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10 December 2019

Franchising Taskforce  
Department of Employment, Skills, Small and Family Business  
Department of the Treasury  
Department of the Prime Minister and Cabinet

By email: [franchising@employment.gov.au](mailto:franchising@employment.gov.au)

Dear Franchising Taskforce

**Franchising sector reforms – consultation on Regulation Impact Statement**

The Australian Competition and Consumer Commission welcomes the opportunity to provide a submission in response to the Franchising Taskforce's Regulation Impact Statement that was released for public consultation on 11 November 2019.

Our submission is attached to this letter. The ACCC consents to our submission being made public.

If the Franchising Taskforce would like to discuss any aspect of our submission, please contact [Redacted] on [Redacted].

Yours sincerely

A handwritten signature in black ink, appearing to read 'Rod Sims'.

Rod Sims  
Chair



AUSTRALIAN COMPETITION  
& CONSUMER COMMISSION

# Franchising sector reforms: Regulation Impact Statement

## ACCC Submission

10 December 2019

## Executive summary

Franchising is an important business model in the Australian economy, but one which has an unfortunate history of some franchisors preying on naive and often vulnerable franchisees and potential franchisees. The result is significant financial harm for those individuals, and significant reputational damage for the business model.

Franchising is subject to a regulatory framework based on the Franchising Code, a prescribed code under the Australian Competition and Consumer Act (CCA), which is administered by the ACCC. Despite a history of twenty years of reforms to the Franchising Code and substantial compliance and enforcement activity by the ACCC over that period, the recent Parliamentary Joint Committee (PJC) Inquiry into franchising identified a range of troubling and persistent issues associated with the franchising business model.

ACCC enforcement action for non-compliance with the Franchising Code is predominantly an *ex-post* regulatory model which can seek to deal with misconduct after it has occurred, but has limited utility in preventing misconduct occurring. In the ACCC's opinion this regulatory gap leads to significant detriment for some franchisees.

Given this, the ACCC is increasingly of the view that the regulatory approach such as the Franchising Code, even in an amended form, will never be adequate to address all the systemic issues associated with the sector, and that serious consideration should be given to an *ex-ante* regulatory model, such as a licensing regime.

An *ex-ante* licensing regime could impose a range of prudential requirements on a franchisor both at the start of, and during the life of a franchise business, and place certain preconditions on the franchisor in seeking to attract franchisees. It could also operate in concert with the CCA to provide a robust compliance framework that should greatly reduce the level of harm currently associated with the franchising business model.

The ACCC believes the reforms set out in the Consultation Regulation Impact Statement (RIS) can only address some of the problems that have persisted in this sector for decades. The proposed incremental changes to the current regulatory framework will not address the fundamental problems that stem from the power imbalance between franchisors and their franchisees. The ACCC is an economy-wide regulator and already commits a disproportionate amount of resources to enforcement investigation and compliance activities associated with franchising matters – in fact, far more than for any other code of conduct.

Increased compliance and enforcement action by the ACCC will not address the multitude of issues raised by franchisees. The concerns of many franchisees are not associated with a breach of the CCA or Franchising Code, and are better addressed through more effective alternative dispute resolution processes.

Under the current regime, enforcement investigation and litigation is the main compliance tool available to the ACCC. Enforcement or litigation can be used to pursue and penalise rogue misconduct, but only well after the harm and damage has been done. In the franchising sector enforcement and litigation, even when combined with education and compliance initiatives, have proved not to be effective mechanisms for achieving widespread compliance.

It is the ACCC's experience that franchisees are often unwilling to either make a complaint or provide evidence of misconduct, due to fear of reprisal and because ACCC intervention can damage the franchise system and hence the value of the franchisee's capital

investment, and directly impact their financial position and ongoing viability of the franchisee's business.

The current regulatory framework that governs the franchising sector prevents the establishment of an effective dispute resolution or arbitration mechanism scheme. Many in the sector are calling for some form of binding determination power which could practically be implemented through a new regulatory scheme such as that which applies to complaints about financial services.

