

Franchising Review Secretariat Unit  
Small and Family Business Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

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**Submission by: Derek Charles Douglas Sutherland**

This submission is provided in response to the Consultation Paper released on 22 August 2023 into the 2023 Franchising Review.

**My experience**

I am a lawyer in private practice and a Consulting Principal at Key Point Law.

My practice is now entirely focussed on servicing clients in the Franchising and Automotive Sectors.

My experience in franchising extends over 30 years and includes:

1. Acting for franchisors, franchisees, master franchisors, master franchisees, territory developers, Distributors and Dealers.
2. Experience in acting for distributors in the Petroleum Retailing sector going back to the 1990's as well as acting for manufacturers of motorcycles, golf carts and other marine vehicles.
3. A focus on transactional work including Code related issues. This includes setting up franchise system documentation and giving advice on Code obligations.
4. Dealing with competition law issues and ACCC random compliance checks and infringement notices
5. Drafting notices required under the Code including end of term notices, notices of dispute and termination.
6. Drafting Code compatible transaction documents such as disclosure documents, key facts sheets franchise agreements and master franchise agreements documenting transactions for the grant, renewal and transfer of a franchise and master franchise.
7. Conducting due diligence on and acting for clients involved in the acquisition and disposal of franchise systems.
8. Acting as an independent review of compliance programs for 2 franchisors who have given S87B undertakings to the ACCC.
9. Providing strategic advice and assistance to parties involved in dispute resolution (including mediations) and litigation.

10. I have acted for and continue to act for many iconic franchise and automotive brands.

I am a current member of the ACCC Small Business & Franchising Consultative Committee and have been for many years. I have been actively involved with the Franchise Council of Australia including holding the position of Chair of their Legal Committee since 2010.

I am making this submission in my own capacity and not in the capacity on behalf of any organisation of which I may be a member or hold office.

These views are my personal opinions and do not necessarily reflect the opinions of the law firm at which I am principal or any organisation I may represent.

## General Questions

1. Are there any general observations you want to make about the regulatory framework?
2. Is the Franchising Code fit for purpose? Should it be retained? If so, should it be remade prior to sunseting?
3. Are there any emerging trends, such as technology or cultural innovations, which would affect the operation of the Franchising Code?

### Question 1:

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

1. **Creating and updating a disclosure document annually:**  
The amendments made to Annexure 1 over the years have had the effect of changing the nature of a disclosure document from a document created and updated once a year to something more transaction specific. This results in increased transaction costs and can slow a transaction.  
  
Items that are now transaction specific include changes to the Code made to reflect the term of the actual franchise agreement (item 18.1(aa)) and whether it has a renewal option (Item 18.1(a)), the relevant warning statement (items 18.3-18.5), the history of the site or territory (item 13.3 and 13.4), details of capital expenditure required to be incurred by the franchisee during the term (clause 30A and item 14.10) including details of the discussion; whether any earnings information is given (item 20) and which warning statement applies.  
  
What once was intended to be a document created and updated once a year has morphed into something that needs review almost every transaction.  
  
This adds to compliance and transaction costs. If a change is made there may also need to be a change to the Key Facts Sheet and profile page on the Franchise Disclosure Register more often than Government may expect.  
  
Many franchisors have those Transaction Specific details in a schedule or annexure so that the preparation date in item 1.1 is not needed to change every transaction.  
  
**Any steps taken to reduce the level of disclosure or duplication would be beneficial – remove the requirement to annex the Code to a disclosure**

	<p><b>document if a copy has been given to the prospective franchisee before disclosure is given.</b></p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Reduce the size of a disclosure document by removing the requirement to annex a copy of the Code to the disclosure document <u>IF</u> the franchisor has given a prospective franchisee a copy has been given earlier. If it hasn't been given earlier, then the franchisor must annex a copy.</li> <li>2. Amend the Code to impose an obligation to give a prospective franchisee a copy of the Code. Ensure the clause allows a franchisor to comply with its obligation to give a copy of the Code by giving a prospective franchisee a copy: <ol style="list-style-type: none"> <li>(a) a physical copy</li> <li>(b) an electronic copy or</li> <li>(c) an electronic copy by an email with a link to a current compiled version of the Code that is readily accessible,</li> </ol> <p>at any time after the prospective franchisee or transferee express an interest in buying a franchise (which makes more commercial sense!!!!).</p> </li> </ol>
2.	<p><b>The terms of the Code still lack consistency and preciseness of language in some of its provisions.</b></p> <p>I have made detailed submissions before on changes and drafting improvements that could be made to make the Code more consistent.</p> <p>I simply refer you to my detailed submission to the last Government inquiry into the Code which are still accessible. If there is a genuine interest in making it more effective; then serious consideration needs to be given to fixing some of those drafting errors.</p> <p>A practical example - there is a definition in the Code of '<i>electronic signature</i>' that was not removed in the last review when other electronic provisions were removed. It is currently not used anywhere else in the Code.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Use this definition in the Code and amend clause 8(4) to make it clear that a Director, Officer or Authorised agent can sign a Disclosure Document, or a Director's Solvency Statement (item 21.1(a)) or any notice required to be given to a franchisee under the Franchising Code using an '<i>electronic signature</i>'.</li> </ol>
3.	<p><b>End of term concepts: Fix the inconsistency that has been identified in the sector about how these terms are used in the Code:</b></p> <p>I have raised in previous submissions to Treasury my concerns with the definitions of 'renew' and 'extend' in the Code, and the failure by Treasury to properly draft provisions that use those defined terms consistently in clauses</p>

