

Additional information on Franchising Code and Unconscionable Conduct reforms

Reforms to the Franchising Code of Conduct

The Government will enhance the investigative powers of the ACCC by amending the Trade Practices Act to allow the ACCC to conduct random audits under the Franchising Code and other mandatory codes of conduct.

At present, franchisees wishing to complain about franchisors not complying with the Franchising Code may fear reprisal from franchisors. The ACCC's random audit powers will strengthen franchisor compliance with the Code, while relieving franchisees of the fear of retaliation against them for complaining to the ACCC about franchisor behaviour.

The Government will also extend the public warning power available under the Australian Consumer Law Bill before the Parliament to include breaches of the Franchising Code and other mandatory industry codes.

This warning – or naming and shaming – power will alert the public to rogue or unscrupulous franchisors.

Under the reforms, where a large number of franchisees are harmed by the behaviour of a franchisor in breach of the Franchising Code, the ACCC will be able to apply for an order providing redress to all the franchisees, without requiring every franchisee to be party to the legal proceedings.

The Government made a pre-election statement noting its belief that the Franchising Code should include a good-faith obligation as long as the scope of this obligation is well defined. However, Recommendation 8 of the Joint Committee's report is for the inclusion of a broad and general reference to good faith in the Franchising Code.

While accepting the intent of Recommendation 8, there are some difficulties with the suggested approach. The law on good faith is still evolving and there is not a single definition or standard set of behaviours that constitute good faith. The inclusion of a general obligation of good faith in the Franchising Code would increase uncertainty in franchising. Neither franchisors nor franchisees would be certain of the occurrence of a breach: court proceedings would be required to establish whether or not there had been a breach.

The extra uncertainty created by the inclusion in the Franchising Code of a general, undefined good-faith obligation could be expected to have adverse commercial consequences for franchisees. Franchisors would seek compensation for the extra risk they faced through larger franchise fees and more onerous terms and conditions in other parts of the agreement. And banks and other financiers would be more reluctant to provide credit to franchisees and franchisors in these more risky commercial circumstances. Since small business organisations are already claiming that banks are being too harsh in their small business lending practices, inserting a general,

undefined good-faith obligation into the Franchising Code would only make matters worse.

The Government therefore considers the best way to proceed is to identify specific franchising behaviours that would reasonably be considered to be inappropriate in a franchising arrangement and implement policies to address those behaviours. The Government will amend the Franchising Code to provide that nothing in the Code limits any common law requirement of good faith in relation to a franchise agreement to which the Code applies.

Based on consultations undertaken as a part of the Joint Committee inquiry, the main behavioural issues are associated with:

- End-of-term arrangements;
- Dispute resolution;
- Unforeseen capital expenditure;
- Unilateral contract variation;
- Attribution of legal costs;
- Confidentiality agreements; and
- Changes to franchise agreements when a franchisee is trying to sell the business.

The Government will amend the Franchising Code to deal with end-of-term arrangements and dispute resolution and will establish an expert panel to inquire into and report on the need to introduce into the Franchising Code provisions that prevent specific behaviours that are inappropriate in a franchising arrangement.

End-of-term arrangements

The Government will amend the Franchising Code to require franchisors to disclose to franchisees the processes that will apply in determining end-of-term arrangements, including whether or not there is some right of renewal beyond the term of the agreement. The Government considers these amendments will assist in mitigating disputes where one party has an expectation, not shared by the other party, that a franchise agreement will be renewed.

Franchisors will also be required to inform franchisees at least six months before the end of the franchise agreement of their decision either to renew or not to renew a franchise agreement.

It is the Government's clear intention that these new end-of-term arrangements will apply to franchise agreements signed after the date of amendments to the Franchising Code. For agreements already in existence, the end-of-term arrangements can be included by the voluntary agreement of both parties but will not be obligatory.

Dispute resolution

The Government recognises the need to encourage parties to a franchise dispute to approach their dispute in a reconciliatory manner.

The Government will amend the Franchising Code to include a list of behaviours expected under the Code that would facilitate dispute resolution. The list will include:

- Attending and participating in meetings at reasonable times;
- Making intentions clear at the outset of the mediation (that is, if the aim is to negotiate an exit arrangement, rather than a resolution to enable continued trading);
- Observing confidentiality obligations during and after the mediation process; and
- Not damaging the franchise brand during the dispute including by providing inferior goods, services and support.

Other issues

The expert panel will report on the need to introduce into the Franchising Code a list of other specific behaviours that are inappropriate in a franchising arrangement, with particular reference to:

- Unforeseen capital expenditure;
- Unilateral contract variation;
- Attribution of legal costs;
- Confidentiality agreements; and
- Franchisor-initiated changes to franchise agreements when a franchisee is trying to sell the business.

Following receipt of the panel's report the Government will make any further necessary amendments to the Franchising Code.

Unconscionable conduct reforms

Unconscionable conduct is behaviour that attracts such significant moral condemnation that the courts may grant special relief to those who have suffered as a result of the behaviour.

The unconscionable conduct provisions will be strengthened by making it clear that protection from unconscionable conduct relates not only to the process of settling a contract but to the terms and conditions of the contract and the ongoing behaviour of the parties to the contract.

The Government encourages the ACCC to persist in its endeavours to obtain further guidance from the courts on unconscionable conduct under the Trade

Practices Act, noting that the ACCC has recently had some success in actions against businesses engaged in unconscionable conduct.

The Government has *accepted* the Senate Committee's recommendations of the majority report.

The Senate Committee did not recommend a statutory definition of unconscionable conduct.

The Government agrees with the Senate Committee's approach of clarifying existing provisions rather than creating uncertainty for consumers, businesses and the courts by changing the fundamental nature of the provisions.

The expert panel being established by the Government will consider whether a list of examples of unconscionable conduct or a statement of principles of what constitutes unconscionable conduct should be incorporated into the Trade Practices Act.

In addition to existing remedies, breaches of the unconscionable conduct provisions of the Trade Practices Act will attract penalties of up to \$1.1 million for corporations and \$220,000 for individuals.