A licensing scheme would establish a better dispute resolution framework and provide for a greater suite of sanctions to ensure franchisors are more compliant. The ACCC recognises that any licensing scheme is beyond the scope of the CCA and may require primary legislation to support a new, different regulatory regime.

A key aim of any regulatory intervention should be to prevent problems from occurring in the first place. The ACCC's view is that pre-entry education and disclosure of key information is not enough to prevent problems from arising. In the ACCC's experience there are a number of franchise systems where there are significant allegations levelled against the franchisor by franchisees, yet the documentation provided to franchisees is compliant with the requirements under the Franchising Code. It is increasingly the experience of regulators that disclosure requirements are not an effective preventative tool. Disclosure alone does not enable good decision making and can place an onerous burden on the parties that should be protected by any disclosure regime.

Given the above, the ACCC does not believe that a public register will achieve anything significant in promoting compliance in the sector and may have the detrimental effect of leading to even fewer franchisees undertaking the requisite due diligence.

Despite the issues evident in franchising, there are many franchise systems where franchisors and franchisees continue to operate successful businesses as part of a collaborative partnership, where the needs of both sides are appropriately considered. It is in the interests of these businesses to prevent unscrupulous operators from continually tarnishing the reputation of the sector, and an appropriate licensing regime appears to be the best mechanism to achieve this.

As stated above, the ACCC's view is that incremental change to the Franchising Code is unlikely to address the fundamental concerns that persist in the franchising sector. Our submission has set out, in further detail, areas for further consideration by the Taskforce and our response to some of the specific options proposed in the RIS.

## Franchising compliance and enforcement approach

The ACCC is an independent statutory authority responsible for enforcing and promoting compliance with the CCA, which includes the Australian Consumer Law (ACL), the Franchising Code and the Oil Code of Conduct (Oil Code).

As an economy-wide regulator, the ACCC prioritises its activities across all sectors through its Compliance and Enforcement Policy. The [ACCC's Compliance and Enforcement Policy](#)<sup>1</sup> sets out the principles, priorities and factors that the ACCC takes into consideration when deciding whether to pursue a particular matter.

Ultimately, the ACCC must be selective in the matters it investigates, noting that it is unable to pursue all matters that are brought to its attention. Key determinants of whether allegations of contraventions of the CCA, including industry codes, will warrant further investigation are:

- whether the circumstances will, or have the potential to, harm the competitive process or result in widespread consumer detriment; and
- whether ACCC action is likely to achieve general deterrence and thereby encourage greater industry compliance.

In addition to enforcing the law, the ACCC encourages compliance with the law, particularly by educating and informing consumers and businesses about their rights and responsibilities under the CCA. The ACCC leverages off successful interventions through compliance and education activities to encourage broader compliance.

The role of the ACCC is not to act as a complaints resolution agency. It cannot act on behalf of consumers or businesses to provide pre-contractual advice or to resolve individual disputes. However, the CCA does provide for a private right of action in most cases, so that any individual or business can pursue their own proceedings under the CCA.

The ACCC has consistently made compliance with, and enforcement of, the Franchising Code a priority. The ACCC commits a disproportionate level of resources to enforcement and compliance initiatives in relation to franchising matters than other sectors. However, the ACCC's compliance and enforcement model has limitations in addressing franchising disputes and allegations.

Enforcement and litigation for franchising contraventions can be difficult. ACCC investigation into franchising allegations often relies on evidence from ex-franchisees, which can raise credibility issues. The allegation might involve conduct that is a number of years old. For example, failure to provide certain information at the start of the franchise agreement. In other cases, as evidenced by the significant number of anonymous submissions to the PJC, current franchisees are unwilling to provide evidence against their franchisor.

ACCC investigation and enforcement action against a franchise system can have a significant impact on the viability of the franchise system. For example, any enforcement proceeding taken by the ACCC is required to be disclosed to prospective franchisees in the disclosure document and this can be a deterrent to people who are considering purchasing into the system and therefore can devalue franchises in that system. This is a further disincentive for current franchisees to provide evidence to the ACCC.