	<p>18, clause 23 and Item 18 of Annexure 1. These end- of-term concept problems are seen in practice every day by those who are involved in transactions.</p> <p>Commercially you see every day 4 core end of term concepts 3 of which relate to an existing agreement and the fourth relates to the parties entering into a new agreement on the ‘then current terms’ which may be different to the existing agreement once the existing agreement ends.</p> <p>The term ‘renew’ is defined in the Code. However, sector participants often use the term with a broader intent to the definition, so it applies to renewing the franchise. This can result in confusion with the terminology used in the code to terminology used in a franchise agreement.</p> <p>Unfortunately, the definition of ‘renew’ is different and does not include an extension of an existing agreement (as the definitions are mutually exclusive.</p> <p>A ‘holding over’ is not defined or considered a ‘renewal’ but a short-term licence or extension of the existing term but terminable on a month-by-month or other basis.</p> <p>Finally, the Code considers a ‘renewal’ may include circumstances where an option (or legally enforceable right) has been given to the franchisee to enter into a new agreement. For example, simply look at the language of Item 18.1(a) of Annexure 1 which requires disclosure of which one (if any applies).</p> <p>In my view the definitions of renew and extend need to be less ambiguous when used in other provisions of the Code. The term “renew” should cover either an option or enforceable right (whether conditional or not) for the franchisee to either renew the franchise by way of a rollover of the existing agreement for the renewal period or entering into a new agreement (on substantially the same commercial terms) for a renewal period.</p> <p>Some clarity needs to be given about whether a holding over is to extend the term of an existing agreement or something else.</p> <p>In relation to an existing agreement, it is either:</p> <ol style="list-style-type: none"> <li>(1) renewed (on the same or substantially the same commercial terms as the existing agreement – eg it is rolled over); or</li> <li>(2) extended - where the term of the existing agreement can be extended for a specified period; or</li> <li>(3) held over – where the existing agreement is held over for a period (whether as a licence on a month by month or periodic basis.</li> </ol> <p>Finally, and quite distinctly there is the concept of entering into a new agreement.</p> <p>These 4 terms are not properly catered for in the Code.</p> <p>The provision in clause 23 was in 2014 for some inexplicable reason changed at the last minute by Treasury to apply to a failure to ‘<u>extend</u>’ - not a failure to ‘<u>renew</u>’ albeit that the rest of the clause assumes it relates to a renewal on the then current terms offered (as if it were to enter into a new agreement). I am not</p>
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	<p>aware of any instance where this clause has been successfully applied or interpreted by a Court to give relief to a franchisee.</p> <p>Clause 18 (and the corresponding clause in Part 5) applies only to require an end of term notice for whether it will extend or enter into a new agreement at end of term but does not deal with whether it will 'renew' the existing agreement or 'hold over' at end of term.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Revisit the inconsistent use of end of term terminology in the Code and fix the inconsistencies.</li> <li>2. Change Item 18 of the Disclosure Document to change the warning statements to something easier to understand and prepare. I have given you an example below.</li> </ol>
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**The warning statements in Items 18.3, 18.4 and 18.5 are inconsistent and problematic and the sector has complained about them since 2015.**

Delete the current Warning Statements so a franchisor must complete and include the following statements in bold 12 point type font to make it absolutely clear:

<b>Item 18.3</b>	<b>Whether the franchisee has the right or option (<u>conditional or otherwise</u>) to renew or extend the term of the agreement or able to hold over or to enter into a new agreement when it expires:</b>
<i>In relation to the following statements include <b>only</b> the relevant words that apply below (eg <u>*does/does not*</u> - insert either <u>*does*</u> or <u>*does not*</u> to clearly state which one applies) in bold size 12 type font .</i>	
<b>End of term arrangements:</b>	
<b>Renew</b>	<b>The franchisee <u>*does/does not*</u> have the option to renew the franchise agreement when it expires.</b>
<b>Extend</b>	<b>The franchisee <u>*can/cannot*</u> extend the term of the franchise agreement when it expires.</b>
<b>Hold over</b>	<b>The franchise agreement <u>*contains/does not contain*</u> a clause which would allow the franchisee to hold over the franchise at end of term if the franchisor agrees.</b>
<b>New Agreement</b>	<b>The franchisee <u>*does/does not*</u> have the right or option to require the franchisor to enter into a new franchise agreement when it expires.</b>
<b>Item 18.4</b>	<b>Warning Statement:</b>
<b>The following warning statement applies:</b>	

