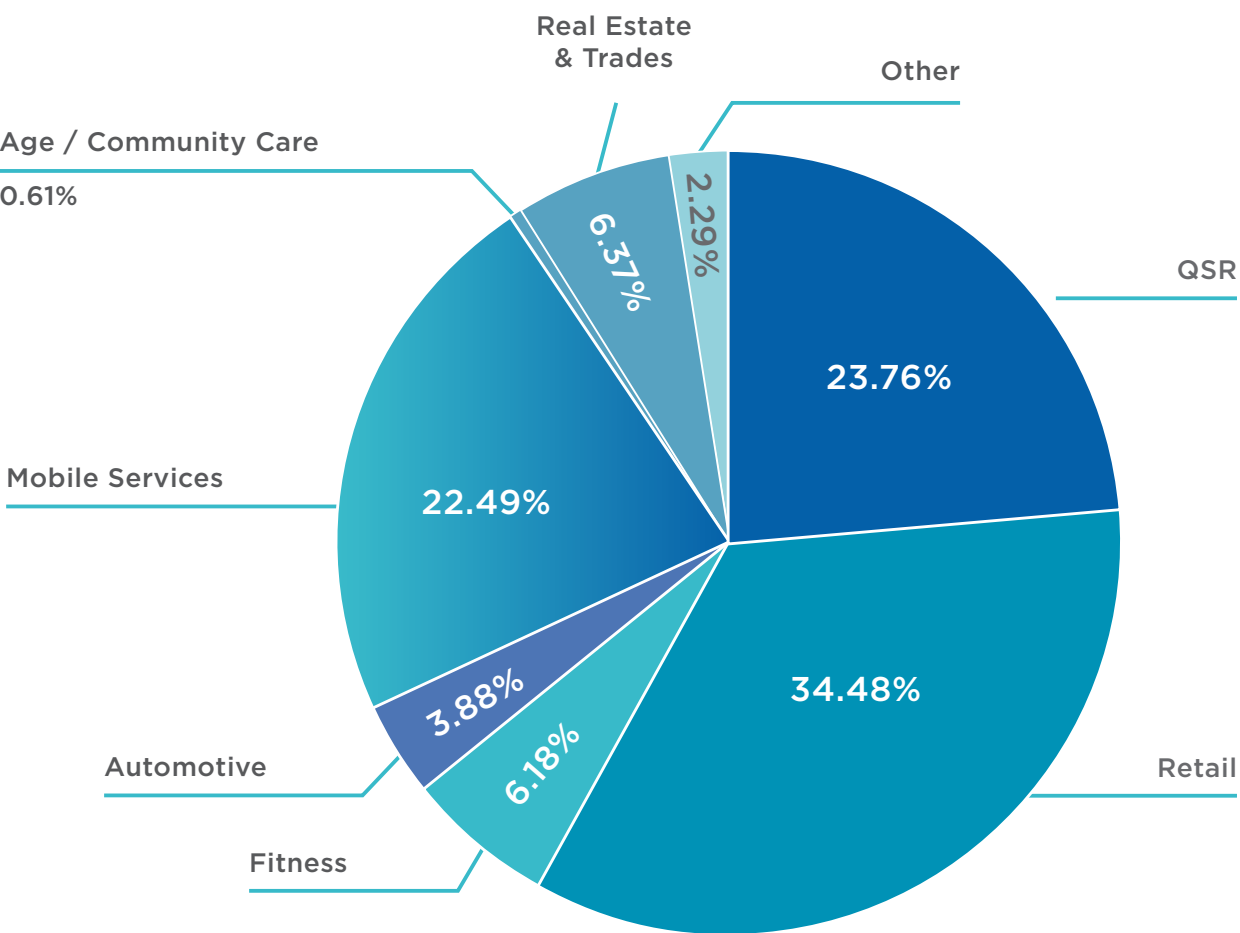
6 POSTS **2,200**  

E-COMMUNICATIONS

6 EMAILS OVER
WEEK PERIOD
TO OUR DATA
BASE OF
5,100

WITH A TOTAL
ENGAGEMENT
REACH OF
30,600
EMAIL
RECIPIENTS 

FRANCHISING SUPPORTING KEY SECTORS ACROSS AUSTRALIA



“

I welcome the review of the Code to support best practice franchising in Australia for both franchisees and franchisors to protect strong brand growth for established and emerging brands in Australia – that's in everyone's interests.

”



Amber Manning
Just Cuts

WHAT WORKS, WHAT DOESN'T AND...



WHERE ACTION IS NEEDED

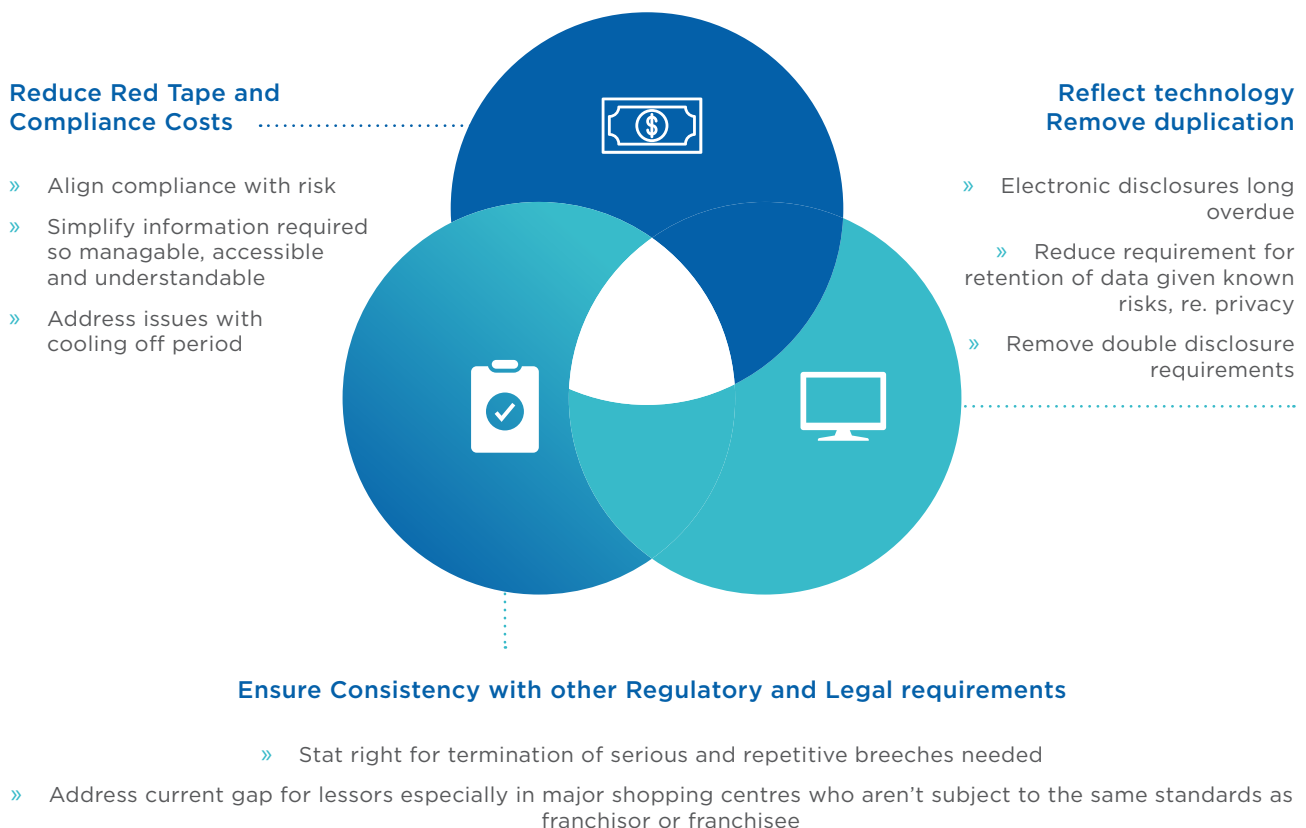
In understanding where the current issues are and opportunities lie, we have consulted extensively with our members (franchisee and franchisor) as well as those advisors (financial, legal, business) who deal with the current frustrations created by the Code.

Australia has the highest level of franchise regulation in the world. Concurrently, complaints are consistently low especially given the reach of franchising in Australia, and the fact that 90% of our members are small businesses.

We estimate that in excess of \$10 Million each year could be shaved off compliance costs each year through take-up of our recommendations without impacting on the regulatory protection provided to franchisees and franchisors.

OPPORTUNITIES FOR IMPROVEMENT

Based on feedback from franchisees, franchisors and business/legal/financial advisors to the sector.



1. Reducing Red Tape and unnecessary compliance costs – Australia has the highest level of franchise regulation in the world.



Constant regulatory creep now sees the Australian franchise sector as the most heavily regulated of any Western country. Appendix 2 sets out the extent of current regulatory protection, and notes that the UK, New Zealand, Singapore and Hong Kong are satisfied that the common law provides adequate protection and have no specific franchise legislation. It seems self-evident that further regulation is not appropriate. The complexity of Code compliance is now creating an unnecessary financial burden on franchisors and franchisees, and must be addressed;

- » Compliance needs to align with nature of investment – low investment models, and existing businesses do not by nature carry the same level of risk as more complex businesses and the compliance framework should reflect this. Similarly, existing franchisees, multi-unit franchisees, sophisticated investors and informed investors need to be treated in a different way given the level of knowledge;
- » It is possible to amend the Code to simplify compliance requirements for franchisors and franchisees and reduce costs without diminishing the protection provided. Details of suggested changes are included in the body of this submission, and include examples where the “one size fits all” nature of all Code requirements needs to be sensibly modified, with adjusted compliance requirements or limited exemptions for some parties;
- » Brand owners face increased regulatory obligations for network compliance, and community expectations do not distinguish between franchisor and franchisee liability in a branded network. Accordingly the Code must enable brand owners to protect the brand, and indeed other franchisees, where there has been a serious breach of the law. The FCA has suggested enhanced immediate termination rights if compensation is paid;
- » The Key Fact Sheet should be completely revised so that it contains brief meaningful information on the commercial “deal”, rather than simply restating parts of the disclosure document and essentially duplicating compliance requirements. The current requirement is especially problematic for those franchisees for whom English is a second language and for whom the cost of translation of the current multiple mandated documentation is significant and off-putting (resulting in concerns that the key disclosure information is not actually being read);
- » Ability for franchisees to sell businesses more easily needs urgent attention – including removal of unworkable provisions inserted in 2020 that cooling off period doesn’t end until lease disclosure is made;
- » Current blanket approach of mandatory 14 day cooling off periods - simply not necessary across the board and creates additional cost and inconvenience for franchisee and franchisor, e.g. in a franchisee-to-franchisee sale or for purchase of an existing franchised business where business performance is established and easily reviewed rather than with a new business where forecasts are involved.

2. Ensuring the Code is consistent with other regulatory and legal requirements, especially the Fair Work Act.



- » Should be a statutory right of termination for serious breaches and for repetitive breaches;
- » Current gaping regulatory hole when it comes to lessors, particularly in major shopping centres, who are not currently subject to the standards as the franchisor and franchisee including with regard to disclosure and conduct.

