



**Australian Government**

**Australian Government response to the  
Parliamentary Joint Committee on Corporations and  
Financial Services inquiry into the operation and  
effectiveness of the Franchising Code of Conduct report:  
*Fairness in Franchising***

**August 2020**



## CONTENTS

Introduction.....	3
Chapter 1 – Completed actions .....	5
Section 1.1: Franchising Taskforce Establishment.....	5
Section 1.2: Information gathering powers.....	5
Section 1.3: Whistleblower protections .....	5
Section 1.4: Automotive Franchising .....	6
Chapter 2 – Entering A Franchising Agreement.....	7
Section 2.1: Information and awareness .....	7
Section 2.2: Non-financial disclosure .....	7
Section 2.3: Financial Disclosure .....	8
Section 2.4: Supply Arrangements and Rebates .....	9
Section 2.5: Cooling Off Periods .....	9
Chapter 3 – Operating A Franchise .....	10
Section 3.1: Capital Expenditure .....	10
Section 3.2: Marketing and Other Cooperative Funds.....	10
Section 3.3: Dispute Resolution.....	11
Chapter 4 – End Of Term Agreements .....	13
Section 4.1: Exit Arrangements .....	13
Section 4.2: Termination.....	13
Section 4.3: Restraint of Trade Clauses .....	14
Chapter 5 – Regulatory Framework.....	15
Section 5.1: Compliance and Enforcement.....	15
Section 5.2: Franchisee Sector Representation .....	16
Section 5.3: Other Code Amendments.....	17
Section 5.4: Alignment with Industry Codes .....	18
Chapter 6 – Other actions .....	19
Section 6.1: Unfair Contract Terms .....	19
Section 6.2: Other actions .....	20



## INTRODUCTION

The Australian Government thanks the Parliamentary Joint Committee on Corporations and Financial Services (the committee) for its report, *Fairness in Franchising*.

Shortly after receiving the report the Government established an inter-agency Franchising Taskforce (the taskforce), to examine the feasibility and implementation of a number of the report’s recommendations. The taskforce has made a careful study of the committee’s comprehensive recommendations and consulted with a wide range of stakeholders to inform its advice to the Government. Of the 71 recommendations:

- 39 specifically call for Government action
- 27 recommendations were put to the Franchising Taskforce for investigation and
- five are directed to independent agencies.

The report revealed a range of problem areas in franchising, ranging from non-compliance with the Franchising Code of Conduct to false or misleading representations and unconscionable conduct. While the most egregious conduct does not appear to be widespread, its consequences have been devastating for some franchisees. There was broad consensus amongst stakeholders that reforms are needed in how franchising is regulated to restore confidence in the industry.

The Government supports the finding that action is needed to improve fairness and transparency for franchisees. It understands the importance of the franchising sector to the Australian economy as a source of jobs and growth. The Government’s actions are informed by the consultation and advice of the taskforce. The actions in this report have been grouped according to the four facets of the franchising experience, and guided by seven core regulatory principles that strengthen protections for franchisees, without imposing unnecessary red tape.

FACET	PRINCIPLES FOR FAIR AND EFFECTIVE REGULATION
<b>Entering a franchising agreement</b>	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
<b>Operating a franchise</b>	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
<b>Exiting</b>	6. Franchisees and franchisors should be able to exit in a way that is reasonable and fair to both parties
<b>Code compliance</b>	7. The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency

The Government's key actions in response to the *Fairness in Franchising* report include:

- doubling the penalties that apply for a breach of the Franchising Code
- strengthening dispute resolution options through the introduction of conciliation and voluntary binding arbitration, in addition to mediation
- targeted improvements to disclosure, particularly those relating to supply arrangements, marketing funds, exit arrangements and significant capital expenditure
- a new mandatory Key Disclosure Information Fact Sheet to improve and simplify upfront disclosure, highlight key information, and assist franchisees to understand obligations and the risks associated with entering a particular franchise agreement
- consultation on the development of a public register of franchisors, to increase transparency in the sector and increase the ability of prospective franchisees to make an informed decision before entering a franchise agreement and
- a franchising website to make it easier for franchisors and franchisees, including prospective franchisors and franchisees, to access information and support.

