

ARA SUBMISSION

FRANCHISING CODE OF CONDUCT REVIEW

OCTOBER 2023

The Australian Retailers Association (ARA) welcomes the opportunity to make this submission into the review of the Franchising Code of Conduct (the Code) given the unique role we play in our sector, representing some of Australia's largest franchise operators and their networks of franchisees.

The ARA is the oldest, largest and most diverse national retail body, representing a \$420 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between.

EXECUTIVE SUMMARY

The ARA has conducted broad member consultation to inform this submission, including interviews with franchise operators and a survey of members ($n=74$) that was heavily skewed towards franchisees. Data and insights from this consultation are summarised below, against the reviews' terms of reference.

- 1. The general fitness for purpose of the Code.** The ARA supports retention of the Code given its role in promoting trust, clarity and fairness in franchising relationships. However, the continued evolution of the retail landscape means that some reforms are needed to ensure that the Code is fit-for-purpose today and into the future. We support clarification and simplification of the Code but caution against major changes that may impose further administrative and compliance burdens on both franchisors and franchisees.
- 2. The role of regulators and agencies in supporting enforcement and dispute resolution.** The Australian Competition and Consumer Commission (ACCC) plays a vital role in regulation, education and stakeholder engagement – ensuring that businesses adhere to the Code's standards. The role that the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) plays is also critical, particularly in relation to dispute resolution for small business. We support enhanced inter-agency collaboration between the ACCC and ASBFEO to synchronise policy efforts.
- 3. The role of the Code in regulating the automotive sector.** The ARA does not represent the automotive sector and makes no comment in relation to these provisions.
- 4. The impact of 2022 reforms.** The 2022 reforms, which increased penalties, have enhanced deterrence and compliance. However, the ARA underscores the need for balance in penalty enforcement, especially considering potential challenges faced by smaller franchisors. Regular reviews are suggested to ensure the penalties align with the sector's dynamic nature.
- 5. The impact of the Franchise Disclosure Register.** The register plays a positive role in fostering transparency but there are some opportunities to increase visibility, simplify the current disclosure standards, support

franchisors to offer additional voluntary information, and streamline the Key Fact Sheet to avoid redundancy. Feedback indicates that too much information in the disclosure register can be counterproductive on both sides, and so including the right information is key.

Given this commentary, our recommendations are summarised below and outlined in the body of our submission.

- Seek to retain the Code, with minor amendments that do not impose an additional burden on franchisees or franchisors, to ensure that it is fit-for-purpose for a contemporary retail landscape, today and into the future.
- Clarify the roles of ACCC and ASBFEO and identify ways to strengthen inter-agency collaboration.
- Adopt an “education over enforcement” approach to non-compliance and ensure that any penalties are commensurate with the impact of any breach and the risk-reward dynamic between the parties.
- Retain, but clarify and simplify, the Franchise Disclosure Register.

RECOMMENDATIONS AND RATIONALE

The ARA has evaluated the current provisions of the Code in the context of the retail sector. Recognising the pivotal role that the Code plays in facilitating trust and fairness within franchising relationships, our recommendations emphasise the need for its retention while also highlighting areas for reform.

We advocate for a balanced approach that does not place additional administrative burden on either party, while acknowledging recent changes are still being implemented. We recommend maintaining the essence of the Code while ensuring it is adaptable to the dynamic nature of the retail sector, balancing the needs of franchisees and franchisors.

General fitness for purpose of the Code

Recommendation 1

Seek to retain the Code, with minor amendments that do not impose an additional burden on franchisees or franchisors, to ensure that it is fit-for-purpose for a contemporary retail landscape, today and into the future

The ARA recommends retaining the Code, with some minor amendments. Eliminating the Code would introduce significant uncertainties and potential vulnerabilities for our members, possibly destabilising the franchising environment in the retail sector.

However, the ARA also recommends cautious reform that maintains the structure and general levels of obligation of the current Code. We emphasise the industry is facing difficult trading conditions and is still implementing other recent changes to the Code.