3. Updating required to reflect current technology and practice and remove duplication.

- » The Code needs to support paperless transactions (this is currently significantly frustrated by the size of disclosure documents including lists of franchisees and the addition of numerous documents, which we contend are overwhelming, rather than assisting potential franchisees in understanding the core elements of a transaction);
- » More flexibility is needed in the Code on electronic disclosures which would allow for significant cost savings and reduced sector carbon footprint;
- » Current provisions on data collection and retention outdated – existing franchisees should be able to opt in while data for former franchisees should only be required for the past year given very real and justified concerns about data privacy and unnecessary data dissemination and retention;
- » Removing the need for double disclosure in circumstances where any changes to the franchise agreement between first disclosure and signing have been immaterial or not prejudicial to the franchisee.

Appendix 3 to this submission provides recent survey data supporting the FCA's contentions.

More broadly, the FCA is concerned that the original value proposition of the Code as an industry based regulatory framework is being eroded, with many recent Code changes being introduced with minimal industry consultation. The history of the Key Facts Sheet is a good example. FCA submissions at the time the Key Facts Sheet was first contemplated, and in subsequent reviews, noted the greater utility of a document that would set out the commercial terms, or “the deal”. Instead the Key Fact Sheet was developed by committee such that the end result was a document that simply restates many facts in the disclosure document, duplicating compliance cost and missing an opportunity to enable prospective franchisees to have a convenient and simple summary of the “deal” that could even be included onto the Franchise Disclosure Register, and be searchable across different franchise systems.

The FCA has established transparent and valuable forums where franchisors, franchisees, advisors and others can meet separately, and collectively provide feedback and develop initiatives. The FCA seeks further and more extensive industry consultation on the detail of changes to the regulatory framework. The end outcome will not only be better focused regulation, but dramatically reduced compliance costs and enhanced overall protection.

QUESTION 1 – REGULATORY FRAMEWORK GENERAL OBSERVATIONS



Are there any general observations you want to make about the regulatory framework?

Australia already has the highest level of franchise regulation in the world. Franchising is at the heart of small business in almost every sector in Australia. Franchising is a \$174 billion segment which includes over 94,000 individual outlets, employing over 600,000 Australians.

Franchising was the backbone that allowed so many businesses across so many sectors to survive the challenges of COVID and in doing so keep supporting their communities and keep providing employment.

One of our Roadshow attendees made the point that if you went for a walk up Swanston Street post-COVID, all the franchises survived and the independent businesses were mostly gone. This was the case across the country.

The Code needs to accommodate the reality that franchising is a thriving and rewarding ecosystem for franchisors and franchisees in Australia, with franchised businesses enjoying higher prospects of survival, success and profitability than non-franchised businesses:

- » Over 90% of franchisors, and almost all franchisees, are small businesses. Small business is especially vulnerable to over-regulation and unnecessary compliance costs or red tape;
- » Franchised businesses often compete against unregulated non-franchised businesses in the same industry;
- » Franchised businesses have higher prospects of survival, success and profitability than other small businesses;
- » Franchise networks are able to compete effectively against large corporations because of the separation of responsibilities between franchisor and franchisee in an agreed manner, which then drives efficient and synergistic collaboration. Regulation that fails to recognise franchising as a business to business relationship, seeks to prescribe what parties may or may not commercially agree or creates joint responsibility strikes at the heart of the competitive advantage of franchising;
- » The systemisation inherent in franchising systems, and shared brand risk, drive high levels of general compliance with the law in franchise networks, particularly when compared to non-franchised small businesses.

Importantly, the systemisation built into franchise networks along with the shared brand risk results in higher levels of compliance with the law compared to non-franchised small businesses.



No changes should be made to the Code that increase regulation of the franchise sector:

- » Australia has the most extensive and prescriptive regulatory framework for franchising in the world. (Some comparable countries - NZ, UK, Singapore, Hong Kong - have no specific franchise legislation.);
- » There are already very high (in some cases excessive) penalties for breach of the Code and the ACL;
- » There is an effective enforcement regime overseen by the ACCC, an active and well-resourced regulator;
- » Franchising complaints, and the level of disputes in franchising, have remained consistently low;
- » Banks report the same level of loan default for franchised businesses as for non-franchised businesses, but significantly lower losses due to the nature of the franchise relationship.

Australian franchising is healthy, successful and collaborative.

Data confirms:

- » Franchising is the best model for small business survival and success;
- » Franchising delivers long-term competitive advantage – 300 franchise systems established > 30 years;
- » The vast majority of franchisees are satisfied with their investment;
- » Franchisees that obtain independent advice and follow the Code process are more successful, and have fewer problems.

The success of franchised businesses in Australia, for example, is reflected in the growing appetite of banks for involvement. Three of the four major banks are actively investing in franchise lending while at the same time reducing lending to independent small business start-ups.

Much of the Code works well in supporting both franchisees and franchisors. We know this from our own surveys and from member feedback.

The Code needs improvement in some areas, as the compliance burden and prescriptive nature of regulation is excessive. This could occur without impacting the intent of the Code, or the protection provided.

We also note the fact franchising complaints and the level of disputes in franchising remain consistently low.



It is a privilege to contribute and participate in Australia's franchising sector for over 20 years, developing scalable and sustainable businesses whereby Australian franchise investors participate and contribute to our Australian economy. Franchising like many businesses contributes and supports the local communities in which they serve from employment opportunities through to a vast array of initiatives to improve the wellbeing of their local communities.



Carlos Antonius
CEO Chatime Group

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » The members who attended the briefing sessions held across the country on the Review agreed that the regulatory framework largely does a good job. There is a desire for no further regulation, and certainly an appetite for simplification of disclosure to ensure the content presented by Franchisors to Franchisees is more digestible and able to be read and understood by non-legal people who want to understand what they are potentially entering into in lay terms.
- » Existing franchisees participating in the review have expressed a desire to reduce the unnecessary time imposts as they relate to additional cooling off periods on additional site acquisitions and to see the renewal process far more simplistic without the cost burden of having an entire set of documents reviewed again.

Considerations:

The Code needs improvement in some areas, as the compliance burden and prescriptive nature of the regulation is excessive. These concerns could be addressed without impacting on the intent of the Code, or the protection provided. Examples:

- » Exemptions or reduced compliance requirements need to be introduced for low investment franchise systems, existing franchisees, multi-unit franchisees, sophisticated investors, informed investors;
- » Changes to simplify the amount of unnecessary material provided to franchisees, to reduce the cost of obtaining advice;
- » Enabling franchisees to sell their businesses more easily – no cooling off on transfer, simplified disclosure obligations, more flexibility in relation to disclosure of franchisee and former franchisee contact details;
- » Removing the need for double disclosure in circumstances where any changes to the franchise agreement between first disclosure and signing have been immaterial or not prejudicial to the franchisee;
- » Better facilitating electronic disclosure and signing via simplified processes and website accessibility to larger documents;
- » Deleting the obligation to provide a copy of the Franchising Code of Conduct with disclosure.



The FCA estimates that in excess of \$10 Million could be shaved from annual compliance costs without impacting on the regulatory protection provided to franchisees and franchisors.

The Code is inconsistent with other expectations on franchisors, notably concerning Fair Work Act. There needs to be a right of termination for serious breach of the law, multiple breaches, etc.

If an issue arises with a specific industry, such as in relation to the automotive industry or the oil industry, these matters should be dealt with outside the Code.

The Code was introduced in 1998, and has been amended 10 times since. Each amendment creates additional compliance cost, and constant review stifles the potential for industry based solutions and impedes the proper evaluation of the effectiveness of previous Code changes. This is largely due to the framing of the Code as a regulation rather than an Act of Parliament.

It is counterproductive to certainty and creates review fatigue. Many of the amendments to the Code have in fact been necessary to address unintended consequences of prior changes. Industry codes were initially introduced to enable industry to develop more flexible regulatory frameworks.

Arguably the Franchising Code of Conduct has evolved beyond this point, and merits proper enactment as legislation where changes need to pass through both Houses of Parliament, and can be made in a more considered and less frequent manner.

“

Franchising has enabled me to take control over my own future. I can structure my business, without my family life having to compromise all the time, provide great service to my clients and all with the support of the franchisor team. Emma Glazebrook MBCM Seymour

”



Emma Glazebrook
MBCM Seymour

QUESTION 2 - IS THE FRANCHISING CODE FIT FOR PURPOSE?



Is the Franchising Code fit for purpose? Should it be retained? If so, should it be remade prior to sun-setting?

In order to ensure this submission reflects current realities and provides practical insight into what currently works and what needs to be improved, the FCA has undertaken a National Roadshow and Online Policy Forum to consult widely with our member franchisees and franchisors, as well as those providing business support and advice.

While franchising operates widely across multiple sectors, there are common challenges and concerns which we encourage the Review to address.

These concerns include:

1. The overwhelming complexity of current mandated disclosure requirements with franchisees and potential franchisees complaining about having to deal with “huge wads of documentation” which increases the burden on both franchisees (especially those from a CALD/BAME background for whom English is a second language and who often turn to their family or migration lawyer for legal support: these people have little to no exposure to franchising, resulting in a process far more complex and costly than it needs to be);

Example: Hire-a-Hubby franchisee Peter Moore made the point during our Melbourne consultation that greater effectiveness would flow from simplifying the disclosure documentation to address:
 - » Demographics/location;
 - » Whether it was the franchisee’s own territory or shared;
 - » Past performance and indicators of future performance;
 - » Whether the franchise is tied to set suppliers;
 - » The opportunity to speak with current and past franchisees.
2. The need to be able to do more electronically (which simplified disclosure would allow);
3. The need for a segmented approach which recognises
 - 1) the difference in the level of knowledge and expertise which existing franchisees and franchisors and sophisticated investors bring compared to that of newcomers;
 - 2) the difference in risk for low-investment versus high-investment franchise arrangements; and
 - 3) the level of understanding and knowledge involved in franchisee-to-franchisee sales;
4. An end to the seven-day termination provisions so brand owners are able to take decisive action, including in those cases where legal breaches or allegations (especially where the Fair Work Act is concerned) which trigger brand damage and/or unworkable situations.

Examples of current unintended consequence:



- » Head Office currently has to employ team members during the 14-day cooling off period on a sale to/from a franchisee to another franchisee or franchisor and then switch them back to the purchaser;
- » Currently if you give 14 days' notice before buying your franchise and then identify an issue in the contract that needs to be fixed, you must wait for that to be remedied and then wait out another 14-day cooling off period, resulting in another two weeks before you start to earn an income.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » Both Franchisor and Franchisee members who participated in the code review discussions feel the code is generally fit for purpose
- » Retail Tenancies is an area crying out for review – this was raised at every single consultation with our members, franchisor and franchisee yet is not currently addressed in the Review.

Considerations:

Yes, the Code is fundamentally fit for purpose. The disclosure based framework mirrors franchise regulation around the world, and balances the expectations of responsible franchisor behaviour and franchisee due diligence and investment responsibility. It is also consistent with the frameworks that apply to investments in shares and securities.

The Code could be improved, in the manner outlined in this submission. This is fine tuning, as opposed to major structural change.

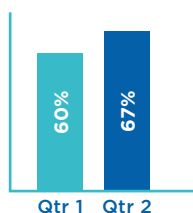
Consideration could be given to enacting the Code as an Act of Parliament rather than a regulation, to provide greater certainty, and reduce the review fatigue that has beset the Code since inception. This would avoid the regular sun-setting challenge.