## CHAPTER 1 – COMPLETED ACTIONS

This chapter sets out action already taken by the Government that implements some of the committee’s recommendations.

### Section 1.1: Franchising Taskforce Establishment

**Issue:** Several recommendations require detailed consideration before they are implemented to ensure they operate effectively.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government established the inter-agency Franchising Taskforce on 10 April 2019.

The taskforce was made up of senior officers from the Department of the Treasury, the Department of the Prime Minister and Cabinet and the Department of Industry, Science, Energy and Resources.

### Section 1.2: Information gathering powers

**Issue:** The Australian Competition and Consumer Commission (ACCC), requires access to a full range of investigative powers if it is to properly enforce the unfair contract terms provisions of the Australian Consumer Law (ACL) in relation to the franchising sector.

**Principle:** 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.

**Action:** The Government has acted to support the ACCC’s ability to properly enforce the unfair contract term provisions of the ACL.

The Government amended the *Competition and Consumer Act 2010* (CCA) on 18 October 2018 to provide that a Notice issued under section 155 could be used to obtain evidence about whether a standard form contract contains an unfair contract term.

### Section 1.3: Whistleblower protections

**Issue:** Some franchisees have been threatened and intimidated after attempting to bring issues to the attention of franchisors.

**Principle:** 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.

**Action:** The Government has extended whistleblower protections to franchisees and their employees and will encourage the promotion of these protections.

The Government response to the Whistleblower Protections report was tabled in Parliament on 9 April 2019. The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019* came into effect on 1 July 2019 and provides protections for franchisees and employees of franchisors reporting a breach of an industry code by a franchisor, and for employees of franchisees reporting a breach by a franchisee. It also provides protection for a broad range of disclosable matters (for example, any misconduct or improper state of affairs).

The Government will engage with the ACCC, the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), state small business commissioners and other stakeholders to promote these protections to the wider franchise community. A new franchising website will provide information about whistleblower protections, including how to lodge a complaint.

## **Section 1.4: Automotive Franchising**

**Issue:** Automotive dealers often face large losses on stock or have been required to expend significant capital that cannot be recouped when their agreement is not renewed.

**Principle:** 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.

**Action:** The Government has acted to strengthen the rights of automotive sector franchisees when agreements are not renewed.

The Government has amended the Franchising Code specifically for the automotive sector to:

- require franchisors to give franchisees 12 months' notice of a decision not to renew an agreement, if the agreement is for 12 months or longer, including a requirement for the franchisor to provide a statement outlining why an agreement is not renewed
- strengthen conditions that prohibit franchisors requiring significant capital expenditure from franchisees, including the introduction of an obligation to discuss expenditure prior to entering an agreement, disclosure of the circumstances under which the franchisee is likely to recoup the expenditure and specifying, as far as practical, the amount, timing and nature of the expenditure to be provided
- include a requirement to discuss, plan and agree end of term arrangements if an agreement is not renewed including for the handling of capital intensive stock and
- expressly allow multi-franchisee dispute resolution.

The amendments commenced operation on 1 June 2020. The automotive sector will further benefit from broader reforms to the Franchising Code, including the introduction of voluntary binding arbitration and increased civil pecuniary penalties for a breach of the Code. The Government will continue to work with the automotive franchising sector on the development of an industry-led, principles based voluntary guide to improve the transparency and fairness of agreements.



## CHAPTER 2 – ENTERING A FRANCHISING AGREEMENT

### Section 2.1: Information and awareness

**Issue:** Franchisees are not always well informed about franchising and may not conduct adequate due diligence prior to entering into a franchise agreement. Many existing resources do not comprehensively cover the risks, rewards, and responsibilities of being a franchisee.

