

To: [Franchising Review](#)
Subject: Review into franchising
Date: Tuesday, 26 September 2023 2:01:28 PM

To Whom it may concern,

My name is [REDACTED], I am an Australian citizen and have been fortunate to have owned and operated my own businesses throughout Australia and New Zealand since 2012.

I have also had the opportunity to own and have owned numerous franchises throughout Australia and New Zealand.

Firstly I wanted to personally thank you for your review into franchising. Personally I think it is a highly unregulated field that unfortunately turns out badly for many people. I have personally had some great and not so great experiences, I have also had friends who have unfortunately lost their livelihoods and homes due to poor conduct from franchisors.

I understand you are incredibly busy however if possible I would like you to spare some time to review some feedback on some of the issues as I see them. I would also be happy to jump on a zoom, call or fly in to see you in person should you wish to discuss these points in more detail.

1. Fixed fee models, present a significant problem in uncertain economic times (Eg covid). Eg during COVID 19 when we were closed, one of the franchises I am a part of use a fixed fee model. We paid \$790,668.08, receiving only \$13,083.5 in fee relief (1.6%), despite the franchisor claiming all available government support (They did this by deferring fees for 2-4 week windows when the fee relief was able to be applied for). Along with 27 other franchisees (Some of these people have now lost their businesses) we took this particular franchisor to mediation regarding this issue and did not achieve an outcome and were not able to pursue the matter in court due to legal fees. Personally I think franchisees should be restricted to a % based model, or should they want a fixed fee they should operate as a licensing agreement for software or operational needs (Which brings me to future points).

2. Balance of risk, In the model mentioned above, the franchisee holds all the risk, e.g. franchisee holds lease, buys the assets and agrees to a fix feed model (Guaranteeing franchisor income) but there are conditions that they need to sell these assets at written down book value AND handover the lease and fitout for no cost at the end of the term. The challenge with this is that it requires the franchisee to bear the risk of starting and building this business to simply hand it over at the end of the term if they decide to go their separate ways. I believe requirements to handover or assign leases should be prohibited, should the franchisor wish to have the lease they should sign that lease and then sublease it to the franchisee with full disclosure of what they are paying. Similar to equipment value, there should be no clauses for written down book value, it should be fair market value and there should not be any restriction on who the franchisee sells this equipment to. If the franchisor wants the equipment and fitout they should be willing to pay a fair market value for it.

3. Restrictive covenants, In the model previously mentioned the restrictive covenants are 3 years through ALL of Australia. I understand that this is not really enforceable, however quite a few of my friends who have been put out of business did not have the funds to challenge this in court, which meant not only had they lost their savings and livelihood they also their ability to operate in a field they know. I believe franchising should be more like a licensing agreement. At the end of the contract term the franchisee loses access to the operational system and they need to give up any copywrite material etc, but they should be free to conduct the business they have spent their life doing.

4. Franchise agreements differ from disclosure documents. There is a quite a bit on disclosure documents in the franchising code of conduct, however in the model mentioned above the franchise agreement does differ from the disclosure documents, key areas being cost allocation for upgrades etc (Eg in disclosure documents they are listed, in franchise agreement they are either not referenced or are uncapped). As well as marketing fund and training levy compliance, Eg as per the code there are certain reporting requirements for marketing funds, whereas they are not listed in the franchise agreement. This has led to the abovementioned franchisor either not providing disclosure documents when requested OR disregarding the disclosure document and using the franchise agreement when it suited his needs. I believe franchise agreements should be very similar to disclosure documents to prevent any confusion.

5. Marketing fund compliance. Follows on from franchising code requirements and disclosure documents vs what is in franchise agreements.

- I believe there should be guidelines as to what the marketing fund can be used for. For example in the model referenced above the fund accrues approx 1 million annually, the franchisor agreed to a \$500,000 website upgrade fully paid for by the fund (50%), this upgrade also has significant upkeep costs (This expenses was not voted on and the franchisees were not consulted). The problem I see with this is that a major website investment is something that increases the franchisor IP/assets value without necessarily helping the franchisees. So in this example I believe the website expense should have been split by the franchisor and marketing fund.