QUESTION 3 - EMERGING TRENDS AND IMPACT ON THE OPERATION OF THE CODE



Are there any emerging trends, such as technology or cultural innovations, which would affect the operation of the Franchising Code?

As already raised, this is an area which does need attention.



Data security an escalating concern

67% of respondents also said they were worried about data security and the risk of criminal conduct (up from **60%** in the last quarter).

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » A number of members supported concepts of single page or smaller styled “term sheets” that articulate clearly the summary of the Franchise offer, and the priority insights into the Franchisor;
- » The ability to create a chance for Franchisors to translates these much smaller documents into multiple languages would assist brands who attract “English as a second Language” franchisees would assist new entrant franchisees to more easily understand the offer;
- » Franchisees could then seek access to the secondary legal documents and obtain legal advice.

Considerations:

Specifically, our member franchisees and franchisors, and the business, legal and financial advisors who support them, ask that:

- » The Code be updated to support electronic transactions by addressing the current overwhelming (and we contend unnecessary) list and size of disclosure documents;
- » Current provisions on data collection and retention are outdated – existing franchisees should be able to opt in, while data for former franchisees should only be required for the past year given very real and justified concerns about data privacy and unnecessary data dissemination and retention;
- » Better electronic disclosure via simplified processes and website accessibility to larger documents;
- » Removing the need for double disclosure in circumstances where any changes to the franchise agreement between first disclosure and signing have been immaterial or not prejudicial to the franchisee;
- » Clauses 9 (2C) and 16(3) of the Code be amended to better permit electronic compliance and avoid duplication.

QUESTION 4 - IS THE GENERAL SCOPE OF THE CODE APPROPRIATE



Does the general scope of coverage of the Franchising Code remain appropriate? Is the scope of coverage flexible enough having regard to the diversity of the franchising industry?

In most cases, a prospective franchisee receives a large and overwhelming amount of irrelevant information up to and in excess of 500 pages. For those prospective franchisees for whom English is a second language, this presents a significant cost and challenge, especially where, as is often the case, they are using their family or migration lawyer who typically has had no exposure to franchising to assist.

Much of the material currently required to be included in the disclosure document (including, for example, a copy of the Code) would be better supplied via a link.

It is not currently possible under the Code to provide tailored information.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » There was overwhelming support from members to minimize disclosure requirements for lower investment businesses. Whilst there was caution being suggested by members of the legal fraternity, the feeling of Franchisors and Franchisees in lower entry level franchises was that the current regulations are scaring off potential franchisees due to how complex the franchise offers appear based on such large volumes of legal documents.

Considerations

The Code must be updated to ensure that mandated disclosure documents to prospective franchisees consist solely of the key information they need to understand the fundamentals of the business they are looking to invest in.

The breadth of the definition of a “franchise agreement” means that all forms of franchising arrangements, from the most basic to the most complex, are caught, and irrespective of the quantum of investment or the actual investment risk. Further, the compliance requirements are highly prescriptive in substance and form, and identical for all franchise arrangements. As a consequence:

- » In most cases a prospective franchisee receives a large amount of amount of irrelevant information;
- » The volume of documentation is excessive, and can in some cases exceed 500 pages;
- » Material required to be included with disclosure (eg: a copy of the Code) can be accessed by other means;



- » The cost of a prospective franchisee obtaining legal and business advice is substantial, leading to a decrease in the number of prospective franchisees obtaining advice;
- » Low cost franchise systems are at a major disadvantage to non-franchised competitors;
- » There are no opportunities to provide tailored and better quality information more efficiently and cost-effectively for franchisors and franchisees. (There are also missed opportunities to reduce the carbon footprint of the franchise sector.)

Provisions must be made to reflect the knowledge of participants: that is, whether an existing franchisee, a low-investment model or a sophisticated investor, the mandated disclosure document includes only the relevant documentation (and not, for example, the printed out copy of the Code as currently required).

QUESTION 5 - EXCLUSION OF COOPERATIVES

Have the amendments regarding the exclusion of cooperatives from the provisions of the Franchising Code effectively clarified that they fall outside the scope of the Code?

The FCA has no specific view on this issue.

“

I chose the franchising path because..... I wanted to help people that are passionate about our industry build a sustainable and profitable business.

What I have been able to achieve from franchising is exceptional growth for our brand and our category of wellness.

”



Jeremy Hassell
CEO / President /
Co-Founder City Cave
Global Office

QUESTION 6 - ADDITIONAL PROTECTIONS FOR NEW CAR DEALERSHIPS



What evidence is available to suggest additional protections in the Franchising Code for new car dealerships should be extended beyond new car dealerships (for example to truck, motorcycle and farm machinery dealerships)?

The FCA expresses no specific view on this issue except to note that new car, motorcycle, truck and farm machinery arrangements are typically very different to traditional franchising arrangements. The “franchisor” is invariably a major international or multi-national corporation, not a small business.

Considerations

The FCA has not seen any relevant evidence, but expresses no specific view on this issue except to note that new car, motorcycle, truck and farm machinery arrangements are typically very different to traditional franchising arrangements. Differences include:

- » The “franchisor” is invariably a major international or multi-national corporation;
- » The relationship involves product distribution, as opposed to the creation of a network of similar businesses focused on providing a common customer experience;
- » There can often be significant differences between the various businesses operated by dealers in the same network;
- » Dealers can often be large businesses themselves, and have multiple brands and product ranges;
- » There can be large up-front capital costs, whereas this is uncommon in general franchising;
- » Floor plan, consignment stock and other financing arrangements are common;
- » The unit cost of an individual transaction with a customer can be very substantial. (Over \$50,000, and sometimes much more.) In contrast the value of an individual customer transaction in a typical franchise can be quite low. (Under \$100, and often much less.)

As a consequence any regulation should be tailored to those industries, and should not apply to franchise agreements generally

QUESTION 7 - AGREEMENTS BETWEEN AUTOMOTIVE MANUFACTURERS AND DEALERSHIPS



Should agreements between automotive manufacturers and dealerships that relate only to service and repair work (which do not cover matters relating to vehicle sales) be considered as franchise agreements and covered by the Franchising Code protections? Why or why not?

The FCA has no specific view on this issue.

QUESTION 8 - AMENDED DEFINITION OF “MOTOR VEHICLE DEALERSHIP”

Has the amended definition of “motor vehicle dealership” effectively clarified that agency sales models remain within the scope of regulation under the Franchising Code?

The FCA has no specific view on this issue.

QUESTION 9 - EFFECTIVE DISCLOSURE TO FRANCHISEES PRIOR TO ENTRY INTO AN AGREEMENT



How effective are the requirements of the Franchising Code that ensure franchisors make information available to franchisees prior to entry into a franchise agreement? If possible, please comment on the effectiveness and content required for inclusion in each of the Franchise Disclosure Register, Information Statement, Key Facts Sheet and Disclosure Document.

The FCA has long championed the critical need to make legal and business advice mandatory, subject to limited and sensible exceptions.

As raised throughout this submission, our feedback from member franchisees and franchisors is the critical importance that the information mandated to be disclosed is 1) relevant to what they are looking to purchase; 2) in plain English; and 3) sensible in terms of volume.

The current requirement that this information include printed documents that are generic and easily accessible online is outdated, and counterproductive due to the excessive volume.

The effectiveness of the Code is reduced by the complexity and size of disclosure documents, the requirement for annexing all associated documents and the lack of exemptions and/or reduced requirements to cater for the differences between franchise systems.

This equates to unnecessary franchisor compliance cost and reduced utility and increased cost of advice for franchisees. These challenges are magnified for franchisees for whom English is a second language.

The **Franchise Disclosure Register** has created useful base level information for the franchising sector but should not be expanded. It is invisible to prospective franchisees, as no resources have been committed to promotion. The purpose of the Register should be redefined to provide a central register of all Australian franchise systems, which is useful and realistic.

The **Information Statement** is a brochure on franchising with minimal utility, but low compliance cost. It addresses the perceived concern that prospective franchisees need to be warned about the risks of franchising at the earliest possibility.

The **Key Facts Sheet** is an attempt to address concerns about the size and complexity of disclosure documents. It currently duplicates compliance obligations for franchisors, and in practice, is of minimal utility to prospective franchisees. Consistent feedback from our National Roadshow was that it is overwhelming in length and counterproductive, as it is so long and complex that prospective franchisees simply don't read it.



The disclosure document is extremely comprehensive, and contains useful material, particularly in the context of high investment and complex format retail franchise systems. Parts of the document however are irrelevant for mobile or service franchise systems, and for lower cost franchises the relevant content is often obscured by excessively prescriptive disclosure requirements and voluminous attachments.

The Information Statement and the Key Facts Sheet are not used in any other country in the world. A better option would be simplified disclosure obligations for specific franchise systems.

Currently the Code provides (clause 8(3)) that information in the disclosure document must be in the form and order of Annexure 1, and use the headings and numbering of Annexure 1. There are over 250 separate numbers, and no context or relevance is provided for the questions. As a consequence, completed disclosure documents are currently long, complex, difficult to read and confusing.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » The membership believe there is far too much documentation, making it unlikely that many prospective franchisees read everything provided to them. It was likened to receiving a prompt from Apple to read the T&Cs for the next upgrade in that people scroll to the end and then simply hit accept.
- » There is a general acceptance that the register is fine, however, the majority of members comments suggested they believe most franchisees do all of their research on the websites of the brands they have an interest in and that rarely if ever does the register rate a mention
- » The Franchise Information Statement was seen as being of little value by the members, both Franchisor and Franchisee
- » The Key Facts Sheet was seen as a waste. Commentary from members suggested this being replaced by a Term Sheet would make for better value than the current document
- » The disclosure document is too big according to the majority of Franchisor and Franchisee members. Simplification of this document to make it more reader friendly would see an upshift in franchisees reading the document
- » The large majority of Franchisor and Franchisee respondents believe that the list of current franchisees is an appropriate ability for an incoming franchisee to make a current day assessment. A group of franchisee respondents suggested that former franchisees are no longer across the current activities of a system and as such are not able to offer current insights.
- » Many respondents highlighted that Franchising is the only known sector to enforce a listing of former representatives contact details and many feel this puts franchising at an unfair disadvantage compared to other nonfranchise businesses.



Considerations:

The FCA has received very strong feedback from its franchisee community that the Key Facts Sheet should be completely revised such that it is (as the term implies) a simple summary of the key facts of the franchise system. The consistent view, which was also strongly supported by the franchisor and legal members of the FCA, is that the Key Facts Sheet should be a 1-2 page only summary of the commercial terms or “the deal”. Included in the Key Facts Sheet would be the term, the initial and ongoing fees, any marketing contribution and a summary of the key obligations of the parties. This would have far greater utility, and indeed could be disclosed on the Franchise Disclosure Register. The FCA would be happy to provide a draft revised Key Facts Sheet for consideration.

The **effectiveness of the Code** is reduced by the complexity and size of disclosure documents, the requirement for annexing all associated documents and the lack of exemptions and/or reduced requirements to cater for the differences between franchise systems.

