



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

25 May 2018

Committee Secretary  
Parliamentary Joint Committee on Corporations and Financial Services  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**By email: [corporations.joint@aph.gov.au](mailto:corporations.joint@aph.gov.au)**

## **INQUIRY INTO THE OPERATION AND EFFECTIVENESS OF THE FRANCHISING CODE OF CONDUCT**

ASBFEO is concerned that despite the Franchising Code of Conduct (the Code) being in place since 1 January 2015, and the work of the Australian Competition and Consumer Commission (ACCC) in imposing penalties regarding breaches of the Code, franchisor's continue to breach the good faith obligation of the Code to use their power to adversely direct the operations of their franchisees.

Franchisees submissions to the Committee identify the widespread issues faced in the industry. In consideration of these we would make the following recommendations to strengthen the Code:

- Definition of 'good faith' – The Code must be strengthened to further define the meaning of good faith and provide the regulator the right to investigate behaviours that appear in breach of good faith. For example, where a franchisor requires its franchisees to exclusively source goods from a specific supplier. It appears in good faith the franchisor used the power of bulk buying to source discounted supplies for its franchisees. In practice, some franchisors pocket the 'discount' as commission and its franchisees are forced into full price, or more expensive, supplies.
- Disclosure document – that the information to be provided in the disclosure document be prescribed. A prospective franchisee cannot possibly know what information is critical to make an informed decision on the on-going viability of a single location or without awareness of franchisors overall model. At a minimum this should include:
  - the applicable awards for the range of employees the business requires.
  - the franchisor future expansion plans to support the sustainability of the chain.
  - establishment costs, recurring and one-off costs and past financial performance

- Introduce mandated arbitration – the powers of the Office of the Franchising Mediation Advisor (OFMA) be expanded to be able to direct parties to arbitration where a resolution is not reached through mediation. Franchisees do not feel they are equal partners in a mediation based on ‘good faith’ as the franchisor can draw on information from across its network and its greater resources to build and represent its case. Where a resolution is not reached franchisees feel unable to fight the matter further due to the high cost and time taken to pursue civil action through the judicial system.
- The Code to expressly prohibit the inclusion of unfair contract terms (UCT). While the majority of franchisee agreements will not be covered by the UCT legislation the Code can require the principles of the legislation be applied to franchise agreements. In addition, the Code can expressly prohibit the inclusion of clauses found to be unfair in a court of law. The imbalance of power held by franchisors is reflected in that the majority of calls received from franchisees by my office are seeking assistance in a contract dispute.

Thank you for the opportunity to submit comments on the Code and I hope these comments are of assistance. Please feel free to contact either myself or Ms Jill Lawrence, on 02 6263 1558 or at [jill.lawrence@asbfeo.gov.au](mailto:jill.lawrence@asbfeo.gov.au) if you wish to discuss these comments further.

Yours sincerely



**Kate Carnell AO**

Australian Small Business and Family Enterprise Ombudsman