**Principle:** 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.

**Action:** The Government will increase the information available to prospective franchisees before they enter the franchise agreement.

Consultation with the sector will inform the Government's development of:

- a public register of franchisors, to increase transparency in the sector and the ability of prospective franchisees to make an informed decision before entering a franchise agreement
- a Key Disclosure Information Fact Sheet containing information that is taken from disclosure documents and
- a franchising specific website to make it easier to access information and support for the franchising sector.

### Section 2.2: Non-financial disclosure

**Issue:** Prospective franchisees often fail to conduct proper due diligence due to the length and complexity of information provided prior to signing a Franchising Agreement.

**Principle:** 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.

**Action:** The Government will improve franchisees' access to non-financial information, supporting their ability to conduct due diligence.

The Government will amend the Franchising Code:

- so that the disclosure document and franchise agreement must be made available in both electronic and hardcopy form
- to clarify that the Information Statement (Annexure 2 to the Franchising Code) must be provided to prospective franchisees separately and prior to providing the disclosure document and other disclosure materials
- to implement technical changes to clause 13 of the Franchising Code, to increase transparency surrounding retail leases (subject to consultation with the sector to ensure there are no unintended consequences), with the exception that franchisors will not need to provide documents they do not possess and

- to require a franchisor’s interests in a leasing arrangement to be disclosed in the Key Disclosure Information Fact Sheet.

The Government will also amend the Information Statement (Annexure 2 to the Franchising Code) to include reference to the ACCC’s franchisee manual and emphasise key rights and information.

The Government acknowledges franchisees’ concerns that rent paid to a franchisor as head lessee should be used to pay rent owing to the landlord, noting retail leasing, including sub-leasing, is regulated by state and territory governments.

Some franchisees are not aware of the obligations involved in running a business. The Government supports the provision of information that enables franchisees to better assess their future workload. However, there are likely to be differences in the time required to run any particular franchise, depending on the skills and experience of any particular franchisee. Providing specific estimates of the time taken to run a franchise may discourage franchisees from undertaking appropriate levels of due diligence. Improved disclosure of financial information through the Key Disclosure Information Fact Sheet will help franchisees assess the time that they will need to commit to the business.

### **Section 2.3: Financial Disclosure**

**Issues:** Some prospective franchisees fail to conduct proper due diligence due to the length and complexity of information provided prior to signing a Franchising Agreement. The presentation of financial information in disclosure documents can be confusing and difficult for prospective franchisees to assess.

**Principle:** 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.

**Action:** The Government will improve franchisees’ access to financial information, supporting their ability to conduct due diligence.

The Government will consult with stakeholders on the development of a Key Disclosure Information Fact Sheet for franchisees. This will provide important information to make an initial assessment about a franchise offer. The mandatory Information Statement will include advice on the franchising website to warn and educate prospective franchisees about the risks with estimating labour costs, particularly for greenfield sites.

The Government will amend the Franchising Code so that any financial information must be part of the disclosure document and require disclosure documents to include a statement on the accuracy and appropriateness of the franchisor’s financial information.

The Government will amend the Information Statement to advise prospective franchisees that their obligations include obtaining information about employment matters and compliance with relevant laws. The Government’s educational resources will also include links to the Fair Work Ombudsman’s guidance.

## **Section 2.4: Supply Arrangements and Rebates**

**Issues:** Some franchisors require franchisees to purchase goods and services from selected suppliers at set quantities, while receiving a supplier rebate. Franchisors are not obliged to disclose to franchisees the maximum resale or purchase price, rebate amount or how they are calculated.

**Principle:** 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.

**Action:** The Government will improve disclosure to franchisees on supply arrangements and rebates received by franchisors.

The Government will amend the Franchising Code to require franchisors to disclose information on supplier rebates, commissions and other payments and to disclose any master franchisor controls and/or rebates from suppliers. Disclosure of financial information will be improved through the introduction of a Key Disclosure Information Fact Sheet.