This translates into unnecessary franchisor compliance cost and reduced utility and increased cost of advice for franchisees. These challenges are magnified for franchisees for whom English is a second language.

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The FCA recommends that the Code be amended to:

- » Create exemptions for low investment franchise systems, sophisticated investors, existing franchisees and other categories where comprehensive disclosure is not relevant or necessary;
- » Allow franchisors to make more limited disclosure in circumstances where it is appropriate in the context of the type of franchise system. The current framework assumes the franchisor has full knowledge of all establishment and operating costs, when this is often not the case. Indeed, in some cases, the franchisee has such knowledge, and the franchisor has none;



- » Give franchisors the flexibility to simplify the amount of unnecessary material provided to franchisees in the disclosure document, to reduce the cost of obtaining advice. (For example, by the franchisor summarising rather than attaching any related document, and enabling it to be inspected via a data room or website)
 - » Enable franchisees to sell their businesses more easily, noting this transaction is the sale of an existing business that should have actual trading history. Changes would include no cooling off period on transfer of a franchise, deletion of clause 26(1C), simplified disclosure obligations, and more flexibility in relation to disclosure of franchisee and former franchisee contact details;
 - » Remove the need for double disclosure in circumstances where any changes to the franchise agreement between first disclosure and signing have been immaterial or not prejudicial to the franchisee;
 - » Better facilitate electronic disclosure and signing via simplified processes and website accessibility to larger documents;
 - » Deleting the obligation to provide a copy of the Franchising Code of Conduct with disclosure;
 - » Clarify when franchisors can recoup reasonable legal fees. The intent of the clause is accepted, but the wording is unnecessarily complex. Sub-clause (1) is a broad blanket prohibition, and the exemption in (2) is unnecessarily narrow and restrictive
 - » Clauses 30A(3) and (4) are unnecessary and do not accord with normal market practice in the broader franchise sector. It is not possible to discuss expenditure that may be required by a landlord, or as a result of a future technological development, before entering into the franchise agreement.
- (These provisions are appropriate only for automotive agreements, where capital expenditure is large and usually required at the commencement of the agreement).

QUESTION 10 – CHANGES TO UNFAIR CONTRACT TERMS LAWS



How have changes to unfair contract terms laws impacted franchise agreements? Is the approach in the Franchising Code to regulating certain types of contract terms still appropriate?

The FCA is disappointed that the Unfair Contract Terms reforms appear to have left retail leasing untouched, leaving franchisors and franchisees vulnerable to unfair arrangements and unconscionable conduct by major landlords.

Considerations

The UCT reforms do not sit sensibly with the Code, which already prescribes certain provisions that must or must not be included in a franchise agreement.

Similarly the “take it or leave it” thinking behind the UCT provisions cannot fairly be said to exist in the context of a framework that features mandatory disclosure of information, 14 day waiting periods, recommended legal and business advice and cooling off periods.

The FCA’s preference is to deal with unfair contract terms by express prohibition in the Code, rather than general reference in the ACL. There is too much uncertainty in the context of franchise agreements – for example the ACCC website gives several examples of potential unfair contract terms in franchise agreements that would be in most franchise agreements. Subject to the Code, and ACL prohibitions on misleading or deceptive conduct and unconscionable conduct, parties should be free to agree on the terms of their franchise agreement.

In fairness, currently the UCT provisions typically have limited practical application in the franchise sector, due to a pragmatic approach by the ACCC. **The FCA is not calling for the repeal of the UCT reforms, or further regulations.**

On balance the UCT reforms have probably moderated provisions in some franchise agreements, and been a useful addition to the overall regulatory framework.

The FCA is disappointed that the UCT reforms appear to have left retail leasing untouched, such that franchisors and franchisees remain vulnerable to unfair arrangements and unconscionable conduct by major landlords. For example in recent times landlords are seeking rental from tenants that were unable to trade during Covid, plus CPI rental increases under leases, whilst at the same time offering new tenants substantial rental discounts.

Franchisors and franchisees are effectively being punished for surviving the challenging Covid period, when most independent small business retailers have failed. By far the major cause of most franchising disputes can be traced to the conduct of major shopping centre landlords.

QUESTION 11 – CHANGES TO UNFAIR CONTRACT TERMS LAWS



Do you have any other comments on how the Franchise Code regulates the relationship between franchisors and franchisees at the point of entry into a franchise agreement?

At a structural level the Code works well, as it obliges franchisors to take a considered approach to franchising, and ensures prospective franchisees receive relevant information and have time to make a considered decision and obtain advice. With fine tuning, it can be made more efficient and costs can be reduced. In a market economy the franchise agreement must always remain the legal backbone of the relationship between two business partners. The Code and the ACL provide comprehensive support to the contractual process.

Considerations

At a structural level the Code works well, as it obliges franchisors to take a considered approach to franchising, and ensures prospective franchisees receive relevant information and have time to make a considered decision and obtain advice. With fine tuning it can be made more efficient and costs reduced. In a market economy the franchise agreement must always remain the legal backbone of the relationship between two business partners. The Code and the ACL provide comprehensive support to the contractual process.

At the core of the franchisor / franchisee relationship is a duality of responsibility – provision of information and appropriate behaviour by a franchisor, and franchisee due diligence and investment responsibility. The Code currently balances that responsibility, recognising that business risk exists and cannot be eliminated.

The biggest threats to franchising are economic and competitive. Regulation is also a threat, as excessive regulation and red tape advantages larger corporations over small business.

QUESTION 12 – IMPACT OF 2021 CHANGES ON VEHICLE DEALERSHIP AGREEMENTS



What impact have the 2021 changes relating to compensation and return on investment had on franchisors and franchisees entering into new vehicle dealership agreements? Where possible, please provide detail on the costs and benefits the new car dealership sector has experienced because of these changes.

The FCA has no specific view on this issue.

QUESTION 13 – SUPPORT OF FRANCHISORS AND FRANCHISEES DURING TERM OF AGREEMENT

How well does the Franchising Code support franchisors and franchisees during the term of the franchise agreement? In particular, does the Franchising Code provide adequate minimum standards relating to structural and/or operational change management?

The FCA has no specific view on this issue, as the section of the Code relates solely to the automotive industry.

QUESTION 14 – EFFECTIVENESS OF 2021 REFORMS RE SIGNIFICANT CAPEX INVESTMENT

How effective are the 2021 reforms which restricted the franchisors' capacity to require a franchisee to undertake significant capital expenditure?

The FCA has no specific view on this issue, as the section of the Code relates solely to the automotive industry.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » Franchisor members expressed a view that to maintain or attempt to gain a market leading position, there needs to be a fair and reasonable requirement for capital investment on the part of franchise partners.

QUESTION 15 - EFFECTIVENESS OF 2021 REFORMS RE GOOD FAITH



What impact have the 2021 amendments to the obligation to act in good faith in relation to new car dealerships had? Where possible, please provide detail on the costs and benefits the new car dealership sector has experienced because of these changes.

The FCA has no specific view on this issue, as the section of the Code relates solely to the automotive industry.

QUESTION 16 - EFFECTIVENESS OF 2021 REFORMS RE EARLY EXIT FROM AGREEMENT

How effective are 2021 reforms to the Franchising Code which created a process for franchisees to formally request early exit from their franchise agreements?

We are not aware of any situation where this process has been used in the franchise sector.

This is probably because the interdependent nature of the franchise relationship is such that conversations would take place at an earlier stage. Similarly, franchisees have a right to assign their franchise agreement and exit the business.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » The majority of member feedback in this regard relates to who holds the head lease and who ultimately is left with any liability if a franchisee seeks to exit a franchise agreement early. Franchisors are prepared to assess whether a site may suit a company owned outlet, but would prefer to have choices as opposed to being compelled to take over a lease.

Considerations

The FCA is not aware of any situation where this process has been used in the franchise sector. This is probably because the interdependent nature of the franchise relationship is such that conversations would take place at an earlier stage. Similarly, franchisees have a right to assign their franchise agreement and exit the business.

On the other hand the FCA is aware of numerous cases where **the existence of such a right in retail leasing laws would be extremely valuable to franchisors and franchisees**. Given the highly captive relationship of leasing in a major shopping centre **the FCA would support initiatives to give tenants in major shopping centres a similar right**.

QUESTION 17 - COMPENSATION WHERE NEW VEHICLE DEALERSHIP IS TERMINATED EARLY



Where possible, please comment on the impact, or expected impact, of reforms to the Franchising Code which seek to ensure franchisees are paid compensation if the franchisor terminates a new vehicle dealership agreement early. Where possible, please provide detail on the costs and benefits (or expected costs and benefits) to the new car dealership sector resulting from these changes.

The FCA has no specific FCA view on this issue, as it is solely an automotive industry issue.

Considerations

The FCA does not support an extension of these provisions into the broader franchise sector, as the nature of the automotive business relationship is entirely different.

QUESTION 18 - ROLE OF THE ACCC

Is the current role of the ACCC in relation to enforcement of the Franchising Code appropriate?

Yes, the ACCC takes a considered approach that is well communicated and understood.

QUESTION 19 - EFFECTIVENESS OF EDUCATIONAL RESOURCES

How useful and effective are the educational resources provided by regulators (such as from the ACCC)? Do they ensure prospective entrants to the franchising sector are sufficiently aware of their rights and responsibilities? Is the level of industry engagement appropriate?

The FCA works hard to ensure it has a strong and proactive relationship with the ACCC. ACCC industry engagement is appropriate and important.

The ACCC's educational resources are useful. However, we also supplement them with industry publications, including the FCA's Franchisees' Guide, which have wider application given they include business issues.



Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » The ACCC's educational resources are useful when accessed, however, most members are of the opinion that new franchise entrants aren't typically using the ACCC as a source of learning.
- » The Franchisors who attended the FCA Policy sessions were all very aware of their responsibilities around disclosure of information, and if anything, there was a pattern of "over-disclosure" as opposed to not providing enough information.
- » There was some Franchisee feedback that suggested given a large number of franchisees have never been in business before, having a simple list of ideal questions a potential franchisee might ask a Franchisor would be helpful. They did however stress that concepts like these need to remain simplistic ie 1 page, not a large document that would act more like a deterrent than an aid.

Considerations:

The ACCC's educational resources are useful, but essentially repeat legal obligations and provide minimal business guidance. Industry publications, such as the FCA's Franchisees Guide, have greater utility for prospective franchisees. The FCA also undertakes educational activities at Franchise Expos, and has useful information available on its website.

It is hard to know the extent to which prospective franchisees access the ACCC resources during the pre-contractual process. We expect any engagement with the ACCC is more likely to occur when a problem arises.

The FCA enjoys a strong positive relationship with the ACCC, and considers ACCC industry engagement to be appropriate for a regulator. **The ACCC's Consultative Committee is however one area where substantial improvement could be made.** Currently there is not a single franchisor or franchisee on the Committee, which instead is comprised largely of advisors and consultants and lawyers. The FCA considers **more meaningful and effective consultation would take place direct with industry bodies rather than through this Committee.**

The FCA considers that **funding for industry bodies like the FCA to conduct enhanced pre-contractual awareness and educational activities will be more effective, and lower cost.** Funding for more extensive industry research would also be valuable.