The level of penalties is a further factor. Penalties for contraventions of the Franchising Code compared with other penalty regimes that the ACCC operates under are low. However, it should be noted that aside from the good faith prohibition, many franchise systems where

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<sup>1</sup> <[www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities](http://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities)>.

there are reports and concerns about significant misconduct generally have a good level of compliance with Franchising Code requirements.

When there are franchise systems with systemic issues, there are significant penalties available to the Court for contraventions by the franchisor of the ACL. While increasing penalties for contraventions of the codes improves compliance with the Franchising Code it will not address the fundamental problems in the sector.

## ACCC key recommendations in response to the RIS

Essentially, franchising remains a 'buyer beware' proposition in circumstances where franchisors' ability to dictate the terms of the ongoing relationship are minimally circumscribed and franchisees are exposed to significant financial risk.

The objectives of industry codes of conduct primarily focus on improving transparency and certainty in commercial dealings, and are not intended to interfere with the parties' freedom to contract beyond addressing conduct that goes beyond hard bargaining or vigorous competition.<sup>2</sup>

The Franchising Code currently provides basic safeguards for franchisees, primarily through imposing minimum standards of disclosure, a procedure for settling disputes, an obligation to act in good faith and some requirements around the transfer and termination of agreements and end of term arrangements.

Despite these protections, the power imbalance between franchisees and franchisors can lead to significant disputes that stem from the lack of control that franchisees have in the way in which they can operate their business.

The profitability and viability of an individual franchisee is very much dependent on the operation and management of the system by the franchisor. A franchisor can have different objectives and drivers that have a direct impact on franchisees.

For instance, instead of focusing on ongoing or long-term profitability, some franchisors focus on short-term profitability of the franchise system at the expense of franchisees. This includes through franchisee capital expenditure, supplier rebates and exclusive dealing arrangements, even in circumstances where the individual franchisee is not making any profit.

Franchisees will generally have less commercial experience and considerably less knowledge of the franchise system than the franchisor. In many circumstances, they will be unaware of, or fail to understand, all the risks of the enterprise at the time of signing, even where the franchisee has sought legal, accounting and/or business advice. This will be particularly the case for prospective franchisees from non-English speaking backgrounds. Ensuring that franchisees are empowered to make informed commercial decisions should be a key objective of any regulatory intervention.

There are different costs and risks for franchisors and franchisees. A franchisor often takes a significant risk in establishing a franchise system. However, by franchising the system, a franchisor is in a position to pass on many of those costs and risks to individual franchisees.

Therefore, in our view, it is not sufficient to make incremental changes to improve the Franchising Code and the capabilities of the ACCC to respond to the issues highlighted in the PJC *Fairness in Franchising* report (PJC report) and the RIS. For completeness, it is not

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<sup>2</sup> The Treasury, *Industry Codes of Conduct Policy Framework*, 30 November 2017, <<https://treasury.gov.au/publication/p2017-t184652>>.

within the ACCC's remit and the ACCC is not resourced to address these problems. Meaningful reform needs to focus on improving industry practice more broadly, including the approach to risk sharing in the franchising business model, which in our view is not possible in an industry code of conduct.

### **Penalties for non-compliance**

*The ACCC recommends the introduction of civil pecuniary penalties for all provisions of the codes and for non-compliance with ACCC notices.*

The ACCC supports option 7.2.2 of the RIS to provide for civil penalties for all provisions of the codes and for non-compliance with ACCC compulsory information gathering notices.

The ACCC can only seek civil pecuniary penalties or issue infringement notices for contraventions of a limited number of Franchising Code provisions and no provisions of the Oil Code.

Where there are systemic issues in a franchise system, ACCC litigation for alleged code contraventions will often include alleged contraventions of the ACL, which has a significant civil pecuniary penalty regime.

In the absence of ACL contraventions, penalties for code breaches alone are an insufficient deterrent. The current maximum penalty available is set at only 300 penalty units (\$63,000), which doesn't apply for all provisions of the Franchising Code.