	<p>If the franchisee does not have a right or option to renew, extend or hold over the agreement or to enter into a new agreement at the expiry of the franchise agreement the franchise agreement ends, and the franchisee no longer has the right to carry on the franchised business.</p>
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	<p>The franchisor may, but does not have to, extend the term of the agreement or hold over of the agreement or enter into a new agreement at expiry of the term.</p>
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5.	<p><b>Transfer - clause 26 – inconsistent cooling off period.</b></p> <p>There is an inconsistency in the cooling off right for a transfer depending on whether it is an assignment as opposed to a new agreement.</p> <p>There is no logical reason to have different provisions.</p> <p>If a prospective transferee must sign a new franchise agreement the cooling off period should end in a similar manner to that contained in Clause 26A(3) as if it was assigned.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Amend the Code to make the cooling off right in clause 26(1) and 26A consistent. This will allow a prospective transferee who wants to take early possession or control of a franchised business to end the cooling off earlier.</li> <li>2. Amend clause 26(1) dealing with a transfer that involves a prospective transferee signing a new franchise agreement to have a cooling off period that ends at the earlier to occur of: <ol style="list-style-type: none"> <li>(a) 14 days from signing or</li> <li>(b) the day that the new franchisee takes possession and control of the franchised business.</li> </ol> </li> </ol>
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6.	<p><b>Item 21.4 of Annexure 1 – there is a practical timing problem of getting an audit report if you delay updating your disclosure document.</b></p> <p>This recommendation is designed to cure an unintended consequence of a previous change to the Code which shortened the period within which a franchisor could obtain an audit report for Item 21.4. That change was made before the exemption was added to allow a franchisor to delay updating its disclosure document and did not contemplate also delaying getting an audit report. This means that a franchisor who applies the exemption has to incur costs for an audit report it may never need to use if it doesn't want to provide its financial reports.</p> <p>Government should either amend item 21.4 of Annexure 1 to change the four (4) calendar month time limit window (in item 21.4) back to a similar period it was previously to get audit report.</p> <p>Alternatively, amend clause 8(7) to state the period can be extended to allow the audit report to be obtained within 2 months of a request for a disclosure document by a franchisee or before it enters into a transaction that requires it to update its disclosure document.</p> <p>That change in period should only apply <b>if (and only if)</b> the franchisor applies clause 8(7) of the Code to delay updating its disclosure document.</p> <p>The unintended consequence is that there is a significant cost to a franchisor of having to get an audit report within 4 months even though it was eligible to apply and actually applied the exemption to delay updating the disclosure document. I have several franchisors who have had to incur that expense unnecessarily even though they applied the exemption.</p> <p>Recommend that item 21.4 be amended so if a franchisor qualifies for an exemption, the franchisor does not have to obtain the audit report within 4 months of the end of the financial year. The previous earlier versions of the Code allowed the audit report to be obtained within 11 months of the end of the financial year.</p> <p>A franchisor may qualify to apply the exemption in 8(7) to delay updating the disclosure document but may still have to pay the costs to get an audit report within 4 months.</p> <p>If after applying the exemption and delaying an update either a franchisor needs to enter a transaction or give a franchisee a disclosure document a franchisor should still be able to get an audit report rather than having to give financial reports.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Amend clauses 8(7) or 8(8) of the Code to expressly allow the franchisor time to delay obtaining an audit report if it applies the exemption.</li> <li>2. Amend Item 21.4 so it recognises that if a franchisor applies the exemption in clause 8(7) then it can rely on and obtain and use an audit report if the report is obtained within 11 months after the end of the financial year.</li> </ol> <p>Currently you have only 4 months to get an audit report and if a franchisor does not it has to give financial reports for the last 2 years.</p>
7.	<p>I otherwise agree with the FCA Submission on this question.</p>



<b>Question 2:</b>	<b><i>Is the Franchising Code fit for purpose? Should it be retained? If so, should it be remade prior to sunseting?</i></b>
1.	Yes. It remains fit for purpose and should be retained.
2.	Yes. It should be remade prior to sunseting.
<b>Question 3:</b>	<b><i>Are there any emerging trends, such as technology or cultural innovations, which would affect the operation of the Franchising Code?</i></b>
1.	Yes. The trend towards electric trucks and vehicles is an emerging trend. Some brand manufacturers and distributors are reviewing the effectiveness of a dealer model and considering agency. It is questionable whether a change in the business model away from franchising to a direct-to-consumer model (such as an agency) will be a long-term trend. There is some evidence that Honda sales has suffered since they moved to an agency model.
	There is a world-wide trend to use of AI and the Disclosure Document items should keep up with relevant laws that may apply either as obligations or restrictions imposed on a franchisee under the franchise agreement to use AI. At the moment we have not seen a change to franchise agreement terms, but it will no doubt come. Legislation is in catch up mode with this development and the Code will also no doubt lag.
<b>Automotive:</b>	
<b>Question 4:</b>	<b><i>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?</i></b>
1.	<p><b>Separate Code or legislation for NVDA's</b></p> <p>No, the current coverage for NVDA's is not appropriate.</p> <p>It is time to recognise that the Franchising Code is not the best means to address some of the more serious concerns of dealers under new vehicle dealership agreements (NVDA's).</p> <p>I have made submissions over many years that there needs to be a separate mandatory industry code or legislation to deal with that type of dealership agreement and the issues that industry is facing around end of term and non-renewal as well as the issues that saw the inclusion of new Part 5 to the Code.</p> <p>Simply deeming a new vehicle dealership agreement (NVDA) to be a franchise agreement to gain protection assumes that all other franchisors and franchisees confront the same issues and need the same protections. That is unrealistic and leaves the fate of the Code in the hands of those who are better resourced to lobby hard for further protections for their industry.</p>