QUESTION 20 – IMPACT OF REFORMS RE PENALTIES



What has been the impact of 2022 reforms which increased certain penalties available under the Franchising Code? Particular comment is sought on penalties which were increased to the greater of \$10 million, three times the benefit obtained, or 10 per cent of annual turnover?

Given 90% of our members are small businesses, for the broader franchise sector, the penalties are unnecessarily high. Ultra Tune and other cases show previous penalty levels were more than adequate to enable significant, but not crippling, fines to be imposed.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » Franchisors that attended the FCA Policy sessions are committed to doing business openly and fairly. The feedback we received centred around that fact that less than 1% of known Franchisors have been responsible for the major breaches that have caused the Code to continually be upgraded to “catch” the smaller number of unscrupulous operators. Applying this level of penalties to people who are well-intentioned operators creates an environment of caution which is counter intuitive to the spirit of entrepreneurship.
- » One interesting comment made about recalcitrant Franchisors is that they can leave the Franchising Sector and move into any other form of business and continue to conduct themselves in an identical way without the scrutiny of the Code.

Considerations:

To be frank there has been some resentment that the franchise sector has been unfairly singled out, with draconian penalties that are unnecessary and presumably were only introduced with the automotive sector (and large multi-national corporations) in mind.

The FCA was disappointed with the lack of consultation on penalties, and feels the ACCC and others made no substantive case for the need for further penalties. Indeed Ultratune and other cases show previous penalty levels were more than adequate to enable significant, but not crippling, fines to be imposed.

Clause 5A of the Code should be removed. A penalty of 600 penalty units per offence is more than adequate. Alternatively, clause 5A should be limited solely to the automotive provisions.

QUESTION 21 – ROLE OF THE ASBFEO



Is the role and activity of the ASBFEO in relation to supporting dispute resolution under the Franchising Code appropriate?

The FCA and its members enjoy a constructive and open relationship with ASBFEO, and appreciate the role ASBFEO plays in seeking to assist with issues that fall outside the desired activities of the ACCC, which is focused on enforcement and endemic issues.

Considerations:

The FCA enjoys a constructive and open relationship with ASBFEO, and appreciates the role ASBFEO plays in seeking to assist with issues that fall outside the desired activities of the ACCC, which is focused on enforcement and endemic issues.

ASBFEO does a good job coordinating the franchise mediation process, which is pivotal to the effectiveness of the Code. The high percentage of successful mediations demonstrates the effectiveness of mediation as a dispute resolution mechanism in franchising. The FCA shares ASBFEO's desire to continually incrementally improve dispute resolution processes, but does not share the view that an adversarial framework such as arbitration or a new court system would help. The features of the existing court system is part of the success of mediation, as neither party can afford a protracted court battle. Rather, the FCA considers the following improvements could be made:

- » More rigorous review of the quality and performance of mediators. A poll of the FCA's Legal Committee, which features practitioners who have been involved in hundreds of mediations, delivered a dissatisfaction level of around 70% with the quality and performance of mediators. Lack of understanding of franchising, and lack of assertiveness in helping the parties reach an attainable solution, were the most common concerns.
- » Adding a conciliation power to the armoury of mediators, such as is

successfully used in the context of Fair Work Act disputes, would help a lot. Conciliation would help the parties think about resolution before the day of the mediation, and also assist lawyers inexperienced in franchising better understand how to successfully resolve a franchising dispute.

- » Training to assist mediators to be more assertive in helping the parties settle matters. The best mediators are assertive, including providing their thoughts on the prospects of success and cost and stress of legal action. The reality is that it is in the parties' interest to settle at mediation in the vast majority of cases, and a little more assertiveness and proactivity would further increase the number of successful outcomes for the benefit of all.

Conciliation should be added to the ASBFEO repertoire, to enable more facilitated and active intervention to attempt to resolve franchising disputes. So ASBFEO could appoint a mediator to conduct a formal conciliation hearing prior to setting a matter down for mediation. There seems to be an increasing trend for parties to seek to proceed immediately to mediation.

QUESTION 22 - RESOLUTION OF DISPUTES



Do the dispute resolution provisions in the Code provide an effective framework for the resolution of disputes? In particular, are you aware of whether 2021 reforms relating to multi-party dispute resolution and voluntary arbitration have been utilised by participants in the franchising sector? If not, why not?

Yes. Mediation is spectacularly successful, and world's best practice. Multi-party dispute resolution sounds appealing, but practical consequences are that fewer matters settle via mediation as the franchisee dynamic changes in a group setting.

No-one uses arbitration. The court system is accessible, and rules and quality of outcomes predictable. The poor quality of mediators means few people would trust an arbitration. Arbitration turns the process adversarial, and away from mediation.

Key Feedback from our Member Engagement Sessions (franchisor and franchisee)

- » The membership believes Mediation has always played a very effective role in dispute resolution, and that there is no identifiable changes that would make it any better than it is already.
- » The majority of commentary about multi-party disputes was that they are less effective than individual resolution processes and there was a belief that outcomes were more likely when matters were dealt with individually.
- » The membership was in favour of using processes that were cost effective for both parties. Mediation was considered an ideal starting point with an acknowledgement that other forms of legal action were always available as a last resort

Considerations:

With a consistent success rate of around 80%, mediation has proven to be spectacularly successful, and in legal circles is regarded as world's best practice.

Multi-party dispute resolution sounds appealing, but would be improved if there was an ASBFEO filter before parties could access it. Practical experience with multi-party dispute resolution is that fewer matters settle via mediation, as the franchisee dynamic changes in a group setting. The low barriers to group mediation mean there is often minimal commonality of issues, and parties often seem less prepared to settle in front of their peers. Occasionally a pack mentality develops which actually inflames the disputes.



No one uses arbitration. The court system is accessible, and rules and quality of outcomes predictable. At present the poor quality of mediators means few people would trust an arbitration by these people. The costs of arbitration are significantly higher than mediation, and arbitration turns the process adversarial, and away from mediation. Augmented mediation, including conciliation and possible FCA Franchisee Advocate are better options.

The FCA is considering the viability of establishing some form of a Franchisee Advocate or Franchisee Concierge who could work alongside franchisees and their advisors to assist in resolving disputes. The FCA informally assists at present, but does not have the resources or funds to undertake a broader role. However it could do so with relatively modest Government assistance.

APPENDIX 1

FCA CONSULTATION ACTIVITIES AND SUBMISSION CONTRIBUTORS



Code Review Marketing Activity

Webinar 1

Email invite to 5,100 on 22nd August

Email invite to 5,100 on 29th August

Webinar 2

Email invite to 5,100 on 19th September

Email invite to 5,100 on 24th September

Email Communication

25th August

Email to 5,100 on 25th September outlining the upcoming state consultations and events

Important message for our franchisor members

Video message from Brendan Green

2,000 members

Wednesday 6th September

<https://mailchi.mp/franchise/ameessage-frombrendangreen>

Vic Code of Conduct Consultation Invitation

<https://mailchi.mp/franchise/2024-business-essentials-fca-excellence-in-franchising-awards-13869650>

Mon, September 11th 2:03 AM to 596 recipients

<https://www.linkedin.com/feed/update/urn:li:activity:7109430734079094784>

Qld Code of Conduct Consultation Invitation

https://www.thewebconsole.com/tools/dbm/campaign/view/campaign/728018/_campaign/5058f1af8388633f609cad-b75a75dc9d

b75a75dc9d

<https://www.linkedin.com/feed/update/urn:li:activity:7109684380905701376>

SA Code of Conduct Consultation Invitation

https://www.thewebconsole.com/tools/dbm/campaign/view/campaign/727896/_campaign/5058f1af8388633f609cad-b75a75dc9d

<https://www.linkedin.com/feed/update/urn:li:activity:7107525525052518400>

WA Code of Conduct Consultation Invitation

https://www.thewebconsole.com/tools/dbm/campaign/view/campaign/727863/_campaign/5058f1af8388633f609cad-b75a75dc9d

Snapshot of LinkedIn posts during the 6 week period

<https://www.linkedin.com/feed/update/urn:li:activity:7109434028910407681>

<https://www.linkedin.com/feed/update/urn:li:activity:7105794668872822784>

<https://www.linkedin.com/feed/update/urn:li:activity:7105110594864762880>

<https://www.linkedin.com/feed/update/urn:li:activity:7105353978149830656>

<https://www.linkedin.com/feed/update/urn:li:activity:7111622864251846656>

<https://www.linkedin.com/feed/update/urn:li:activity:7110451940320301056>

Facebook page activity throughout the 6 week period

<https://www.facebook.com/franchisecouncilAU/>

APPENDIX 2

FRANCHISE REGULATION IN AUSTRALIA - PART 1



It is important to put the review of the Franchising Code of Conduct, and franchising regulation more broadly, into proper context.

Australia has the most comprehensive regulatory regime of any country in the world. Although many of the elements of the regulatory framework may have been replicated or had their inspiration in foreign jurisdictions, it is without precedent to have them all together. Further, there are some rather unique “home grown” initiatives.

From past experience many advocates for amendments to the Code do not have a sound understanding of the extent of current protection available. In this Annexure, the FCA summarises the comprehensive provisions of the Code. It seems beyond rational argument that the Code is comprehensive and effective in the context of regulating a contractual relationship between two business parties in a market economy. Further regulation would threaten the viability of the franchising model, and indeed there is a strong case for simplification and a reduction in compliance cost.

Penalties for breach of the Code are also very high by world standards, and indeed when compared to other regulation. For example:

- » Almost every provision of the Code, including some very innocuous provisions, carries a pecuniary penalty of \$165,000 per breach. Taking but one of many possible examples to illustrate how this is disproportionate to the breach, if a franchisor receives a request from 100 franchisees for a copy of the current disclosure document and fails to provide it in 14 days, the potential penalty is \$16,500,000;
- » Breach of clause 17 of the Code, perhaps by failure to include financial statements with the disclosure document due to a delay in completion of the audit, carries a penalty of the greatest of:
 - » \$10 million; or
 - » Where the value of the benefit attributable to the breach can be ascertained, three times the value of that benefit; or
 - » Where the value of the benefit attributable to the breach cannot be ascertained, 10 per cent of the annual turnover.
- » Any individual involved in a breach of clause 17 can face a civil penalty of \$500,000.

Factor in the uncertainty that applies to the interpretation of many Code provisions, and the case for reform is compelling.



Understanding the current regulatory framework

The key elements of the franchise regulatory framework are contained in the Franchising Code of Conduct (the Code), or the Australian Consumer Law (ACL). The key elements of the regulatory framework are:

1. Disclosure and other extensive obligations under the Code, including:
 - a. Obligations in relation to some of the content of Franchise Agreements;
 - b. Requirements to produce and annually update a complex and lengthy disclosure document;
 - c. Detailed disclosure timing requirements, and a 14 day cooling off period;
 - d. Requirements to also provide a Key Facts Sheet and an Information Statement as separate disclosure obligations;
 - e. Certification and other requirements concerning franchisee information receipt and franchisee legal and business advice;
 - f. Continuous disclosure obligations in relation to certain matters;
 - g. Ongoing franchisee access to a current disclosure document;
 - h. Mandatory processes for dispute resolution.
2. The express duty of good faith contained in the Code;
3. Registration on the Franchise Disclosure Register;
4. The prohibition on misleading or deceptive conduct contained in the ACL;
5. The prohibition on unconscionable conduct contained in the ACL;
6. The prohibition on unfair contract terms in standard form small business contracts contained in the ACL;
7. Operational restrictions in relation to issues such as marketing funds, transfers, termination and dispute resolution;
8. Oversight by the ACCC;
9. High financial penalties for breach of almost every provision in the Code, and for breaches of the ACL;
10. Specific automotive industry obligations;
11. Potential liability for franchisors for franchisee breaches under the Fair Work Act.

