



Australian Government



Australian  
**Small Business and  
Family Enterprise**  
Ombudsman

4 November 2024

Small and Family Business Division

Department of the Treasury

Langton Crescent

PARKES ACT 2600

via email: [smallbusinessfranchising@treasury.gov.au](mailto:smallbusinessfranchising@treasury.gov.au)

Dear Sir/Madam,

### **Franchising Code of Conduct Exposure Draft**

The Australian Small Business and Family Enterprise Ombudsman (the ASBFEO) welcomes the opportunity to provide feedback on the review of the Franchising Code of Conduct, Exposure Draft (the Code). Effective codes of conduct are important in industries where market dysfunction impacts the welfare of businesses and consumers, and importantly, where self-regulation has not adequately addressed these issues.<sup>1</sup>

The ASBFEO recognises the way that the Franchising Code carefully balances disclosure obligations, regulatory safeguards and conduct expectations for franchisees and franchisors, whilst providing for incentives for businesses to invest, develop, take risks, uplift productivity, innovate and share success in franchise partnerships. Franchising offers an important opportunity for people to own and operate a business with the support of a franchise system.

The ASBFEO therefore supports the targeted and proportionate approaches of the Franchising Code that set disclosure, behavioural and conduct minimums or 'floors', while encouraging ambitions for best practice approaches that far exceed the 'floor' of the instrument.

Since the Franchising Code's introduction, it has improved business disclosure and conduct and addressed problems with some of the issues in commercial dealings between franchisees, master franchisees, and franchisors. Whilst dealings covered by the Franchising Code are commonly characterised as between small and family businesses and their large business counterparts, it is important to recognise that small businesses may be found on both sides of franchisee and franchisor relationships.

We make the following recommendations on the Franchising Code of Conduct, Exposure Draft consultation.

#### **Recommendation 1: The Code should provide greater clarity that it covers the full term of a franchise relationship from the commencement of interaction, negotiation and initial engagement through to matters that relate to the franchise even after end of a specified term.**

The ASBFEO regularly assists with disputes that relate to behaviours that occur before a formal franchise contract is signed and matters raised after the end of the term of a franchise but are matters covered by the Franchising Code. For example, we often encounter issues when a

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<sup>1</sup> The Treasury, *Industry Codes of Conduct Policy Framework*, The Treasury, Australian Government, November 2017.



potential franchisee is required to pay a deposit or other amount before a franchise agreement is signed. Similarly, following termination of a franchise agreement, it is common that there are disputes about the use of intellectual property, ability to compete, and surrender of equipment and materials.

The Franchising Code is clearly intended to apply to pre-agreement interactions in various instances that are specified in the Code. For example, subclause 6(2) provides that the obligation to act in good faith applies to proposed agreements, subclause 9(1)(b) requires documents to be provided in respect of proposed agreements where a non-refundable payment is made and clause 14 applies to payments made before a franchise agreement is entered into.

Similarly, Division 5 of the Code relates to termination and disputes about termination that may be brought under the Code after the end of the term. However, we often encounter pushback on issues where, say, a breach notice results in termination but the issues underpinning the breach notice are raised and disputed after termination. In instances like these, alternative dispute resolution would be better supported if there was a general statement in the Code that made it clear that pre-agreement behaviours are covered and speedy termination by a franchisor does not bar a franchisee from bringing a dispute.

The addition of a clause (or at least further guidance) would help both franchisees and franchisors understand that the Code applies to pre-agreement behaviours as well as actions that may be disputed after the end of the term of a franchise. For example, section 3(1) could be amended to provide:

...this code applies to conduct... in relation to a franchise agreement entered into on or after 1 October 1998 and includes conduct addressed by the code that occurs before a proposed franchise agreement may be entered into and conduct during or after the end of the term of a franchise agreement where that conduct relates to matters covered by this code.

This issue could alternatively be addressed in clause 5 of the Code.

**Recommendation 2: Section 15(e) and section 75 of the Code should enable the ASBFEO to publicise franchisees in addition to franchisors who refuse to engage in or withdraw from an ADR process.**

The ASBFEO agrees with s75 and changes that align with the feedback within the review, but as noted in our previous feedback on the Code, we recommend that the ASBFEO be able to publicise the names of franchisees in addition to the names of the franchisors, who refuse to engage or withdraw from an ADR process.

In our experience of providing assistance to parties of a franchising dispute it is not only the franchisors that can refuse to engage or withdraw from an ADR process. To support a fair and equitable dispute resolution it is reasonable that both franchisees and franchisors could have their details made public for failing to engage in ADR processes and resolving a dispute in a reasonable time period.