A breach of the CCA will be triggered should a supplier rebate to a franchisor result in a substantial lessening of competition.

## **Section 2.5: Cooling Off Periods**

**Issue:** There is uncertainty about the timing and triggers of the cooling off period.

**Principle:** Franchisees and franchisors should have ‘cooling off’ time to consider whether the relationship is right for them after signing.

**Action:** The Government will clarify franchisees’ rights in relation to cooling off and disclosure periods.

The Government will amend the Franchising Code to clarify that the cooling off and disclosure periods are measured in calendar days and clarify that the 14-day disclosure period must begin at least 14 calendar days before signing a franchise agreement.

The Government will amend the Franchising Code to allow a franchisee to terminate the agreement at any time up to 14 days after the last of certain events have occurred, such as, the agreement being signed, payment is made, disclosure documents are received and, if applicable, a copy of the terms of the lease are received.

Cooling off rights will be extended to the transfer of an agreement to a new franchisee and where the franchisee enters a substantially new agreement with the franchisor (a deemed transfer) but not to renewals or extensions.

## CHAPTER 3 – OPERATING A FRANCHISE

### Section 3.1: Capital Expenditure

**Issue:** Franchisees are often required to expend significant capital without any prospect of making a return on their investment.

**Principle:** 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

**Action:** The Government will strengthen franchisees' rights when a demand for significant capital expenditure is made.

The Government will amend the relevant clauses of the Franchising Code to apply recent automotive franchising changes to the broader franchising sector:

- prohibiting franchisors from requiring franchisees to undertake significant capital expenditure, except where it has been disclosed before entering into a franchise agreement, is legally required, or is agreed to by the franchisee during the term
- introducing an obligation to discuss expenditure prior to entering an agreement
- requiring disclosure of the circumstances under which the franchisee is likely to recoup the expenditure and
- specifying, as far as practical, the amount, timing and nature of the expenditure to be provided.

### Section 3.2: Marketing and Other Cooperative Funds

**Issue:** There is a lack of clarity, consistency and accountability with respect to the use and reporting of marketing and other cooperative funds by franchisors, leading franchisees to believe that franchisors are not acting in their best interest.

**Principle:** 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.

**Action:** The Government will improve information provided to franchisees in relation to the use of marketing and other cooperative funds.

The Government will amend the Franchising Code to clarify requirements relating to the treatment and reporting of cooperative funds where regular payments are required to cover advertising and marketing activities.

The Government will also:

- instruct the Department of Industry, Science, Energy and Resources to write to the Australian Accounting Standards Board, asking it to consider whether guidance for auditing of marketing and cooperative funds is required and
- work with the sector to emphasise the importance of developing best practice financial statements.

The Government will amend the Information Statement and use educational materials to improve franchisees' understanding that, if the franchisor becomes insolvent, they may lose the benefit of shared funds such as marketing funds.

The current annual financial reporting regime is appropriate. Although, marketing and other cooperative funds are often a source of dispute between franchisors and franchisees, increasing the frequency to provide financial statements would impose material costs on franchisors, which is likely to be passed on to franchisees and in turn consumers, without giving franchisees any additional rights in relation to how marketing funds are used.

### **Section 3.3: Dispute Resolution**

**Issue:** The Franchising Code does not provide franchisees with accessible, affordable and effective dispute resolution processes.

**Principle:** Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties.

**Action:** The Government will strengthen the management of the dispute resolution services and organisations, including expressly allowing multi-party dispute resolution under the Franchising Code, conciliation and voluntary binding arbitration.