The Code has had an important role in the retail franchising landscape in Australia. Its intent has been to provide a structured framework that has fostered trust, clarity and fairness in franchising relationships. We note that the Code has been an instrument that has contributed to guiding our members, averting conflicts and endeavouring to ensure a level playing field between franchisees and franchisors.

While the Code remains fundamentally important, the retail industry has evolved since its inception. We agree that changing consumer behaviours, digital transformations, and emerging business models necessitate a review of the Code's current provisions to ensure it is contemporary, relevant and adaptive to the dynamic retail landscape.

However, we caution against major changes or reforms, given the need to assimilate previous changes and to avoid unnecessary diversion of resources under challenging retail conditions.

Many franchisees operate as small businesses facing higher operational costs, with restricted time and resources. These businesses are already navigating through an increasingly complex workplace relations system, attempting to fulfill their duties to employers amidst evolving laws and regulations.

In summary, the retail industry sees the Code as an essential framework that underpins the relationships between franchisees and franchisors. To ensure its continued relevance and efficacy, we advocate for a proactive approach that retains the Code while also embracing necessary reforms. This balanced approach will safeguard the interests of all stakeholders while adapting to the evolving needs of the retail sector.

Role of regulators and agencies in supporting enforcement and dispute resolution

Recommendation 2

Clarify the roles of ACCC and ASBFEO and identify ways to strengthen inter-agency collaboration.

The ARA recommends that the ACCC should maintain its focus on enforcement, regulation and education around the Code, while ASBFEO should focus on dispute resolution, advocacy and support to ensure that the unique needs of small businesses and family enterprises are considered in the Code's evolution and application. Both organisations should work collaboratively to ensure a balanced, fair and effective regulatory environment.

When considering the roles of the ACCC and ASBFEO, it is essential that the regulatory environment promotes competition, protects small businesses and maintains fair trading in Australia. The ARA offers the following recommendations in terms of the unique value proposition of each entity.

ACCC

- **Regulation and Enforcement:** The ACCC should maintain its role in monitoring and enforcing compliance with the Code. This includes ensuring businesses do not engage in anti-competitive practices and that they adhere to any standards set out within the Code.
- **Education and Advocacy:** The ACCC should take on the responsibility of educating businesses about their rights and obligations under the Code. This could involve the creation of educational materials, workshops, and online resources.
- **Investigation:** The ACCC should be equipped to investigate breaches of the Code.
- **Stakeholder Engagement:** Engage with various stakeholders, including small businesses, to gain feedback on the efficacy of the Code and potential areas for reform.

ASBFEO

- **Advocacy:** ASBFEO should serve as a voice for small businesses and family enterprises, representing their concerns and needs regarding the Code. The Ombudsman can advocate for reforms that address unique challenges faced by these enterprises.
- **Dispute Resolution:** Serve as a mediator for disputes arising between small businesses and larger entities or between businesses due to the Code. Offering an alternative dispute resolution mechanism can be more efficient and cost-effective than court processes.
- **Feedback and Recommendations:** The Ombudsman should regularly collect feedback from small businesses and family enterprises about the challenges and benefits under the Code. This feedback can then be used to make informed recommendations for future reforms.
- **Support and Resources:** ASBFEO can provide resources, guidance, and support to small businesses and family enterprises, ensuring they understand the Code and have the tools to comply.
- **Liaison with ACCC:** Given the overlapping interests of the ACCC and ASBFEO, it's crucial that the two entities maintain open communication and collaborate on shared goals. This could involve joint initiatives, shared resources, or coordinated responses to common issues.

Impact of 2022 reforms**Recommendation 3**

Adopt an “education over enforcement” approach to non-compliance and ensure that any penalties are commensurate with the impact of any breach and the risk-reward dynamic between the parties.

The ARA supports the need for strong regulatory measures to maintain the integrity of the franchising system but we also believe in the importance of striking a balance in terms of addressing and penalising non-compliance.