	<p>In my view there will be an ever-growing divergence and increasing inconsistency in provisions applying depending on whether you are a party to a NVDA.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. A separate mandatory industry code for NVDA's should be prescribed for new motor vehicles. Alternatively separate legislation to deal with conduct by manufacturers and distributors may be necessary to give rights and relief that the Code cannot currently provide.</li> <li>2. If a new Code or legislation is enacted carve out and take NVDA's outside the application of the Code and remove Part 5 from the Code.</li> <li>3. If the sector wants it, leave other MVDA's under the protection of the Code or have a code that applies just to MVDA's and NVDA's to them.</li> <li>4. Recognise the growing inconsistency between obligations in the Code applying depending on whether you are a NVDA or not.</li> </ol>
2.	<p><b>NVDAs – not small businesses</b></p> <p>The reality is that most Dealers for new motor vehicles are not small businesses. That industry is undergoing major change and some brands are changing their models and the networks are being rationalised. The reality is that smaller dealerships are being consumed by larger businesses who aggregate multi-brand distributorships.</p> <p>Despite the push by some manufacturers or distributors to change to an agency model to effect a direct-to-consumer strategy, Government needs to consider other measures to protect dealers including issues relating to minimum terms.</p>
3.	<p><b>Other MVDAs</b></p> <p>There are other types of truck and heavy machinery dealerships which fit within the scope and protections afforded by the Code because they are motor vehicle dealership agreements (MVDAs).</p> <p>Those participants are relatively silent and do not usually get involved in publicly advocating for change because they have not seen the need for additional protections of the kind sought by dealers of new motor vehicles.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Absent compelling evidence of mischief requiring additional regulation in those sectors, I do not think that extending Part 5 of the Code to those other forms of MVDAs is warranted or even necessary.</li> <li>2. Unless there is compelling evidence from sector participants of the need for those changes there would be an unnecessary cost burden in changing dealer agreements to adopt those provisions of Part 5.</li> <li>3. The reviewer needs to test and evaluate whether there is demonstrable evidence of the need to extend Part 5 to those industries.</li> </ol>

<b>Question 5:</b>	<b><i>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?</i></b>
	1. No submission
<b>Question 6:</b>	<b><i>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)?</i></b>
1.	<p>I am not aware of any significant or substantial levels of disputation in the truck and heavy machinery or farm machinery dealership sectors to justify the extension of Part 5 to their dealerships.</p> <p>I act and have acted for distributors of Trucks and Buses (including electric trucks and electric pickups) and heavy machinery (used in mining and earth moving).</p> <p>Many of the issues that caused the need for Part 5 of the Code to have been made ONLY affect the new motor car sector and potentially dealers in new motor-cycles.</p> <p>Publicly there does not appear to be examples where dealers of trucks, marine, buses and heavy machinery face the same changes to their models, terms of their agreement and non-renewal to warrant the imposition of Part 5 into their agreements.</p> <p>In my experience (in heavy machinery dealerships) that part of the automotive sector does struggle with the concept of and regulation of their businesses as a franchise agreement. In many cases they (and the dealers) do not consider themselves to be a franchise.</p>
<b>Question 7:</b>	<b><i>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?</i></b>
1.	<p>The question assumes that the dealer agreements are between the Manufacturer (OEM) and the dealer when in fact usually they are not.</p> <p>Usually there will be an Australian distributor who may or may not be related to the OEM and have the contractual arrangements including in relation to service and parts.</p>
2.	<p><b>One agreement covering sale, service and parts</b></p> <p>I act for several distributors including a large international brand Distributor of Trucks and Buses in Australia.</p> <p>Their dealer agreement covers multiple brands and combines sale of vehicles with sale of parts and service as well in the one agreement.</p>