The Government will:

- incorporate the functions of the Franchising Mediation Adviser into ASBFEO, to improve the efficiency of dispute resolution assistance and make it clearer that ASBFEO can assist with franchise disputes
- ensure all franchisees can access ASBFEO's dispute resolution services
- implement a voluntary binding arbitration model by appointing a Franchising Arbitration Adviser, utilising a model similar to that in the Dairy Industry Code
- introduce conciliation to complement existing dispute resolution provisions
- support ASBFEO's power to write to the ACCC and other regulators notifying them of systemic or serious matters that have come to its attention
- provide best practice guidance on timeframes for the commencement and completion of dispute resolution processes and
- amend the Franchising Code to clarify that, if the person conducting the dispute resolution process determines it is appropriate to conduct a multi-party process, the franchisor cannot refuse to take part in that process.

Ideally, parties should not commence litigation pending the finalisation of dispute resolution processes. However, parties may need to exercise their legal rights to commence litigation to protect their position and considers courts are in the best position to manage the competing interests in these circumstances. While the Government supports dispute resolution bodies being protected from liability to the extent that protection is required, it notes the lack of examples that suggest action is necessary. Existing protections are sufficient to protect dispute resolution bodies from liability. A strengthened dispute resolution framework will improve satisfaction with outcomes and the success rate of dispute resolution processes.

The Government will not apply a levy on franchisors based on the number of complaints. This would be open to human error and manipulation, likely to be costly to collect, would be passed on to franchisees and in turn consumers and could have the unintended consequence of deterring franchisees from seeking mediation assistance.

## CHAPTER 4 – END OF TERM AGREEMENTS

### Section 4.1: Exit Arrangements

**Issue:** Franchisees are unable to exit an unviable franchise that is fair to both parties and in a way that reasonably constrains and balances financial losses.

**Principle:** Franchisees and franchisors should be able to exit in a way that is reasonable and fair to both parties.

**Action:** The Government will strengthen the ability of franchisees to exit the agreement before the end of the term and increase disclosure of end-of-term arrangements for goodwill.

The Government will:

- consult with the franchising sector to develop amendments to the Franchising Code to facilitate negotiated early exit that balance the rights and interests of franchisors and franchisees
- amend disclosure requirements to ensure end-of-term arrangements for franchisee goodwill are clearly specified and
- require franchisors to clarify a franchisee's entitlement to goodwill in the franchise agreement and include this information in the Key Disclosure Information Fact Sheet.

### Section 4.2: Termination

**Issue:** Exit arrangements, including termination rights, are unfairly weighted in favour of franchisors over franchisees.

**Principle:** Franchisees and franchisors should be able to exit in a way that is reasonable and fair to both parties.

**Action:** The Government will balance the rights of franchisors and franchisees to facilitate and negotiate an early exit from a franchise agreement.

The Government will:

- consult with the franchising sector to develop new provisions in the Franchising Code to facilitate negotiated early exit that will balance the rights and interests of franchisors and franchisees and
- amend clause 29 of the Franchising Code to require the franchisor to provide the franchisee with seven days' notice of a proposed termination in special circumstances, so that a mediator or arbitrator can assist the parties to negotiate.

The Government considers it appropriate that franchisors be able to move quickly to address concerns around fraud or public health or safety. If the franchisor is not acting appropriately in terminating under these provisions, there are other avenues for redress for franchisees.

### **Section 4.3: Restraint of Trade Clauses**

**Issue:** Franchisees can be negatively affected by restraint of trade clauses after they have exited a franchise agreement.

**Principle:** Franchisees and franchisors should be able to exit in a way that is reasonable and fair to both parties.

**Action:** The Government will improve awareness of restraint of trade clauses and balance the rights of franchisors and franchisees.

The Government will:

- increase prospective franchisees' awareness of the effect of restraint of trade clauses and clarify what constitutes a breach of clause 23 of the Franchising Code
- make technical changes to clause 23 and monitor their effectiveness and
- amend the Information Statement to warn prospective franchisees of the need to obtain advice about restraints of trade before entering the agreement.