The ACCC strongly believes that the incentives for compliance should be strengthened by increasing penalties for misconduct. To achieve effective deterrence there should be significant penalties available for all provisions of the Franchising and Oil Codes.

### **Dispute resolution**

*The ACCC recommends more dispute resolution options in the regulatory framework, including the establishment of a single body with the power to make binding decisions.*

The ACCC submits that there should be more effective alternative dispute resolution pathways than those that currently exist in the codes.

A key theme in the PJC report is the perceived gap between mediation and litigation. The PJC report noted that in 'many cases mediation is a desirable and effective dispute resolution. However, the absence of a determinative mechanism as another constituent part of the dispute resolution process is a serious shortcoming.'

The ACCC believes that a licensing scheme for franchisors that includes the ability to provide binding decisions for franchising parties in dispute would go a significant way to addressing this shortcoming.

There may be scope for such a scheme to impose upfront requirements that must be met by a party in order to be granted the right to become a franchisor, as well as ongoing conditions that be met for the duration of the franchise system in order to retain a licence where one has been granted.

The ACCC often receives requests from franchisees to intervene in what are substantially private disputes. These franchisees typically want a quick resolution of their complaint so that they can move forward and focus on their business interests. Litigation, whether taken by the ACCC or an individual litigant, will not typically fulfil these needs. Litigation is generally a slow, time consuming and disproportionately expensive means of resolving franchising disputes.

The Taskforce noted in the RIS that complex legal considerations may limit, or even prevent, the Commonwealth from compelling parties to participate in arbitration (or other determinative resolution schemes). The ACCC notes that there are examples of determinative schemes that currently exist in Australia, such as Telecommunications Industry Ombudsman and the licensing scheme operated by the Australian Financial Complaints Authority, whose members are subject to various conditions.

We encourage the Taskforce to carefully consider recommending to the Government a determinative dispute resolution mechanism other than litigation that is accessible and streamlined to be cost effective. The ACCC acknowledges that a licensing scheme or other determinative mechanism is likely to require a different regulatory framework to the CCA or industry codes.

#### *Proposal to merge OFMA and ASBFEO*

The ACCC considers that combining mediation-related services under the codes into a single entity would remove duplication. However, there needs to be some caution in combining a mediation and advocacy service. The effectiveness of any mediation service includes that it is seen to be impartial and independent.

The ACCC does not support the recommendation for a formal referral mechanism to the ACCC. This would in our view interfere with the ACCC's role as an independent statutory authority.

#### **Education and professional advice**

##### *The ACCC recommends a more holistic approach to education in the franchising sector.*

The ACCC would support initiatives that enable prospective franchisees to be more aware and informed before they invest in a franchise. In particular, a larger focus on financial literacy and business education to better equip franchisees with the knowledge and skills they need to effectively operate a business. The ACCC is not the appropriate agency to develop and operate this resource.

##### *The ACCC supports that independent professional advice be made mandatory for prospective franchisees.*

Franchisees can lose significant personal investments should their business venture not be successful, yet there are often instances where prospective franchisees have not sought any kind of independent professional advice before signing a franchise agreement.

While the ACCC acknowledges that obtaining independent professional advice will not necessarily prevent a franchise business from failing, good legal and business advice can help prospective franchisees to better understand the risks they face in acquiring a franchise. Accordingly, the ACCC in principle supports option 1.3.3 to mandate that all prospective franchisees receive legal and financial advice before entering into a franchise agreement.

However, the ACCC suggests that the Taskforce consider whether such a requirement should be reserved for franchise arrangements where the total costs payable for the franchise are above a certain value. In addition, the ACCC suggests extending the cooling-off period, including to allow the franchisee sufficient time to consider advice and exit the contract if the franchisee decides to exercise their cooling-off rights.

The ACCC also supports recommendation 16.2 of the PJC report to prohibit franchisors from passing on to franchisees their costs for preparing, negotiating and settling franchise documentation.