Detail of Franchise Regulation

- » **Information Statement.** Franchisors must provide an Information Statement in the prescribed form to a prospective franchisee within 7 days of the prospect formally expressing an interest in a franchise. The Information Statement is essentially a brochure on the advantages and disadvantages of franchising. There is no similar requirement in any other jurisdiction.
- » **Disclosure.** Extensive obligations in relation to pre-contractual disclosure that revolve largely around the provision of a comprehensive disclosure document to a prospective franchisee.



» **The disclosure document:**

- » Must be “in the form and the order and under the numbering” and “under the titles” set out in the annexures to the Code. Essentially all disclosure documents are the same irrespective of the size of the system, the complexity of the franchise model or the amount of the investment;
- » Must be given to a prospective franchisee or a franchisee proposing to renew or extend a franchise at least 14 days before the prospective franchisee enters into a franchise agreement or an agreement to enter into a franchise agreement or pays non-refundable money to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement;
- » Must be provided with a copy of the franchise agreement “in the form in which it is to be executed”, which means that the document has to contain all commercial terms and be ready for signature;
- » Must be provided to any existing franchisee within 14 days of receiving a written request;

- » **Key Facts Sheet.** Franchisors have to provide a Key Facts Sheet with the disclosure document. The Key Fact Sheet must be in the prescribed form, and updated annually.
- » **Good Faith.** The Code contains an express obligation on each party to a franchise agreement to act in good faith in relation to a franchise agreement and the Code.

» **Franchise Disclosure**

Register. Franchisors

must provide information about the franchisor and the franchise system for inclusion on the Franchise Disclosure Register, and must update that information annually. The Register is be freely available for public inspection.

- » **Franchise Agreement.** Provisions in the franchise agreement must comply with the Code’s requirements in relation to issues such as releases of liability, freedom of association of franchisees, cooling off, assignment and termination.
- » **Advice.** Under the Code, Franchisees are actively encouraged to obtain legal and business advice prior to entering a franchise agreement.

A Franchisor must not enter into, renew or extend a franchise agreement unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.

Before a franchise agreement is made, the franchisor must have received from the prospective franchisee signed statements that the prospective franchisee has been given advice about the proposed franchise business, from at least an independent legal adviser, business adviser or accountant or has been told that such advice should be sought but has decided not to seek it.



- » **Cooling Off.** A franchisee may terminate an agreement (being either a franchise agreement or an agreement to enter into a franchise agreement) within 14 days after the earlier of entering into the agreement or paying any money under the agreement. There are additional requirements if a lease of premises is involved. If the franchisee terminates the franchise agreement pursuant to the cooling off right, the franchisor must, within 14 days, repay all money paid by the franchisee to the franchisor under the agreement, less reasonable expenses provided those expenses have been disclosed in the disclosure document given to the franchisee.
- » **Marketing Funds.** A franchisor must prepare an annual financial statement of the marketing fund's receipts and expenses for the last financial year, including the percentage spent on production, advertising, administration and other stated expenses. It must also have the statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates. The franchisor must give the franchisee a copy of the statement within 30 days of preparing the statement, and a copy of the audit report (if applicable) within 30 days after preparing the report. Contributions to the marketing or cooperative fund must be kept in a separate bank account, and funds may only be spent in the manner prescribed by the Code.
- » **Notification of End of Term Arrangements.** Franchisors have additional disclosure obligations to clarify for franchisees what, if any, arrangements exist in relation to ending

the franchise term.

Franchisors must also

give at least 6 months' notice of their decision to renew or extend (or not to renew or extend) a franchise agreement.

- » **Continuous Disclosure of Materially Relevant Facts.** A franchisor is required to disclose to a franchisee if it becomes aware of certain materially relevant facts, including any change in majority ownership or control of the franchisor, any proceedings by a public agency such as the ACCC, or a judgment or arbitration award in criminal or civil proceedings in Australia against the franchisor alleging breach of a franchise agreement, contravention of trade practices law or the CCA, unconscionable conduct, misconduct or an offence of dishonesty, a judgment against the franchisor under certain workplace relations and industrial relations laws, or civil proceedings in Australia against the franchisor or an associate of the franchisor by 10% or 10 of the franchisees in Australia of the franchisor (whichever is the lower). Disclosure must be made within a reasonable time, but not later than 14 days after the franchisor becomes aware of the relevant facts.
- » **Transfer.** A franchisor cannot unreasonably withhold consent to a franchisee's request to assign a franchise agreement. The Code also requires disclosure of whether the franchisor will amend the franchise agreement prior to, or on transfer of, a franchise agreement termination.



- » **Termination.** Immediate termination is only available in very limited circumstances, with most cases requiring a franchisee to be given written notice of default and an opportunity lasting not more than 30 days to cure the default. Immediate termination of agreements entered into from 1 July 2021 requires 7 days' notice to be given and reasons provided, and can be inhibited by a franchisee activating a dispute resolution process.
- » **Franchisee right to request termination.** A franchisee has the right to request termination of a franchise agreement, and a Franchisor is obliged to respond to the request.
- » **Dispute resolution.** The Code contains a mediation process which, if activated by a party, is mandatory. If the parties do choose mediation or arbitration, the mediation or arbitration must be conducted in Australia. Where there are similar disputes, franchisees or the franchisor may require that they are resolved by a single dispute resolution practitioner and process.

There are additional requirements for automotive arrangements, notably mandatory clauses that need to be included in “new vehicle dealership agreements”. Agreements must:

- » Provide for the franchisee to make a reasonable return on any investment required by the franchisor;
- » Provide for the franchisee to be compensated in the event of early termination;
- » Specify how compensation is calculated;
- » Provide for buyback or compensation for vehicles, spare parts and special tools;
- » Not contain a provision purporting to exclude compensation on termination except for termination due to franchisee breach.

There are additional provisions requiring (generally speaking) 12 months' notice of intention to extend or not extend an agreement, and an obligation to provide reasons and implement a wind-down plan if an agreement is not renewed or extended.

The Australian Consumer Law

The CCA regulates business conduct in Australia, promoting fair and effective competition and consumer protection. The CCA, and the ACL, make certain conduct, including misleading or deceptive representations, unconscionable conduct, exclusive dealing and resale price maintenance, illegal. The important sections of the CCA and the ACL that must be borne in mind are principally:



- » Section 18 of the ACL, which prohibits misleading or deceptive conduct. Section 4 of the CCA augments section 18 by providing that a person making any statement as to a future event (such as a projection as to turnover) must be able to prove they had reasonable grounds for making it;
- » Section 22 of the ACL, which provides that a corporation must not, in trade or commerce, engage in conduct that is in all the circumstances “unconscionable”;
- » Prohibitions on unfair contract terms in standard form small business contracts that will apply to most if not all franchise agreements; and
- » Chapters 2, 3 and 4 of the CCA, which contain a range of prohibitions against restrictive trade practices, such as price fixing, misuse of market power, resale price maintenance and covenants affecting competition.

Contravention of the provisions of the CCA can result in severe penalties. In the case of breaches of some provisions in Chapters 2, 3 and 4, including the price fixing provisions, these can include fines up to \$500,000 for individuals. In the case of corporations, penalties can be as much as the greatest of:

- » \$10 million; or
- » Where the value of the benefit attributable to the breach can be ascertained, three times the value of that benefit; or
- » Where the value of the benefit attributable to the breach cannot be ascertained, 10 per cent of the annual turnover.

APPENDIX 3

FRANCHISE REGULATION IN AUSTRALIA - PART 2



1. The franchise sector makes a substantial contribution to the Australian economy
 - » \$174 billion in annual turnover;
 - » Over 1,100 different franchise systems across virtually every industry;
 - » 94,000+ individual franchised businesses, employing more than 565,000 people;
 - » The franchise model ensures rural and regional Australia have access to goods, services, brands and opportunities that would otherwise be limited to major population centres;
 - » The indirect economic impact of franchising estimated at 3 times the direct impact.
2. Franchising enables small businesses to compete effectively with big business
 - » Almost 300 franchise systems have been in business for more than 30 years;
 - » 30% of franchisees have been in their franchise between 5-10 years and nearly 40% had been in their franchise for more than 10 years;
 - » Franchised businesses were better supported during the pandemic, and have received more quickly;
 - » Banks report sound asset quality in their book of franchise loans, and three of the four majors are actively investing in franchise lending.
3. The Franchise Council of Australia understands Australian franchising
 - » Franchisor Forum, Franchisee Forum and Legal Committee provide quality input and ensure an accurate and balanced view on industry policy;
 - » The FCA's formal and peer led educational activities promote best practice in franchising;
 - » The FCA's Franchising Standards & Guidelines augment the regulatory framework;
 - » The FCA's Quarterly Pulse Check Surveys feature responses from more than 100 franchise systems across diverse industries, and provide accurate and timely information. Insights from March 2023:
 - » 72% reported increased average weekly revenue over past 12 months
 - » 53% optimistic about business conditions over the next six months
 - » Top concerns or challenges include Staffing and Recruitment, Rising Interest Rates and Inflation, Wellness of Franchisees and Staff
 - » 94% expressed growing concerns around Data Security and Risk



- » FCA Franchisee Surveys are providing further insights - more than 1,000 Franchisees across 83 different networks were surveyed in October 2021, and a second survey is currently under way:
 - » Responses largely echo the findings in the Franchise System surveys:
 - » The biggest challenges include Finding and Keeping Staff, Interest Rates and Inflation and the financial performance of their business
 - » 80% said their Franchisors were supportive and 59% said being part of a franchise network provided an advantage over operating an independent business
 - » More than 70% of Franchisees plan to increase employment numbers in 2023
 - » 75% of franchised businesses actively support local charities and community activities.
- 4. Franchising is vulnerable to over-regulation and excessive compliance cost
 - » The vast majority of franchise systems operate multi-state and many nationally – 915 franchise systems operate in NSW; 861 in Vic; 860 in Qld; 640 in WA; 560 in SA; 444 in ACT; 356 in Tas and 275 in NT;
 - » 95% of franchisors, and almost all franchisees, are small businesses with < 20 employees.