## CHAPTER 5 – REGULATORY FRAMEWORK

### Section 5.1: Compliance and Enforcement

**Issue:** The current regulatory environment does not deter systemic poor conduct and exploitative behaviour and has entrenched the power imbalance. Penalties are inadequate and fail to provide any meaningful deterrent to large franchisors.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government will establish a more effective enforcement regime to encourage greater compliance with the Franchising Code by doubling pecuniary penalties for a breach.

The Government supports an effective enforcement regime, which is essential for ensuring compliance with the Franchising Code. A significant increase in the pecuniary penalties for a breach of the Franchising Code will encourage greater compliance with the Code.

The Government is aware that the standard of information about marketing funds being provided to franchisees by some franchisors can be a source of dispute.

The Government will

- amend the CCA to increase the maximum civil pecuniary penalty available for a breach of an industry code from 300 penalty units to 600 penalty units
- double the civil pecuniary penalty for breaches of the Franchising Code from 300 penalty units to 600 penalty units and
- amend the Franchising Code to apply penalties for breaches of clauses that relate to the use of marketing funds.

‘Churning’ and ‘burning’ have potentially significant consequences for a franchisee who purchases a business that has failed in the past or is unlikely to be viable. The ACCC has the power to address churning and burning under existing legislative provisions, such as unconscionable conduct and false or misleading representations provisions of the ACL, and the good faith and disclosure provisions of the Franchising Code.

Educational materials, including the Information Statement, will draw prospective franchisees’ attention to the risk of these practices and information in the disclosure document will assist them to recognise when a franchise system has a high turnover of sites.

The Government is aware of the benefits that greater franchisee involvement in decision-making processes can have on the franchise system. Accordingly, it has closely examined the merits of adopting a regulatory framework which might promote greater transparency, co-management and risk sharing in franchising relationships.

Regulating franchising as a general partnership co-investment model would mean a material change to the sector and would likely have unintended consequences. It would materially change the relationship between the franchisor and franchisee and require the Franchising Code to be replaced with a franchising act that would impose significantly greater regulatory burden.

The Government is satisfied with the level of industry compliance with Notices issued under section 51ADD of the CCA. The ACCC has alternative powers to collect information from franchisors if it suspects there has been a breach of the ACL or the CCA, which includes a breach of the Franchising Code.

## **Section 5.2: Franchisee Sector Representation**

**Issue:** There is currently a lack of effective representation of franchisee views in the franchising sector.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government will monitor the effectiveness of regulatory reforms on the franchising sector through collaboration across all relevant agencies and with the franchising sector.

The Government acknowledges the efforts of the Australian Association of Franchisees and the Franchise Council of Australia in promoting and increasing the representation of franchisee interests. The Government will continue to provide franchisees with opportunities to provide their views on franchising policy, regulation and legislation – including through ASBFEO, state and territory small business commissioners, the ACCC and the Department of Industry, Science, Energy and Resources.

Franchisors are best placed to decide the composition of their boards and how to ensure franchisees are involved in decision making, noting that some franchise systems have hundreds of franchisees and operate nationally and many franchisors are small businesses.

## **Section 5.3: Other Code Amendments**

### **'No Agent' and 'entire agreement' clauses**

**Issue:** Franchisors avoid liability for misrepresentations by brokers or outside the written agreement.

**Principles:** 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.

**Action:** The Government will improve franchisees' awareness about 'no agent' and 'entire agreement' clauses.

The Government will educate franchisees on the use of 'no agent' and 'entire agreement' clauses through the Information Statement, and ask the ACCC to refer to these terms in its educational material.

### **Ban on passing on legal fees**

**Issue:** Franchisors often require prospective franchisees to reimburse the costs for preparing, negotiating and executing the franchise agreement.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government will address franchisors passing on the legal costs of preparing documents to the franchisee.

The Government will prohibit (and have pecuniary penalties for) franchisors passing on the legal costs of preparing, negotiating and executing documents to the franchisee (except where it is already incorporated into a joining fee).