- I also believe when funds are in place, whether this is a marketing fund or training levy there should be a board appointed by the franchisees to vote on spending initiatives by the franchisor. They would not have the ability to reduce fund contributions; this is something agreed to in the disclosure document. They would only have the ability to vote on how that money was spent. In the franchise I am referencing, although the franchisor reports on the fund (Not to code standard) there is nothing the franchisees can do if they dispute the expenses (Bar legal action, which is prohibitive see point 9). Eg \$500,000 on a website, paying HQ staff to increase their franchise fee profits, paying for travel etc.

6. Training levy compliance. Follows on from franchising code requirements and disclosure documents vs what is in franchise agreements. Eg in the model mentioned above this is uncapped in the franchise agreement (There is a reference in the disclosure document which I mentioned in point 4), which the franchisor has used to either force franchisees to pay for training, or increase regular fees as a part of the training levy. Similar to marketing funds I believe there should be requirements of reporting, and voting e.g. the fund/levy is

not for profit, the franchisor needs to disclose how the funds were spent at the end of each financial year.

7. Purchase of merchandise, franchisor mark ups and additional fees. As per the franchising code there are requirements that franchisors disclose in their disclosure documents expected costs etc. However as mentioned in point 4 this is not always reflected in franchise agreements. Eg in the model I have mentioned there is a clause in the franchise agreement that states "The franchisee must adhere to all aspects of the franchise owner manual" the problem with this is that over a 10 year period the manual is likely to have significant changes, as well as significant fitout and product changes. I believe if a franchisor was to include a clause that "the franchisees must abide by a manual", a CURRENT copy of the manual should be included in the agreement/disclosure document. Then when the franchisees reach the end of their term they would be provided with an updated manual along with a new agreement, and could choose whether or not to continue with the franchise with all the updates and requirements. Should there be any merchandise/product/fee changes during the franchisees term they would have the ability to opt out.

8. Cases of exclusive dealing - eg signing franchise over to new franchisee if prior franchisee does not sell assets at a price set by the franchisor (Normally a huge loss). This is linked in with point 3, restrictive covenants, point 2, balance of risk, and point 9 no regulatory body. Due to how alot of franchise agreements are structured a lot of franchisees are at the mercy of the franchisor at the end of the term. An example from the model I referenced, a friend of mine (██████) had signed a sales and purchase agreement for her business for \$250,000 to ██████████. The franchisor called ██████████ and said she had to drop her price to \$150,000, otherwise he would just sign over the franchise to ██████████, and enforce restrictive covenants on her putting her out of business. As a result she had no choice and accepted the loss. The interesting part is that ██████████ were willing to pay her \$250,000, however the franchisor offered ██████████ lending for \$150,000 and said if they agreed he could get her price down. The last sentence is a bit of a specific stab at the mentioned franchisor, however the forced sales is unfortunately not a unique circumstance.

9. No regulatory body, so often franchisors stonewall disputes. Although there has been great work on the code, the challenge as I see it is there is no regulatory body for franchising. Which often leads franchisors (Who generally have a lot more money than franchisees) to bullying or intimidation like tactics against their franchisees both during and after their term. I understand there is the ACCC, however franchising is a HUGE industry with laws constantly changing which does make it hard for the ACCC to keep up. As mentioned I have personal experience in this (COVID 19) I have had friends see losses in their business after years of hard work and others who were put out of business due to not having the funds to defend injunctions at the end of their term. So in summary I applaud this well needed review, however I would like to see it go beyond merely changing the code to potentially appointing a regulatory body who can mediate and enforce action if necessary on franchise related disputes.

As mentioned I am happy to jump on a call, do a zoom or fly in to see you to discuss any of these points.

Kindest regards,