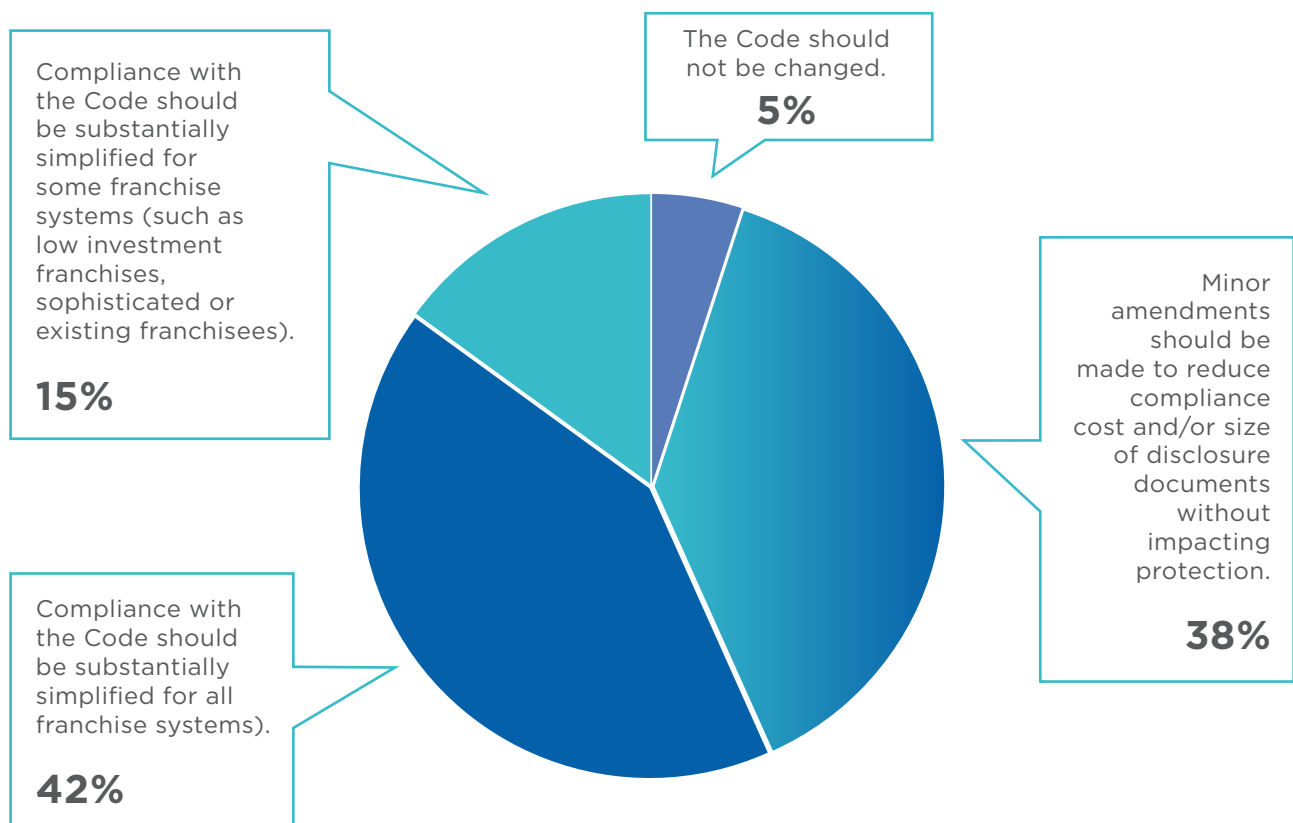
APPENDIX 4

SURVEY FINDINGS

PART A – CODE SPECIFIC QUESTIONS



Q. Which of the following best summarises your views on the detail of the Franchising Code?

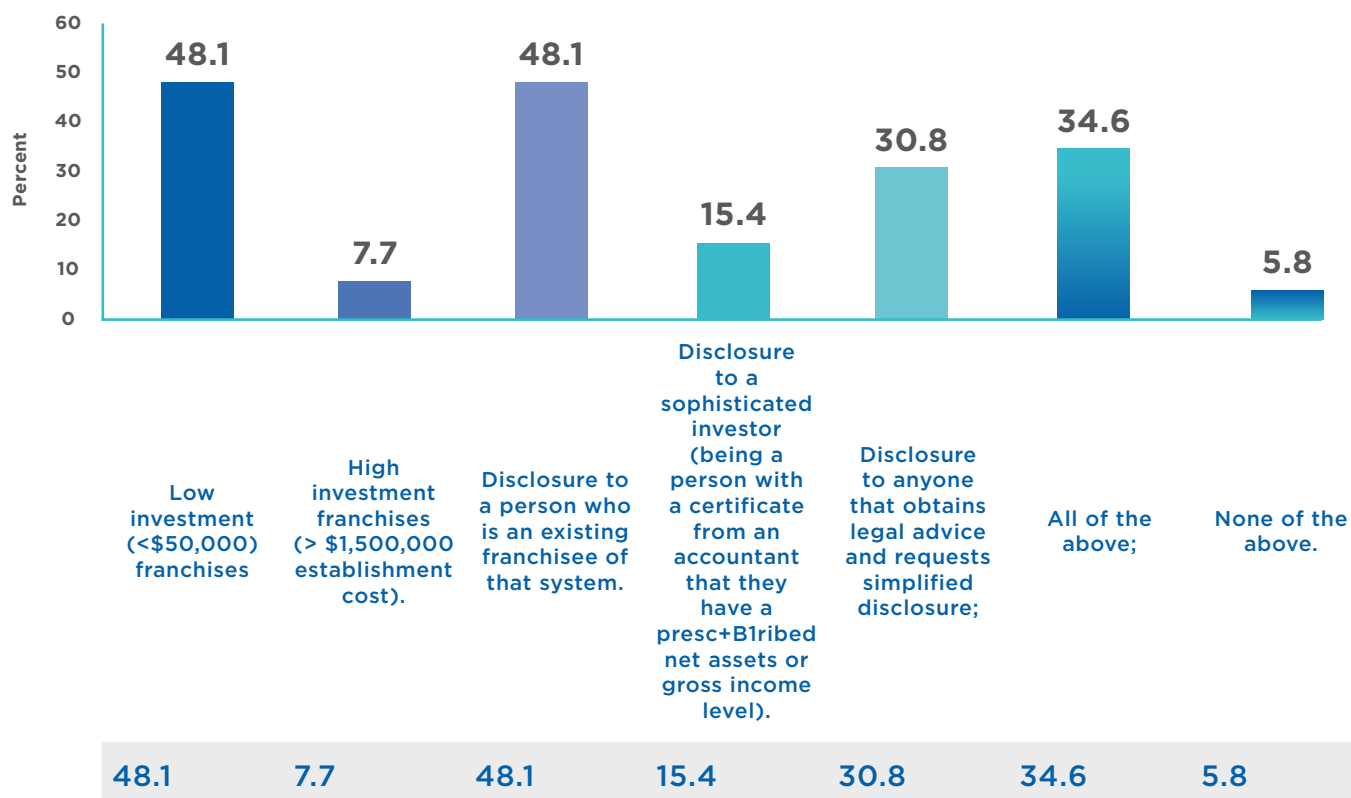


When asked to summarise their view on the detail of the franchising code:

- » 5% of respondents were of the view the Code should not be changed
- » 15% of respondents were of the view the Code should be substantially simplified for some franchise systems
- » 42% of respondents were of the view the Code should be substantially simplified for all franchise systems
- » 38% of respondents were of the view that minor amendments should be made to reduce compliance cost / size without reducing protection



Q. For which of the following situations would you support substantially simplified disclosure?

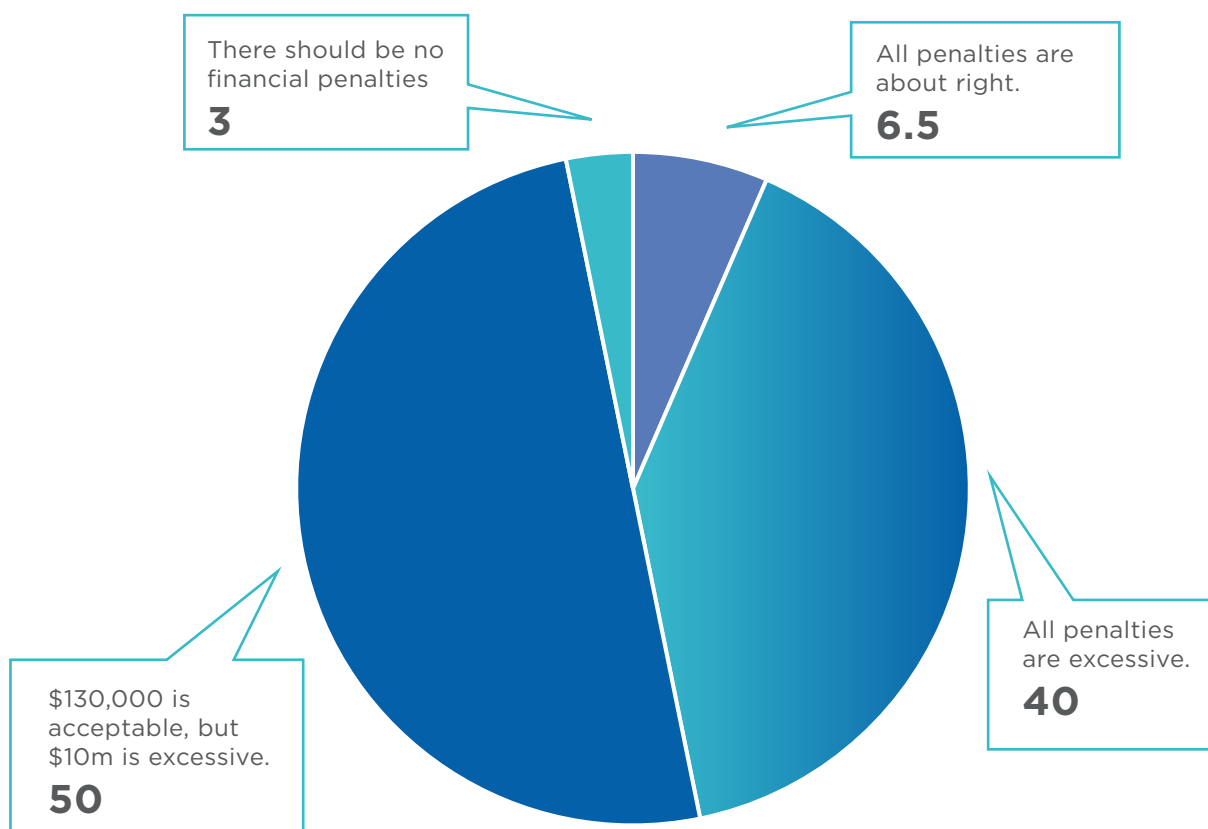


Respondents indicated they would support simplified disclosure on the following basis:

- » 48% for low investment (<\$50,000) franchises
- » 8% for high investment (>\$1500,000) franchises
- » 48% to an existing franchisee
- » 15% to a sophisticated investor with certified asset and income levels
- » 38% where legal advice had been obtained and simplified disclosure requested.
- » 35% where any of the above categories applied
- » 6% would not support simplified disclosure for any of the above categories.



Q. The penalties for most breaches of the Code are approximately \$130,000, but some provisions carry a penalty of the greater of \$10 million, three times the benefit obtained, or 10 per cent of annual turnover. Which statement best describes your view?