## **Franchisor due diligence**

*The ACCC supports potentially stronger incentives for franchisors to test whether prospective franchisees are suitable for their franchise system.*

Franchisors as much as franchisees need to be well informed before agreeing to enter into a franchise with a particular person. The ACCC considers that franchisors should do more to test whether a prospective franchisee will be suitable for their system before they enter into an agreement. Selling a franchise to someone who is not suited to the business, or who doesn't understand franchising risks, can set them up for failure and further undermines public confidence in franchising.

## **Franchise register**

*The ACCC does not support the proposed national franchise register.*

The ACCC does not support the proposal to establish a government-administered national franchise register. In our view such a register will give rise to unintended consequences. In particular:

- A franchise register will create a misapprehension among prospective franchisees or franchisees that the inclusion of a franchise system on the register means that a particular system is endorsed, compliant or successful. In turn, an over reliance on the register may result in even less appropriate due diligence being conducted by prospective franchisees.
- Significant resourcing would be required to create the register and ongoing maintenance will be needed to ensure that it remains current to the sector, relative to any minimal benefits that may be realised.

The ACCC understands that the advocacy for a national franchise register is to promote increased transparency and assist in due diligence. There has also been a suggestion that a register of franchise documents will prevent problems from arising. However, in our view this is not likely.

There are a number of franchise systems where significant allegations are made against the franchisor by franchisees. This is despite the documentation offered by these systems to franchisees being compliant with the Franchising Code. The ACCC notes that the existence of such a register can lead to the misapprehension that the business model, as distinct from the documentation, is compliant with the Franchising Code or ACL.

The ACCC believes that if such a register is established the ACCC should not have a role in administering it. This is to avoid the perception that the ACCC has endorsed the registered franchise systems.

## **Consistency of industry codes**

*The ACCC supports repealing the Oil Code and adding specific fuel retailing provisions to the Franchising Code.*

Repealing the Oil Code and adding specific fuel retailing provisions to the Franchising Code per option 7.1.3 would reduce regulatory compliance costs associated with the need to comply with separate and inconsistent industry codes. This also ensures that the regulations applying to franchising and fuel supply arrangements remain consistent over time.

## ACCC further response to RIS principles and options

Our response to the proposed options in the RIS should not detract from our strong submission that a new regulatory framework for the franchising sector such as a licensing scheme with binding determinations for franchising disputes be seriously considered by the Taskforce.

### **Entering a franchise agreement**

**Principle 1:** Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor.

The ACCC supports changes to the Franchising Code to require meaningful disclosure. This includes financial information for a pre-existing franchised business and lease arrangements.

The supply of key financial information such as Business Activity Statements (BAS), profit and loss statements (P&L statements) and balance sheets is necessary to conducting due diligence and assessing risks. Any obligation to provide increased financial information for a relevant franchised business for the previous two years should extend to franchisors that have acquired a franchised business irrespective of whether they or a previous franchisee operated that business during this period of time.

For a new franchise site, the ACCC considers it may not always be possible to provide financial information on a 'comparable site'. However, if earnings information is supplied it should be provided with the disclosure document and in accordance with item 20.4 of Annexure 1 of the Franchising Code.

In relation to leasing, the franchisor will often hold the relevant lease rights and the discretion to renew the lease. It is important for prospective franchisees to know the financial and leasing arrangements before they enter into an agreement.

However, the ACCC does note that increasing disclosure requirements can have an adverse impact, as evidenced in certain other regulatory environments. For instance, a recent [report](#)<sup>3</sup> that looked at the effectiveness of disclosure for financial products on consumer outcomes found that reliance on disclosure and warnings can be less effective than expected, and at times can backfire contributing to consumer harm. Any reforms should address deficiencies in the current disclosure regime. It is important to note that increased disclosure would not address fundamental power imbalances and information asymmetries in the franchisor/franchisee relationship.

### **New online educational resource**

The ACCC generally supports the introduction of additional education options for prospective franchisees as set out in option 1.3.2, but note we are only one of a number of stakeholders involved in providing education. Further consideration by the Taskforce is required to determine the most appropriate organisation to deliver this service.