While we recommend an education approach before enforcement through penalties and other measures, we also recognise that penalties play an important role in encouraging compliance and remediating non-compliance.

And so we also recommend that any penalties should be commensurate with the breach and should not unduly burden businesses, especially in these challenging economic times. We recommend a further review into the risk transference between franchisees and franchisors as part of a review of penalties and of the broader Code.

The ARA acknowledges the 2022 reforms that increased penalties under the Code, with penalties now reaching the greater of \$10 million, three times the benefit derived, or 10% of annual turnover.

From our perspective representing both franchisors and franchisees within the retail sector, we have observed the following:

- **Improved deterrence and compliance.** The increased penalties have encouraged franchisors to review their operations and ensure their compliance with the Code.
- **Increased confidence.** For franchisees, the higher penalties offer an added deterrent to potential misconduct, instilling greater confidence in their franchisor relationships.
- **Increased risks for franchisors.** While the intent behind the penalties is clear and understandable, it also means that franchisors now face greater risk. Some franchisors have mentioned that the increased penalties have also created operational challenges, particularly in terms of potentially facing significant penalties for minor inadvertent breaches.
- **Relationship imbalance.** The ARA has heard accounts from franchisees and franchisors, that relationship imbalance remains a high concern for the system. These issues are not comprehensively addressed and may be exacerbated by the penalty system. For example, some franchisees feel that their franchisor is outsourcing their risks to their franchise network. Whilst some franchisors report that they are prevented from ejecting franchisees who breach regulations from their networks – exacerbating their exposure to breaches.

Impact of the Franchise Disclosure Register

Recommendation 4

Retain, but clarify and simplify, the Franchise Disclosure Register.

The ARA recommends revisiting the structure of the register to define the information that is relevant and necessary to support the franchisee with informed choices and strategic decision making.

The ARA recognises the important role that the Franchise Disclosure Register plays in fostering transparency within the franchising system. Members report the value of the Franchise Disclosure Register but also raised concerns about the administrative burden it places on both parties.

Whilst it is acknowledged as a valued asset, concern has been expressed that sometimes too much information is disclosed (making it unwieldy for consumption) and sometimes too little information, or the wrong information, is provided (making it difficult to rely on for decision making, with confidence).

The ARA sees the Franchise Disclosure Register as an instrumental asset for the franchising sector but makes the following recommendations to improve uptake and transparency.

- **Increase promotion of the Register.** The effectiveness of the register hinges on widespread awareness of its existence. To maximise its utility, concerted efforts are needed to promote its existence to a broader audience. Collaborations between governmental bodies, industry associations, and relevant stakeholders can amplify its reach.
- **Maintain, clarify and simplify disclosure requirements.** The present disclosure parameters of the Code are calibrated to ensure transparency while protecting business-sensitive information. The ARA believes that any modifications to these requirements, especially those potentially adding burdens on franchisors, should be

preceded by further industry consultations. From member feedback, we understand that disclosures can be problematic where too little or too much detail is shared. Identifying the right level of disclosure is key.

- **Encourage voluntary disclosure.** While maintaining the foundational disclosure criteria of the register, the ARA endorses franchisors who choose to offer more in-depth voluntary information. Such initiatives enhance transparency and can foster a stronger trust dynamic with potential franchisees. We caution against overwhelming the franchisee with too much information but encourage enough detail to support informed choices and strategic decision making.
- **Re-evaluate the Key Fact Sheet.** Introduced in 2021, the Key Fact Sheet has expanded to encompass information potentially beyond its initial scope. The ARA recommends a detailed review, accompanied by industry consultations, to assess its present-day relevance and identify areas for refinement.

CONCLUSION

As noted, we enjoy a unique position in the retail sector, representing some of Australia's largest franchise operators and their networks of franchisees. Consultation with a range of members has informed our position that the Code should be retained with minor reforms to ensure it is fit-for-purpose.

The ARA and its members thank the ACCC for the opportunity to engage in this consultation. For any queries in relation to this submission, please contact policy@retail.org.au