

# ARA SUBMISSION

## FRANCHISING CODE OF CONDUCT - EXPOSURE DRAFT

OCTOBER 2024

The Australian Retailers Association (ARA) welcomes the opportunity to comment on the remade Franchising Code of Conduct, as per the draft *Competition and Consumer (Industry Code - Franchising) Regulations 2024*.

The ARA is the oldest, largest and most diverse national retail body, representing a \$430 billion sector that employs 1.4 million Australians – making retail the largest private sector employer in the country. As Australia's peak retail body, representing more than 120,000 retail shop fronts and online stores, the ARA informs, advocates, educates, protects and unifies our independent, national and international retail community.

We represent the full spectrum of Australian retail, from our largest national and international retailers to our small and medium sized members, who make up 95% of our membership. Our members operate in all states and across all categories - from food to fashion, hairdressing to hardware, and everything in between. Within our membership are some of Australia's largest franchise operators and their networks of franchisees.

While the Code remains important to ensuring strong relationships between franchisees and franchisors, the ARA continues to advocate for a balanced approach to regulatory intervention that safeguards the interests of all stakeholders, ensures the long-term viability of the system, and keeps pace with the evolving needs of our sector.

### EXECUTIVE SUMMARY

In principle, the ARA is supportive of the overall proposition put forward by Dr Michael Schaper in the independent review into the Franchising Code of Conduct, that there are opportunities to improve the overall operation of the Code for the benefit of franchisees and franchisors. We are also broadly supportive of most recommendations made by Dr Schaper and note that the exposure draft – in most cases – accurately enlivens those recommendations.

However, the ARA holds concerns about a number of the recommendations endorsed by government, and about how some recommendations have been transposed into the draft Code, which has been remade with significant changes to drafting and structure. These concerns are outlined below.

- The prospects of a remade Code were not widely anticipated by industry. With the current Code sunsetting in April 2025, industry has insufficient time to review the remade Code and prepare for implementation.
- Protections that may be required in the automotive sector are not fit-for-purpose for general franchising in the retail and hospitality sector. Assuming all franchise systems have a similar risk profile will result in a one-size-fits-all approach that will unnecessarily increase the administrative burden on franchisors in our sector, restrict opportunities for new franchisees and negatively impact the health of the system. We are most concerned about the provisions in relation to return on investment, dispute resolution and compensation.
- In particular, it is unclear how or if a reasonable rate of return could be agreed to by the parties. The definition of reasonable is unclear, the timeframe to calculate a reasonable return is unclear, and the impact of additional investment through the term of an agreement is unclear. Without this additional clarity, disputes will most likely be decided in the courts after dispute resolution mechanism have failed, with the risk of future litigation to be covered by franchisors through potentially higher costs for franchisees.

- Seemingly innocuous changes in relation to disclosure statements, will add significant administrative burden for franchisors - creating unnecessary cost, complexity and risk to network operators without any material benefit to franchisees, with adverse consequences for the system as a whole.

To address these concerns, the ARA has made a number of recommendations including the current Code remain in operation until October 2025, and then be replaced by the remade Code. We have also supported the allocation of additional funding to the Australian Small Business and Family Enterprise Ombudsmen (ASBFEO) as endorsed by government in its response to Dr Schaper's report and recommendations.

## **ARA POSITION ON EXPOSURE DRAFT**

While the ARA broadly supports the intent of Dr Schaper's review and recommendations, we note a number of risks arising from the Government's response to Dr Schaper's review and a number of instances where the remade Code goes beyond the proposals put forward by the review and agreed to by the Government.

### **Insufficient time to review draft and prepare for implementation**

- In our submission to the Schaper review, the ARA indicated our support for clarifying and simplifying the existing Code but cautioned against wholesale changes that would impose an additional administrative burden on franchisors and franchisees.
- While the changes to the Code seek to address piecemeal amendments made to the Code over time, we are disappointed that the remade Code contains substantive changes that have been communicated less than six months before the current Code is due to sunset in April 2025.
- These timeframes provide inadequate time for industry to provide feedback on significant changes to the Code, that were not envisaged). In the short-term, providing feedback on the wholesale redrafting and restructuring of the Code requires detailed analysis and extensive engagement with key stakeholders. The process of seeking this feedback has been complicated by the limited timeframe that government has allowed for consultation.
- More importantly, these timeframes put the sector under pressure to prepare for implementation and manage transition risks. As currently written, the remade Code will require franchisors to:
  - Update all existing agreements by 01 April 2025, and create new templates for all new agreements from 01 April 2025;
  - Develop a new template from Disclosure Statements by October 2025; and
  - Provide Disclosure Statements twice over the next 12 months, in April 2025 under the current framework and in October 2025 under the remade Code.
- At a time when businesses across the retail sector, including franchisees and franchisors, are navigating challenging economic conditions and an aggressive reform agenda, remaking the Code will present initial implementation challenges for franchisees and franchisors, and create ongoing compliance issues for both parties, taking focus away from the core business of running and growing the franchise sector.
- Given the current Code is due to sunset in April 2025 and interested parties (including the ARA) made submissions to Dr Schaper in September 2023, who handed down his independent review in December 2023, these issues were entirely avoidable.
- The recommendation to retain the current Code until October 2025 will allow time for industry to fully prepare ahead of commencement of the new Code. The increase in penalties under the new Code give