	<p>Their disclosure document covers all of these aspects as if it were one franchise agreement.</p> <p>Some MVDA distributors do combine service and spare parts with the dealer agreement for simplicity.</p> <p>I suspect that it is less common for NVDA's where compulsory compensation clauses would cover compensation for loss of opportunity for service and parts aspects of their business.</p> <p>In my view usually the primary document is the franchise agreement, and some explanation is given to the service and repair rights in the disclosure document.</p> <p>There is already an argument that in the event of a dispute they should be considered to be part of the franchise agreement as the dispute is still between the parties to a franchise agreement just about their relationship under another agreement.</p> <p>In terms of disclosure the obligation to incur expenditure usually covers not just showroom but also service and spare parts storage.</p> <p>I also accept that OEMs and Distributors may also argue that there is a good reason not to include those service and repair agreements in the franchise agreement as they would for new vehicle dealership agreements (NVDAs) mean that they would need to include Part 5 compensation clauses in those NVDAs and pay compensation for loss of the rights to service (not just new car sales).</p> <p>Given the changes to the unfair contract term regime you have to wonder if a requirement to enter into a separate agreement for service and supply of parts with the same entity is in fact an unfair contract term if it prevents the small business obtaining the benefit of protections under the Code. Time will tell.</p> <p>No recommendation.</p>
<b>Question 8:</b>	<b><i>Has the amended definition of motor vehicle dealership effectively clarified that agency sales models remain within the scope of regulation under the Franchising Code?</i></b>
1.	Yes.

## Questions

8. 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.
9. 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?
10. 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?

### *New vehicle dealership agreements*

11. 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.

<b>Question 9:</b>	<i>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.</i>
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### **Franchise Disclosure Register:**

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| 1. | <p>The register contains some useful information about who is a franchisor under the Code although there are questions about the IT platform and usefulness of searches for franchisees seeking to gain information about an industry sector.</p> <p>Unfortunately, I have seen instances where a franchisor has registered in an industry class that is quite different to its competitors so a franchisee trying to search across the same industry classes is problematic.</p> |
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2.	<p><b>No need to extend the Franchise Disclosure Register (Register)</b></p> <p><b><u>There is NO need to extend the current provisions to make registration of disclosure documents or franchise agreements mandatory.</u></b></p> <p>The franchising sector <b>does not want compulsory lodgement of these documents.</b></p> <p>Only a very low percentage of franchisors relative to the total number of profiles have voluntarily uploaded their disclosure document, franchise agreement or key facts sheet. Most do not and most would prefer that to remain the status quo.</p> <p>When the Register went live there were franchisors who thought it was mandatory to do so based on information provided by Treasury.</p> <p>As a consequence, there was in the first few days following the commencement of the register there was chaos and an absolute scramble by their competitors (particularly in the automotive sector) to upload those documents before they were taken down.</p> <p>Since introduction of the Register, I have made submissions to Treasury and the ACCC about franchisor profiles I had identified suggesting that they approach the franchisor to remove documents lodged because:</p> <ul style="list-style-type: none"> <li>(a) in one case a marketing brochure not key facts sheet was uploaded – which is prohibited.</li> <li>(b) in another case the franchisor lodged copies of documentation that did not contain <b><u>ANY OF THE 2021</u></b> changes at all and were grossly non-complying.</li> </ul> <p>It is misleading if a franchisor lodges an out-of-date document that could not be relied upon by a franchisee to enter into an agreement. In my view that just makes them misleading.</p> <p>Whilst the Code specifies the register should only include information in the disclosure document it asks a franchisor to disclose their intention to expand into other states which is NOT currently a requirement of the Disclosure Document</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. <b>DO NOT EXTEND THE REGISTER TO REQUIRE COMPULSORY LODGEMENT OF A DISCLOSURE DOCUMENT OR, FRANCHISE AGREEMENT.</b></li> <li>2. Change the Code to prohibit a franchisor lodging any out of date Disclosure Document, Key Facts Sheet or a franchise agreement that does not contain Code compatible provisions to the Register.</li> <li>3. Both the Code and the Register itself should make it clear that only current in-force documents can be uploaded or lodged on a franchisor profile.</li> <li>4. Empower the Registrar to remove a document which is in their reasonable opinion (or the opinion of the ACCC) out of date or non-complying (eg the Disclosure Document is too old for a prospective franchisee to rely on to enter into a franchise agreement or the document does not contain mandatory changes that are required to be included under the Code.</li> <li>5. Include a warning on the Register to protect franchisees to be careful not to on that type of document.</li> <li>6. Remove the requirement in the Profile Page of the Franchise Disclosure Register which obliges a franchisor to specify which states the franchisor</li> </ol>
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	<p>intends to expand to as it is not information that is contained in any of the items of Annexure 1.</p> <p>It became apparent to me that despite registration there did not seem to be a great deal of proactive activity monitoring or enforcing the requirements by Treasury.</p>
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3.	<p><b>Key Facts Sheet</b></p> <p>In my view the profile page of a franchisor has moved towards almost a direct repetition of the Key Fact Sheet information.</p> <p>It would have been simpler and more effective to require a franchisor to upload their Key Fact Sheet to be on their profile page. This would have allowed a simpler search and compare function where that summary could be compared across brands.</p> <p>The Key Facts Sheet format prescribed is inflexible and does not easily allow a franchisor to give an answer consistent with its profile page and disclosure document given restrictions on the number of words allowed in the space. A review for consistency across the Key Facts Sheet, Profile Page questions and questions of the Code should be conducted.</p> <p>For example, the question about goodwill and the options to properly answer this in each of these platforms is inconsistent. The Key facts Sheet encourages a yes / no answer when the disclosure document and profile page may need further explanation (eg because it is a NVDA and there are compulsory compensation clauses). This leads to a slightly different answer across the 3 documents.</p> <p>It is also strange that a Director or officer or authorised person must sign a disclosure document but doesn't have to sign the Key Facts Sheet.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Check the Key Facts Sheet template form and the Franchise Disclosure Register Profile Page questions and available responses to ensure there is space to properly and consistently answer.</li> <li>2. Another example is costs disclosure where there is a character limit in the Key Facts Sheet that prevents proper costs disclosure being given based on an arbitrary character limit.</li> </ol>
4.	I also support the FCA submission on this question.
<p><b>Question 10:</b> <i>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?</i></p>	
1.	Yes.
2.	<p>I also support the FCA submission on this question.</p> <p>The sector would prefer to deal with unfair contract terms in a franchise agreement by express prohibition in the Code rather than a general reference in the ACL.</p>
<p><b>Question 11:</b> <i>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?</i></p>	
1.	I also support the FCA submission on this question.