As discussed above, the ACCC considers that a more holistic approach to education should better prepare franchisees before they invest in a franchise, with a larger focus on business education and improving financial literacy. Financial literacy is a key skill needed to operate

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<sup>3</sup> Joint report by the Australian Securities and Investments Commission and the Dutch Authority for Financial Markets, REP 632, *Disclosure: Why it shouldn't be the default*, 14 October 2019, <<https://download.asic.gov.au/media/5303322/rep632-published-14-october-2019.pdf>>.

a business. Despite this, many prospective franchisees lack these skills and franchisors' training programs are more likely to focus on their service offerings.

For example, the ACCC has heard multiple reports from franchisees in the food and beverage industry that their mandatory training only touched briefly on the aspects of running a business, and instead focused heavily on the details of food and beverage preparation.

Franchisees are often smaller operators and are unlikely to have the same understanding of the business that the franchisor does. They are also often from a culturally and linguistically diverse background, and may not fully understand the risks of running a small business.

### **Information statement**

Option 1.1.2(b) recommends that the Information Statement is supplied as a separate document to the rest of disclosure materials. Under clause 11 of the Franchising Code, it is an existing requirement that the Information Statement is provided as a separate document to the rest of the disclosure material. The ACCC supports the Information Statement remaining separate from other disclosure documents, and clarifying this requirement in the Franchising Code as appropriate.

The ACCC also suggests the following in the Information Statement:

- the statement be removed: '*Statistics suggest franchisees have lower failure rate than other businesses*'
- the ACCC's role be clarified to make it clear that the ACCC does not provide dispute resolution services and investigates reports in line with its Compliance and Enforcement policy, and
- the website reference to the online pre-franchise course be updated to provide the current address.

### **Other disclosure**

The ACCC also supports:

- providing disclosure in hard copy and electronic format to assist prospective franchisees with their due diligence (option 1.1.2(a) and 1.1.2(d))
- recommendation 18.3, requiring the franchisor to provide a prospective franchisee with a reasonable estimate of their personal workload in running the franchise business (option 1.1.2(c)), and
- franchisors providing better contact details for former franchisees.

<p><b>Principle 2:</b> Franchisees should have time to consider whether the relationship is right for them before committing to an agreement.</p>
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### **Extending the disclosure and cooling-off periods**

The ACCC generally supports changes to extend the disclosure and cooling-off periods under the Franchising Code but with no ability to waive these extended periods.

Extending both the disclosure and cooling-off periods will provide franchisees with more of an opportunity to properly assess the business and contractual arrangements, ask questions and obtain further information.

Lease and site costs are a major business cost for many franchisees, yet franchisees are frequently unaware of lease conditions prior to signing. To ensure that the franchisee has

certainty as to the lease arrangements that are to be entered into, the ACCC recommends (where applicable) that franchisors should be required to provide the fully executed lease, or where this is not possible, the final lease signed by the franchisor prior to the commencement of the cooling-off period.

While principle 2 is focused on making sure that franchisees have time to consider whether the relationship is right for them, the ACCC submits that many franchisors could do more vetting of prospective franchisees. As set out earlier, selling a franchise to someone who is not suited to the business, or does not understand franchising risks, can set them up for failure. There may be scope for the Taskforce to consider whether franchisors should be subject to specific obligations in this regard.

### **Option to waive an extended disclosure or cooling-off period**

The ACCC does not support the proposal that franchisees should have the option to waive or reduce extended cooling-off or disclosure periods (option 2.1.3). Our experience suggests that enthusiasm for commencing a new business and a belief in the reliability of the existing franchise system, together with the imbalance in bargaining power, is likely to result in franchisees opting to waive or reduce an extended cooling-off or disclosure period. However, there may scope for an exception to be made for extensions or renewals of a franchise agreement where no substantive changes are made to the agreement as a condition of extension or renewal.