## **Section 5.4: Alignment with Industry Codes**

### **Ban on charging wastage and shrinking fees**

**Issue:** A ban on wastage and shrinkage payments under the Food and Grocery Code helps contain the discretion of the more powerful party and should be aligned across industry codes.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government will improve awareness of the issue of wastage and shrinkage payments by franchisees.

The Government will educate the sector in relation to wastage and shrinkage payments by franchisees and existing protections on the Franchising Code and the ACL to deal with those issues.

### **Oil Code of Conduct**

**Issue:** Inconsistency between industry codes is confusing for franchisees and franchisors.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** Upon finalisation of amendments of the Franchising Code the Government will consider amending the Oil Code of Conduct to ensure consistency where appropriate, as part of the Oil Code of Conduct mid-term review.

The Government supports consistency between industry codes where appropriate and notes a planned mid-term review of the Oil Code.

## CHAPTER 6 – OTHER ACTIONS

### Section 6.1: Unfair Contract Terms

**Issues:** Unfair contract terms laws have had limited effect on franchising.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government will work with stakeholders to develop best practice models in relation to unilateral variation of contracts.

Issues relating to unilateral variations of franchise agreements and subsidiary documents are best dealt with through the ACL and the good faith provisions of the Franchising Code. The Government will work with stakeholders to develop best practice models in relation to the process by which a franchisor makes unilateral variations to contracts and subsidiary documents.

The Government will

- improve awareness of existing unfair contract term protections and mechanisms with which franchisees can seek redress
- consider appropriate amendments to the Franchising Code relating to retrospective variation and
- amend the Information Statement to emphasise the importance of prospective franchisees understanding Code requirements before entering a franchise agreement.

The Government is taking action in relation to unfair contract terms as part of a separate reform process. The Government announced in March 2019 that it would further strengthen the protections for small businesses from unfair contract terms that it introduced in 2016. On 13 December 2019, the Department of the Treasury released a Consultation Regulation Impact Statement on enhancements to unfair contract term protections. The paper sought feedback on the application of any enhanced unfair contract term protections to franchise agreements, and closed on 27 March 2020. The Treasury received close to 80 submissions.

Any changes to the ACL will need to be considered through the Legislative and Governance Forum on Consumer Affairs.

## **Section 6.2: Other actions**

### **Actions by independent bodies**

The ACCC has confirmed it is investigating Retail Food Group in relation to various alleged breaches of the ACL and the Franchising Code. The Australian Securities and Investments Commission has concluded two investigations into Retail Food Group and confirmed that it would not be taking any enforcement action in relation to the investigations.

Rather than instruct the ACCC to conduct an inquiry into terms in franchise agreements concerning the supply of goods and services to franchisees, the Government will address issues with supplier rebates and supply arrangements through its reforms to disclosure to franchisees by franchisors, as set out above. After these reforms have had time to have an impact, it may be useful for the ACCC to conduct an inquiry.

The CCA prohibits the Government directing the ACCC in relation to its consideration of a class exemption to allow collective bargaining by franchisees.

The Government welcomes one of the ACCC's 2020 compliance and enforcement priorities being to ensure that small businesses receive the protections of the competition and consumer laws, with a particular focus on the Franchising Code.

### **Duty to provide franchisee training**

**Issue:** The Franchising Code does not place a sufficient duty on the stronger party to conduct training with respect to the Code.

**Principle:** The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency.

**Action:** The Government will encourage franchisees to undertake training and seek professional advice before entering a franchise agreement.

The Information Statement will emphasise the importance of prospective franchisees understanding Franchising Code requirements before entering a franchise agreement. The Government will encourage prospective franchisees to undertake the available free online training and/or seek disinterested professional advice on the requirements of the Code.

The Government considers these issue of wastage and shrinking payments are best dealt with through existing protections such as good faith and ACL protections relating to false or misleading representations, as well as the increased disclosure requirements.

While the Government supports pre-entry education and training, it does not consider it is the franchisor's role to ensure that prospective franchisees understand the requirements of the Franchising Code.