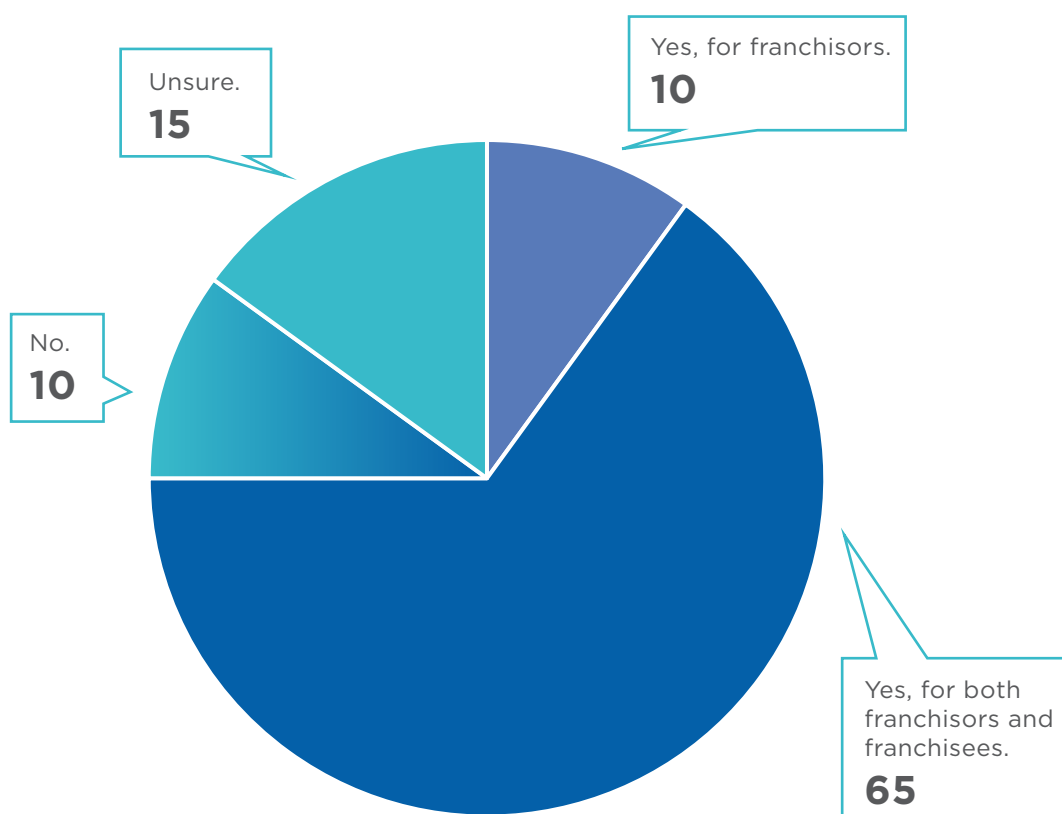


When asked for their views on the penalty amounts for code breaches:

- » 3% of participants responded there should be no financial penalties
- » 7% of participants responded that penalties were about right
- » 40% of participants responded that all penalties were excessive
- » 50% of participants responded that \$130,000 was acceptable but \$10m was excessive



Q. Would Code amendments to better facilitate electronic disclosure materially reduce compliance costs for franchisors and franchisees without impacting Code protection?



When asked whether amendments to the Code to better facilitate electronic disclosure materially would reduce compliance costs (without impacting Code protection):

- » 65% of participants expected a reduction in compliance costs for franchisors and franchisees
- » 10% of participants expected a reduction in compliance costs for franchisors
- » 10% of participants did not see a reduction in compliance costs
- » 15% were unsure



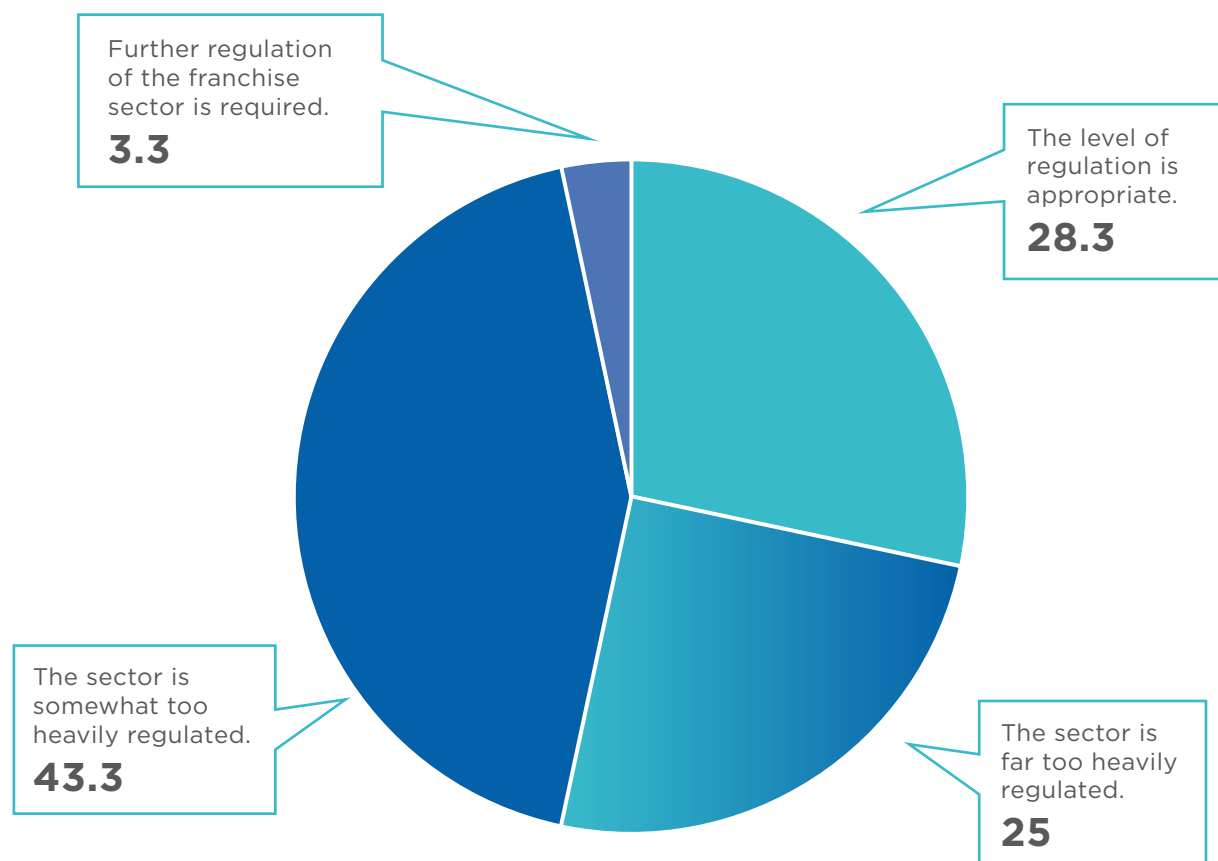
Q. Which of the following amendments to the Code do you support?

Responses to whether particular amendments would be supported are tabulated below:

Amendment	% Supporting Amendment
Ability to reduce mandatory Code disclosure time periods by mutual agreement where franchisee has legal advice and meets exemption criteria.	65.4%
Simple opt in / opt out form permitted in relation to inclusion of current and former franchisee details in the disclosure document.	61.5%
No cooling off period on sale of an existing franchised business by a franchisee.	44.2%
Immediate termination not requiring 7 days' notice.	32.7%
Franchisor ability to terminate immediately for serious breach of the law causing potential brand damage provided appropriate compensation is paid.	76.9%
3 strikes rule - Franchisor ability to terminate immediately if 3 or more breaches.	61.5%



Q. Reflecting on the Code and the prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms, which statement best reflects your view of the regulation of the Australia franchise sector?

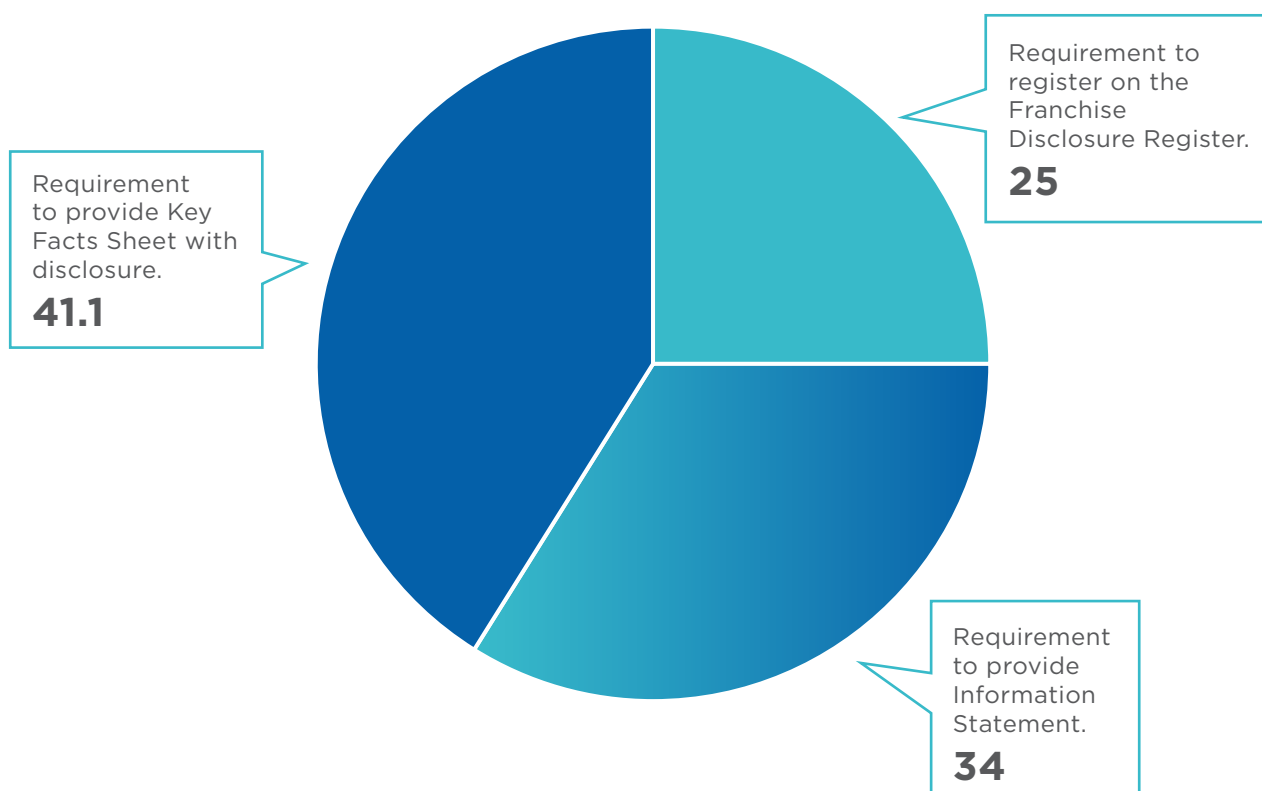


In relation to the view of the regulation of the Australian franchise sector:

- » 44% of respondents viewed the sector as being too heavily regulated
- » 25% viewed the sector as being far too heavily regulated
- » 28% viewed the level of regulation as appropriate
- » 3% indicated that further regulation was required



Q. Which of the following have been the most useful additions to the Code disclosure process?



When asked what had been useful additions to the Code Disclosure process:

- » 44% of respondents selected the Key Facts Sheet as the most useful addition to the Code disclosure process
- » 34% of respondents selected the requirement to provide the Information Statement as the most useful addition to the Code disclosure process
- » 25% of respondents selected the requirement to register on the Franchise Disclosure Register as the most useful addition to the Code disclosure process



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