It should be noted that the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (ASBFEO Act) section 74(1)(a) and (b) enables the Ombudsman to publicise the name of an entity who is a party to a dispute and has either refused to engage or withdrawn from an ADR process. However, the Ombudsman is not compelled to publish the entities information, but instead the Ombudsman takes all necessary steps to ensure the entity can reengage in ADR, including through



direct written correspondence and by providing to the entity an advance copy of the public notice so that they can respond.

The publication of an entities name is a mechanism of last resort, and the Ombudsman takes into consideration the nature of the dispute and the actions of the parties before making a decision to publish. The ASBFEO Act already enables the Ombudsman to publish either entity that is party to a dispute, amending the relevant sections of the Code to enable both franchisees and franchisors to be named when they refuse to engage or withdraw from an ADR process will bring the Code into alignment with section 74(1)(a) and (b) of the ASBFEO Act.

**Recommendation 3: When deciding if a party to a franchise agreement has acted in good faith, the Code should provide greater guidance that could be considered when determining if parties have acted in good faith or failed to act.**

In our experience of handling disputes from small businesses and particularly those that are in the franchising sector, that there is a limited understanding of what it means to act in good faith. While small businesses do recognise that at the minimum it means to act honestly and not to deliberately set out to undermine the agreement of the contractual benefit, it quickly becomes less clear, for example, when seeking to determine whether particular behaviours may amount to retribution, duress, lack of cooperation and so forth.

To support both franchisors and franchisees in understanding what actions might be considered good faith we encourage Treasury to include in the Code, examples of actions that may assist in determining if a party has acted in good faith. The *Competition and Consumer (Industry Codes – Dairy) regulations 2019* (the Dairy Code), section 11(4) provides examples of actions that could be considered when deciding if a processor or farmer has acted in good faith in dealing with a farmer or processor.

The Dairy Code provides 9 examples of conduct that may be considered including but not limited to the following:

- whether the first party has acted honestly;
- whether the first party has not acted arbitrarily, capriciously, unreasonably, recklessly or with ulterior motives;
- whether the first party has not acted in a way that constitutes retribution against the other party for past complaints and disputes;
- whether the first party's relationship with the other party has been conducted without duress.

**ASBFEO Position A: Establish a mechanism within the Franchising Code of Conduct that supports the recording and reporting of both internal and external disputes between parties to a franchise agreement.**

The ASBFEO encourages the Australian Government to consider including in the Code a mechanism that collects and reports on a broad level of disputation within the franchising sector. We recognise that the Government agreed with recommendation 1 of the Independent Review of the Franchising Code of Conduct, to ensure the provision of more comprehensive, robust statistics about the franchising sector.



This could be a mechanism included in the Code to require franchise systems to report on the number of complaints received, the nature of the complaint and the resolution. Further, the Franchise Disclosure Register could be enhanced to record this information, allowing regulators to have a better understanding of the types of complaints and volumes providing a better understanding of the level of disputation in the franchising sector.

This mechanism could be similar to the reporting requirements of the *Competition and Consumer (Industry Codes – Food and Grocery) Regulation 2015* clause 36D, that requires the Code Arbiter to collect and report on complaints each financial year.

**ASBFEO Position B: Reasonable Return on Investment - should apply where multiple franchises are held.**

The ASBFEO supports the amendment to the Code to include a general application of the requirement for franchise agreements to provide a reasonable right for return on franchisee's investment and the addition of section 44 that requires prior to entering into, the renewal or extension of franchise agreement a discussion about significant capital expenditure, and the circumstances under which the franchisor considers that the franchisee is likely to recoup the expenditure.

We suggest that to avoid doubt and to be abundantly clear that this return-on-investment provision will apply regardless of whether single or multiple franchises are held, so that a potential franchisee can make an informed decision about purchasing an additional franchise. This will enable a prospective franchisee to make an informed decision by assessing if the franchise system is dependent on their own personal time and effort and if there is a genuine opportunity for a return on investment as they consider if they can replicate their success across multiple businesses. Often franchisees do not realise until after they have purchased the subsequent franchise that there is no real ability to scale and they unable to support more than one or perhaps two franchises.

The ASBFEO will develop accessible and user-friendly best practice guidance material on the obligation of reasonable opportunity for return on franchisee's investment to help build confidence understanding of what this obligation means in practice for franchisors and franchisees, including what information should be contained in disclosure documents.

We also note, in line with recommendation 23 of the Government response to the Independent Review of the Franchising Code of Conduct, we are continuing to engage with the Treasury on whether a licencing regime may be an effective method of regulating the franchise industry and whether there is benefit in using existing mechanisms such as the Franchising Disclosure Register to achieve the desired outcomes.

If you require any further information, or have any questions regarding our submission, please contact the ASBFEO Policy and Advocacy team via email at [advocacy@asbfeo.gov.au](mailto:advocacy@asbfeo.gov.au).

Yours sincerely

The Hon. Bruce Billson

Australian Small Business and Family Enterprise Ombudsman