### **Extending cooling off provisions to transfers, extensions and/or renewals**

The ACCC considers that the treatment of transferees should be the same as that of franchisees who purchase their business from the franchisor, as the reasons for requiring a cooling-off period are the same in both cases (option 2.3.2). However, an exception may be made for extensions or renewals of an agreement where it is on substantially the same terms as the original agreement.

### **Operating a franchise**

<p><b>Principle 3:</b> 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.</p>
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### **Marketing Funds**

The ACCC agrees with the proposed options under 3.1.2(a) to address the marketing fund inconsistencies in the Franchising Code. Various stakeholders have identified a lack of transparency on how marketing funds are used and this can make it difficult for franchisees to verify that the fund is being used for legitimate and reasonable purposes in accordance with the Franchising Code.

While the ACCC acknowledges clarification of the term ‘meaningful information’ is desirable, given the term’s contextual nature in our view this might be best achieved through the development of judicial authority. In *Ultra Tune Australia Pty Ltd v ACCC [2019] FCAFC 164*, the Full Federal Court cautioned against a prescriptive approach and said it will vary from case to case on what is sufficient detail to give ‘meaningful information’ on a fund’s income and expenditure:

*83 That said, it should be acknowledged that cl 15(1)(b) is not particularly clear or prescriptive as to what is required to give “meaningful information” about a marketing fund’s income and expenditure. However, the general intention of the provision is plain enough, namely that the franchisee should be in a position to know what the income and expenses of the fund are for the purpose of making some meaningful assessment of whether that use is appropriate. The references to*

*“sufficient detail” and “meaningful information” must be understood with that purpose in mind.*

- 84 *To be more prescriptive might have reduced the capacity for franchisors to tailor the information provided to a wide range of different circumstances, given the diverse range of economic activities in which franchise arrangements exist. To accommodate those different circumstances, cl 15(1)(b) has a protean quality. What is sufficient detail to give “meaningful information” on a fund’s income and expenditure will vary from case to case. Similarly, what may be a sufficient level of detail for certain items or categories of expenditure may be insufficient for others, bearing in mind also that cl 15(1)(b)(ii) necessarily requires a focus “particularly with respect to advertising and marketing expenditure”. As a general proposition, the more significant an expense is, the more important it will be to a franchisee, and therefore the greater the level of detail that will be required to facilitate an informed assessment by the franchisees concerned. There may be cases in which more detail is needed for a lesser expenditure in order to understand why it is appropriate. In each case, however, the adequacy of the statement must be considered and assessed as a whole.*

### **Increased awareness and guidance for marketing fund obligations**

The ACCC supports the PJC’s recommendation 6.11 that the Auditing and Assurance Standards Board prepare and issue guidance to assist franchisors, accountants and auditors in the preparation of financial statements and audit reports for marketing funds.

The ACCC also generally agrees with ensuring that master franchisors are required to meet the requirements of marketing funds as outlined in option 3.1.2(d) as well as in respect to any other relevant provision under the Franchising Code where drafting is unclear and to clarify the distribution of marketing funds in the event of franchisor insolvency as set out in option 3.1.2(e).

<p><b>Principle 4:</b> 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.</p>
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### **Rebates**

The ACCC generally supports more meaningful disclosure of rebates. At present the disclosure requirements for rebates are limited.

The lack of transparency on rebate arrangements is often a source of conflict, particularly where franchisors retain and profit from rebates. The potential for conflict is heightened in systems where the franchisee is required to purchase products from nominated suppliers at a higher cost or of lower quality than could be sourced elsewhere.

The ACCC considers that increasing disclosure, such as the amount of any rebate received or what percentage of the value of franchisee sales is received from a supplier as a rebate (for example, for the previous financial year) and details of how that rebate was used will help franchisees to better understand the risks.

The ACCC notes the Taskforce’s comment that some stakeholders have indicated there may be practical difficulties in disclosing rebates, particularly relating to the disclosure of potentially commercial-in-confidence material. The ACCC notes that franchisees are often required to sign confidentiality agreements relating to the handling of sensitive or confidential information.