2.	<p>Originally the Code allowed a franchisor to produce a disclosure document and update it once per year.</p> <p>Over time changes to the Code have made the disclosure document so transaction specific that it becomes difficult to manage the disclosure process without changing multiple items in a disclosure document including clauses 13.3 and 13.4, Item 14.10 significant capital expenditure, Item 18 and Item 20.</p> <p>This has led to greater compliance and transaction costs.</p>
<b>New vehicle dealership agreements:</b>	
<b>Question 12:</b>	<b><i>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.</i></b>
1.	I am not aware of any claim having yet been made for a franchisor withdrawing from the market to justify compensation.
2.	<p><b><i>Divergence</i></b></p> <p>Dealers of new motor vehicles (passenger cars and commercials to which Part 5 applies) have issues with their industry under a new vehicle dealership agreement (NVDA).</p> <p>If Government accepts submissions of dealer advocates that there is a need to provide additional protections to those dealers where Part 5 applies, then now may the opportunity for them to have their own "Car Code" or separate legislation to protect them and carve their agreements out of the scope and application of the Franchising Code.</p> <p>The divergence is causing inconsistencies in obligations under the Code.</p> <p>Further changes will simply cause a greater divergence and complicate the Code</p> <p>For example some existing divergences include:</p> <ol style="list-style-type: none"> <li>1. the good faith obligation is wider and different for NVDA's which requires the contractual terms in a NVDA to be fair and reasonable;</li> <li>2. the difference in a NVDA for end of term notice period minimum of 12 months and</li> <li>3. in an NDVA a requirement to include reasons for non-renewal.</li> </ol> <p>It is uncertain whether dealers under motor vehicle dealer agreements (MVDA) that are not NVDA's actually face the same issues as dealers under NVDA's to justify extending Part 5 to all or additional MVDA's.</p> <p>Currently there is a 2-tier system where Part 5 applies to NVDAs but not to other MVDAs.</p>

3.	<p><b><i>Withdrawing from the Australian Market</i></b></p> <p>Part 5 of the Code has mandatory compensation clauses intended to cover a franchisor 'withdrawing from the "Australian market"'. </p> <p>There are many Australian distributors who hold rights from foreign manufacturers (OEMs).</p> <p>Those OEMs do not have to register in Australia as a franchisor, yet they control whether the vehicles are able to be offered in Australia through the distributor (and its network) including potentially decisions about rationalising the network or changes to distribution models in Australia (eg where some dealers of electric vehicles may be offered agency agreements as opposed to a dealer agreement).</p> <p>Whilst the distributor may not want to lose its rights, those rights may end if their existing distribution agreement is not renewed, or a new agreement is not able to be negotiated. The manufacturer may withdraw from the Australian market but not the distributor.</p> <p>The clauses in Part 5 do not differentiate between the OEM and the Australian Distributor who may not be part of a corporate group of the OEM. Many Chinese brands for example have Australian importers and distributors which are unrelated to the Chinese OEM.</p> <p>Currently Clause 46A(1) applies if the agreement is terminated prematurely by a distributor before it expires and to an extent assumes the distributor is the OEM (or an entity within the OEM's corporate group). A foreign OEM can withdraw from the market without penalty and leave its Aust distributor to face compensation claims.</p>
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4.	<p><b><i>Minimum Distribution agreement term</i></b></p> <p>Many foreign OEMs are not prepared to offer long term distribution agreements and often they can be as short as a 3 year distribution agreement term. This is particularly the case with Chinese manufacturers. They normally do not contain a right of renewal.</p> <p>This commercial reality just does not help an Australian distributor who has obligations imposed under Part 5 of the Code.</p> <p>This short-term distribution arrangement makes the application of clause 46B incredibly restrictive as a dealer can only be offered a term no longer than the expiry date of the distribution agreement and usually no right to renew unless a new distribution agreement is entered into.</p> <p>There is currently no minimum term protection afforded to distributors (against their OEM) who intend to enter into NVDA's with their dealers.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. Any separate legislation dealing with NVDA's should consider affording for the benefit of an Australian distributor of vehicles a minimum term distributor agreement that may fall within a NVDA offered to their dealers. This would allow more certainty of term for a dealer and greater compensation from an OEM if it causes a premature end to the Distribution Agreement.</li> <li>2. Any NVDA legislation or Car Code should also: <ol style="list-style-type: none"> <li>(a) Regulate foreign OEMs, require them to register and make them liable if they pull out of the Australian market or change the dealership model.</li> <li>(b) Impose a minimum term and renewal right for a distributor who has a dealer network in Australia.</li> <li>(c) Prohibit a distributor agreement containing a clause allowing for termination for convenience on notice (similar to the clause 28 process that allows a franchisor to terminate on reasonable notice) which would expose an Australian distributor to a compensation claim simply because the OEM wants to exit the market mid-term and affect all of its dealers.</li> <li>(d) An Australian distributor would be more inclined to grant longer terms and renewal rights to dealers if its distribution rights were longer.</li> </ol> </li> </ol>
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## Questions

