



THE LAW SOCIETY
OF NEW SOUTH WALES

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25 September 2023

Dr James Popple
Chief Executive Officer
Law Council of Australia
PO Box 5350
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By email: Jessica.Morrow@lawcouncil.au

Dear Dr Popple,

Independent Review of the Franchising Code of Conduct

The Law Society of NSW appreciates the opportunity to provide input to the Law Council of Australia for its submission to the Treasury's *Independent Review of the Franchising Code of Conduct*. The Law Society's Business Law Committee has contributed to this submission.

Background

We note the Franchising Code of Conduct¹ (the Code) is due to sunset on 1 April 2025 and that the Review² will have regard to, among other things, the general fitness for purpose of the Code.

We raise the following issues for consideration by the Review which relate to enduring obligations in franchise relationships and ending a franchise agreement.

Key Issue C. Enduring obligations in franchise relationships

Q 13. How well does the Franchising Code support franchisors and franchisees during the term of the franchise agreement? In particular, does the Franchising Code provide adequate minimum standards relating to structural and/or operational change management?

The Law Society agrees with the Review that unilateral variation of franchise agreements can undermine franchisees' due diligence prior to entering into a franchise agreement. At the same time, flexibility is required for franchisors to adapt and innovate their business model to respond to rapid market changes and remain competitive.

¹ The *Competition and Consumer (Industry Codes-Franchising) Regulation 2014* made under Part IVB of the *Competition and Consumer Act 2010*.

² <https://treasury.gov.au/consultation/c2023-436091>

We note that the substantive franchise agreement may contain subsidiary documents, such as the operations manual. The operations manual enables the franchisor to impose standards on the way that businesses are operated under its brand (including to ensure appropriate quality standards for goods/services sold under that brand) and gives the franchisee information on how the business is to be operated, which is intended to shortcut the time it would take for the franchisee to develop these practices/information independently.

A franchisor can potentially make significant operational changes by way of variations to the operations manual. Clarification of the circumstances in which the franchisor is able to vary the operations manual is recommended. It would also be very useful if the Review could consider the interaction of the Code with the unfair contracts terms regime in the Australian Consumer Law,³ particularly as it relates to a franchisor's ability to unilaterally vary the operations manual. This is important, as the operations manual is frequently incorporated by reference into the franchise agreement, and the ACCC has in the past expressed the view that a unilateral variation of the operations manual may be considered an unfair term in certain circumstances.

A common theme to recent changes to the Code has been to increase the level of disclosure a franchisor is required to provide before a franchise agreement can be entered into. While we acknowledge the importance of certainty for franchisees as to unilateral contract variations which may, in some cases, amount to an extension of the scope of a franchise agreement, we do not consider the multiple and often duplicative levels of disclosure required⁴ lend themselves to effective communication of that information to potential franchisees. In addition, we are of the view that the denseness and prescriptiveness of the form of disclosure document means key information is not necessarily highlighted and/or fully appreciated by franchisees.

While we support the continuation of the Code, we also note the accretion of regulation⁵ is disruptive and adds significant additional regulatory burden on franchisors. In our view, these reforms have resulted in limited appreciable difference to the power dynamic and information asymmetries that exist between franchisors and franchisees/potential franchisees.

Key Issue D. Ending a franchise agreement

Q 16. How effective are 2021 reforms to the Franchising Code which created a process for franchisees to formally request early exit from their franchise agreements?

The 2021 reforms were intended to go some way to address a view that the Code reinforced an asymmetry of power in the franchisor's favour. The early termination process was one of a number of measures introduced⁶ in an attempt to adjust the balance of power in favour of franchisees, and was not intended to give an automatic right to terminate for any reason. Rather, it was designed to provide an avenue for franchisees to commence negotiations for early termination.

On one view, the early termination request process may be considered ineffectual, given the franchisor retains the power to refuse a request, albeit with reasons. On another view, the parties' interests are sufficiently balanced, as a franchisor refusal may amount to a breach of the Code's good faith obligations or unconscionable conduct clauses. The development of guiding principles to assist parties in determining reasonable circumstances to make and refuse requests for early termination might go some way to alleviate concerns that the process does not allow for an equitable exit.

³ As set out in Schedule 2 of the *Competition and Consumer Act 2010*.

⁴ Disclosure Document (cl.8, the Code); Key Facts Sheet (cl.9A); Information Statement (cl.11); Franchise Disclosure Register (Schedule 1, Part 5A) .

⁵ Following reforms in 2020, 2021 and 2022.

⁶ *Competition and Consumer (Industry Codes – Franchising) Amendment (Fairness in Franchising) Regulations 2021* (Cth)

If you have any questions about this submission, please contact Sonja Hewison, Policy Lawyer at sonja.hewison@lawsociety.com.au or on (02) 9926 0219.

Yours sincerely,

A handwritten signature in black ink that reads "CBanks". The letters are cursive and fluidly connected.

Cassandra Banks
President