## Significant capital expenditure

The ACCC supports amendments to clause 30 of the Franchising Code to provide further clarification of significant capital expenditure per option 4.2.2.

The ACCC also supports balancing the rights of franchisees to deal with circumstances where franchisors may seek to exploit significant capital expenditure requirements (option 4.2.3).

As noted by the PJC, some capital expenditure may be necessary in order for a franchise system to remain competitive and respond to changing market conditions. However, this can negatively impact franchisees who may be required to invest, but not be able to recoup the value of that investment. For example, when the franchise agreement is not renewed.

The current exceptions to the prohibition on significant capital expenditure are broad and provide few constraints on the ability of franchisors to impose capital expenditure requirements on franchisees.

## Unilateral variations

The ACCC does not support an outright ban on unilateral variations (option 4.3.2). The ACCC acknowledges that in some instances unilateral variations may be necessary and desirable, such as to ensure compliance with changes in the law.

Some unilateral variations may result in contractual clauses that are unfair terms under the business-to-business unfair contract term laws. There is a separate review process on foot which is better placed to deal with this.

## Exiting

<p><b>Principle 6:</b> Franchisees and franchisors should be able to exit in a way that is reasonable to both parties.</p>
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## Additional termination rights for franchisees

While the ACCC broadly supports the provision of statutory termination rights for franchisees (option 6.1.2(b)), the specific circumstances of such termination rights would require careful consideration.

### *Other additional statutory rights for franchisees*

In the ACCC's view, the introduction of additional franchisee termination rights is likely to assist to address some of the power imbalance between franchisors and franchisees. However, we consider that the proposal under option 6.1.2(b) to base the franchisee-triggered termination provisions on scenarios 2, 3 and 4 as set out in recommendation 11.1 of the PJC report may pose some difficulties. Modifications to existing contract law that are particular to franchising relationships may result in unintended consequences, and there may be instances where the interests of an individual franchisee conflict with the interests of other franchisees in the system. We suggest further consideration is given to the way in which statutory franchisee termination rights could be introduced. For example, it may be worth considering whether the franchisee should have recourse to termination rights where the franchising offer changes fundamentally during the life of the franchise, or where promises or representations are not met.

### *Additional requirements where the franchisor is terminating in special circumstances*

The ACCC considers that there is no strong rationale to limit termination in special circumstances (option 6.1.2(a)). The special circumstances currently prescribed under clause 29 of the Franchising Code are limited to events that would seriously threaten the reputability and standing of the franchise system. In these circumstances, it is desirable that the franchisor is able to legitimately terminate immediately when these events occur.

### **Clarifying termination processes and rights**

The ACCC supports the proposal to incorporate the common law principles of restraints of trade into the Franchising Code (option 6.2.3) in order to clarify aspects of the termination process for franchisees. The ACCC also supports option 6.2.2 to clarify the wording of clause 23 of the Franchising Code.

The ACCC suggests that consideration be given as to whether the Franchising Code is amended to include a statutory recognition of the common law principle that the franchisor must act to mitigate its losses and/or a limitation on the right of franchisors to recover losses in certain circumstances. While franchisees accept certain business risks in undertaking a franchised business, they face the additional risk of owing substantial damages to the franchisor in case of termination prior to the end of the term of the agreement.

While educational guidance can assist franchisees to understand their legal rights and obligations to some extent, the complexity surrounding franchise termination rights would be difficult to address in this manner. We suggest that detailed advice on a franchisees' possible termination rights is more appropriately addressed by a franchisee obtaining legal advice.

### **Goodwill**

The ACCC often receives reports from franchisees that indicate a general misunderstanding of end-of-term rights, including in relation to goodwill. Requiring franchisors to clarify and make explicit the franchisees' rights in respect of goodwill in the franchise agreement (option 6.3.2) may assist to align expectations at the outset of the franchise relationship and reduce the likelihood of disputes. Franchisees who are better informed of their rights in relation to goodwill may also be able to negotiate better terms for themselves, noting however the significant imbalance of bargaining power that exists between the parties may limit the extent to which they are successful in negotiating better terms.