12. 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?
13. How effective are the 2021 reforms which restricted the franchisors' capacity to require a franchisee to undertake significant capital expenditure?

### *New vehicle dealership agreements*

14. 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.

<b>Question 13:</b>	<i>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?</i>
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| 1. | <p>The restrictions in the Code and the UCT regime make it difficult for a franchisor to include a general clause allowing the franchisor to make structural changes and adapt its model to remain competitive and cutting edge.</p> <p>There are always changes to make including due to technology, emerging markets and products and competitors.</p> <p>Many changes are needed during the term to meet competition and evolving and changing technology that would face any small business to adapt over time. Making compensation compulsory ignores that business reality. Small businesses have to plan to change and incur costs to adapt.</p> <p>The Code and threat of the UCT regime being applied are restrictive and prevent a franchisor rolling out change even where there is a general contractual clause allowing them to.</p> <p><b>RECOMMEND:</b></p> <ol style="list-style-type: none"> <li>1. The Code should recognise the special nature of a franchise relationship and allow for a franchisor to implement system wide change during the term without it being an unfair contract term.</li> <li>2. No compensation is necessary as it is still an investment by the franchisee in their business.</li> <li>3. If there is a cost (even of not a capital expense) the Code should provide for a discussion and disclosure about the cost and nature of the change costs, risks etc (like Clause 30A requires for capital expenditure) and a reasonable period of notice to implement the change (eg no more than 3 months).</li> </ol> |
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	<p>4. It would assist the sector to have clarity on this point and to avoid a claim that any term requiring a franchisee to comply with structural changes is an unfair contract term. If that outcome could be achieved, then it would be useful to include a process to allow structural change to occur if a franchisor follows a process the Code allows or permits to be in a franchise agreement so it becomes a term required or permitted by law.</p> <p>5. If the franchisor had that certainty to avoid the UCT regime applying to a term setting out a procedure for change (including significant changes to the operating model, then it follows that a franchisee could be given an express right to exit without penalty if it does not want to comply with the change.</p>
2.	<p>It is not necessary to change the Code to add provisions to compensate franchisees for a change.</p> <p>I do not believe that it is necessary to give franchisees the capacity to exit a franchise system without penalty simply because there is a change in management or ownership of a franchisor.</p> <p>A franchisee can already request early exit from their agreement.</p>
<b>Question 14:</b>	<b><i>How effective are the 2021 reforms which restricted the franchisors' capacity to require a franchisee to undertake significant capital expenditure?</i></b>
1.	<p>I think the changes have made completion of Item 14 more difficult and confusing for franchisors. Particularly when it comes to having the discussion about capital expenditure and including that information required by Clause 30A in the correct item of the disclosure document.</p> <p>I submit that the following changes below be made to Item 14 to make it easier to comply with.</p>
2.	<p>Unfortunately, when changes were made to Clause 30A of the Code and item 14.10 to cover significant capital expenditure they were not drafted well.</p> <p>Item 14.10 of Annexure 1 is currently confusing. It doesn't set out clearly the information a franchisor must provide under that item to be given under clause 30A(2) (a) to (d) when it should.</p> <p>Item 14.9 specifies that the information relating to a payment need only be set out once. Unfortunately, Item 14.9 was not amended to refer to capital expenditure under Item 14.10.</p> <p>As a consequence, Item 14.10 does not reflect the wording of the details to be disclosed as a consequence of the requirements of Clause 30A of the Code. Item 14.10 should clearly set out in relation to capital expenses what details a franchisor is expected to give under that item to comply with Clause 30A.</p> <p>Information covering capital costs may be already set out with details specified under Items 14.4 (a) to (e), 14.6 (a) to (e) or 14.7 (a) to (e) but they do not appear in Item 14.10 and seem to be required to be repeated again under that Item 14.10.</p>

