
CONTEMPORARY LEGAL THINKING

**BRIEFING NOTE ON
FAIRNESS IN FRANCHISING:
GOVERNMENT RESPONSE**

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Introduction

On 20 August 2020, the Government published its response to the Parliamentary Joint Committee on Corporations and Financial Services (*The Committee*) *Fairness in Franchising* report.

The report recommended changes to the Franchising Code of Conduct (Code) and this is the Government's response to the recommendations.

Although Dealers have the benefit of separate protections in Part 5 of the Code, they still retain many of the general protections in the Code and so benefit from those as well.



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Government Response

The Government's response is framed around the four key facets of the franchise experience as well as seven core principles for fair and effective regulation as indicated in the following table.

FACET	PRINCIPLES FOR FAIR AND EFFECTIVE REGULATION
Entering a franchising agreement	1. Prospective franchisees should be able to make reasonable, informed assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor.
	2. Franchisees and franchisors should have 'cooling off' time to consider whether the relationship is right for them after signing.
Operating a franchise	3. Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties.
	4. A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest.
	5. Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties.
Exiting	6. Franchisees and franchisors should be able to exit in a way that is reasonable and fair to both parties.
Code compliance	7. The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

Completed Actions of Relevance to Dealers

1. The Government has supported the information-gathering powers of the ACCC with respect to unfair contract terms and has implemented legislation to this effect.

The ACCC now has investigative power to obtain information, documents and evidence for the purpose of determining whether or not to make an application to the court for a declaration of the existence of unfair contract terms in a consumer or small business contract.

2. The Government's response to the issue of threats and intimidation to franchisees/Dealers is to extend whistleblower protections for franchisees and employees of both franchisees and franchisors have been added through the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, which came into effect on 1 July 2019.

This is an interesting response given that to date, whistleblower protection has been unavailable as it does not fall within the scope of disclosable matters. Although it does not appear to have been tested, the

scope of disclosable matters now appears to include Dealer complaints, which might fall into the category of *"improper state of affairs or circumstances"*.

The Government specifically states in its response that a breach of an industry code would qualify. Importantly, the amendment clearly provides anonymity to whistleblowers in section 1317AA of the *Corporations Act 2001*, which states that, *"There is no requirement for a discloser to identify himself or herself in order for a disclosure to qualify for protection..."*

3. Finally and significantly, the Government amended the Franchising Code to introduce the *New Vehicle Dealership Agreements* provisions for the automotive sector to strengthen the rights of Dealers.

Those industry specific provisions commenced operation on 1 June 2020 and have been unpacked in detail by the [Briefing Note on the New Automotive Regulations](#) released by V.S George Lawyers in August 2020.

Key Actions to be Taken by Government of Relevance to Dealers

1. The Government has resolved to take steps to improve the accessibility, affordability and effectiveness of the dispute resolution processes. The Government will implement a voluntary binding arbitration model, introduce conciliation and amend the Franchising Code to clarify that if the person conducting the dispute resolution process deems it appropriate to conduct a multi-party process, the franchisor cannot refuse to participate.

Increased dispute resolution alternatives and the ability to force franchisors to comply with a multi-party process is a step in the right direction to alleviating the imbalance in bargaining power between franchisees and franchisors. This also appears to clarify that clause 52 of the Code, which only applies to Dealers, is intended to be a mandatory requirement to participate in a multi-party process.
2. The Government has committed to amending the Code to clarify requirements relating to the treatment and reporting of cooperative funds where regular payments are required to cover advertising and marketing activities. Dealers should be ready to contribute to this discussion in order to protect co-operative funds from misuse and also to clarify ownership of the funds in co-operative accounts.
3. Dealers commonly face the inability to exit an unviable franchise agreement in a way that is fair and that constrains losses. Exit arrangements, including termination rights, unfairly favour franchisors over franchisees. The Government intends to amend the Franchising Code to facilitate negotiated early exits that balance all interests involved.
4. The Government has resolved to double the maximum financial penalty for a breach of the Franchising Code from \$66,600 (300 penalty units) to \$133,200 (600 penalty units). Despite the significant increase, this amendment falls far short of the recommendation in the Fairness in Franchising report, which called for penalties to 'at least' reflect those currently available under Australian Consumer Law that exceed \$10,000,000.

Conclusion

The changes that have been implemented by the Government and the intended changes constitute further progress for Dealers on the journey to a level playing field. It is apparent that franchisee concerns are being taken seriously and that there are genuine attempts to provide adequate protections. We now await details of the proposed intended changes that have been flagged by the Government's response.



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