**RECOMMEND:**

1. Fix the drafting of Item 14 of Annexure 1. It needs each of the following changes to be made.
2. Amend Item 14.8 to add “or 14.10,” after “14.7”.
3. Amend Item 14.9 to delete the word “and” between “14.3 and 14.6” and replace with “,” add after the words “14.6” the words “or Item 14.10” so it is clear you only have to refer to an expenditure that is a capital expense once.
4. Amending Item 14.10 and add a new Item 14.11 (and example from clause 30A) for consistency so they read:

**14.10 Capital expenditure – Clause 30A**

**This item applies if the franchisor requires the franchisee to incur a capital expenditure which may otherwise be considered to be a capital expense of the kind specified in Clause 30A of the Code.**

**Details for each capital expenditure must include:**

- (a) The description of the capital expenditure;
- (b) The amount of the capital expenditure or high low range to calculate the capital expenditure;
- (c) When the capital expenditure has to be incurred;
- (d) Whether the capital expenditure is refundable and if so, under what conditions,

**and as much additional information as is practicable including the following:**

- (e) The rationale for the capital expenditure;
- (f) The amount, timing and nature of the capital expenditure;
- (g) The anticipated outcomes and benefits of the capital expenditure; and
- (h) The expected risks associated with the capital expenditure.

**Before entering into, renewing or extending the term or scope of a franchise agreement the franchisor and franchisee must discuss at least paragraphs (e) to (h) of each capital expenditure the franchisor requires the franchisee to incur and how the franchisee considers it is likely to recoup the**

	<p>capital expenditure, having regard to the geographical area of operations of the prospective franchisee.</p> <p><b>14.11</b> For item 14.10, if the amount of the capital expenditure cannot easily be worked out – the upper and lower limits of the amount.</p> <p><i>[Clause 30A Example: The information could include the type of any upgrades to facilities or premises, any planned changes to the corporate identity of the franchisor's brand and indicative costs for any building materials.]</i></p>
<b>Question 15:</b>	<b><i>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.</i></b>
1.	<p>Unclear at this stage.</p> <p>I am not aware of any claim by a dealer relating to the change in the new 'good faith' provision requiring terms in a NVDA to be 'fair and reasonable'.</p> <p>I have been involved with negotiations with Dealer Councils where they have made it clear they want changes to dealer agreements to ensure the terms are fair and reasonable and in those negotiations the franchisor distributor has endeavoured to do so. To that extent, in my experience it has made a positive impact for dealers.</p>

## Questions

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

### *New vehicle dealership agreements*

16. 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.

**Question 16:** *How effective are 2021 reforms to the Franchising Code which created a process for franchisees to formally request early exit from their franchise agreements?*

1. Prior to the reforms I have seen franchisees request early exit. My experience has been that usually the parties can negotiate for exit on agreed terms. I have seen several requests to exit based on medical grounds.
- Ultimately it depends on the circumstances and willingness to negotiate reasonable terms for the sale or closure of the business. In my view most franchisors would not want a franchisee who wants to leave, to remain in the network.

**Question 17:** *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.*

1. No submission.



## Questions

### **ACCC and enforcement**

17. Is the current role of the ACCC in relation to enforcement of the Franchising Code appropriate?
18. 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?
19. 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?

### **Dispute resolution**

20. Is the role and activity of the ASBFEO in relation to supporting dispute resolution under the Franchising Code appropriate?
21. 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?

<b>Question 18:</b>	<i>Is the current role of the ACCC in relation to enforcement of the Franchising Code appropriate?</i>
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| 1. | Yes. I also support the FCA Submission on this question. |
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<b>Question 19:</b>	<i>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?</i>
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| 1. | Yes. They are useful. I also support the FCA Submission on this question. |
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| 2. | Yes, the level of industry engagement is appropriate. |
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<b>Question 20:</b>	<i>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?</i>
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| 1. | Yes. I agree with the FCA Submission on this question. |
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<b>Question 21:</b>	<b><i>Is the role and activity of the ASBFEO in relation to supporting dispute resolution under the Franchising Code appropriate?</i></b>
1.	<p>Yes. I agree with the FCA Submission on this question.</p> <p>In my View the Ombudsman does an excellent job and promotes his role and function of ASBFEO well.</p> <p>My experiences dealing with ASBFEO have been better than expected.</p>
<b>Question 22:</b>	<b><i>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?</i></b>
1.	<p>Yes, they do work. Mediation does work to resolve most disputes.</p> <p>Both franchisors and franchisees invoke the dispute resolution procedures.</p>
2.	No, I have not yet seen an example of voluntary arbitration of a dispute utilized.
3.	I have been involved in a dispute acting for multiple franchisee parties where the franchisor refused to engage in multi-party dispute resolution even though the issues were identical for all the franchisees, and they had lodged a collective bargaining form to allow negotiation of a new agreement collectively.

**Date:** 19 September 2023



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