more weight to this recommendation and will negate the need for multiple disclosure statements in FY25, one under the current Code and one under the new Code.

- Assuming that government proceeds with the unrealistic timeframes outlined in the draft exposure, it is imperative that transitional arrangements allow a grace period for franchisors to prepare for and implement requirements under the remade Code, without threat of non-compliance or adverse action under the new penalty regime.

### **Protections for automotive sector are not fit-for-purpose for general franchising**

- Based on the Terms of Reference published in May 2023, the intention of including the automotive sector in the Schaper review was to determine whether “protections available to automotive franchisees should be extended beyond new car dealerships, to [include] truck, motorcycle and farm machinery dealerships.”
- We also understand that the approach to concurrently review different aspects of the Code that were due to sunset within months of each other (like automotive and general franchising) was to drive process efficiencies for Treasury through the review process.
- Given this context, it is disappointing that this process has resulted in protections that may be required in the automotive sector being applied to all franchise agreements, including in the retail and hospitality sector.
- Our position is that these provisions are not fit-for-purpose for general franchising in retail and hospitality, which has a different risk profile for both franchisees and franchisors, in comparison to the automotive sector. Motor vehicle dealerships require significant capital expenditure upfront but typically have relatively short-term agreements.
- In contrast, franchise agreements in the broader franchise sector (including in retail and hospitality) commonly run between 5-10 years, with some franchise agreements also being open ended, providing greater opportunity for a franchisee to see a return on their investment.
- The transference of protections from the automotive sector into retail and hospitality franchise systems overstates the risk in our sector, creating an unsustainable safety net for a guaranteed return on investment and making franchisors more risk averse, reducing opportunities for franchisees and constraining overall growth of the sector.

### **Ensuring a reasonable return on investment is unreasonable**

- As noted, the assumption that retail and hospitality franchise systems have the same risk profile as the automotive sector will drive adverse outcomes for franchisors and franchisees alike.
- The provision that “a franchisor must not enter into a franchise agreement unless the agreement provides the franchisee with a reasonable opportunity to make a return” absolves the franchisee of all responsibility to seek their own independent financial advice and run their business in a financially responsible manner.
- It also disregards the risks that franchisors face if a business in their network fails, given the costs of selecting, training and onboarding franchisees and the brand risks associated with a failed franchisee.
- This imposition of an additional requirement on franchisors also runs counter to the stated objective of the Schaper review, to simplify operation of the Code. We also believe that this requirement will undermine the health of franchise networks in our sector, to the detriment of franchisors, franchisees, and their customers.
- It is also unclear how or if a reasonable rate of return could be agreed to by the parties. The definition of reasonable is unclear, the timeframe to calculate a reasonable return is unclear, and the impact of additional

investment through the term of an agreement is unclear. Without this additional clarity, disputes will most likely be decided in the courts after dispute resolution mechanism have failed, with the risk of future litigation to be covered by franchisors through potentially higher costs for franchisees.

- Our position is that provisions in relation to a reasonable rate of return be removed from the remade Code in-line with the Information Paper, which noted that “franchisors are not expected to provide a contractual guarantee of a profit or the success of the franchisee’s business [nor] remove the inherent risks of running a business.”

### **Compensation provisions are not fit-for-purpose**

- Just as the provisions to ensure a reasonable return on investment should not be transferred from the automotive sector into the retail and hospitality sector, nor should the requirement for the franchisor to pay compensation costs to a franchisee in their system due to early termination. The underlying assumption of a universal risk profile across all types of franchise systems, which has resulted in a disproportionate policy response, will make franchisors more risk averse and create an artificial safety net for franchisees.
- There are a range of reasons why a franchisee may choose to terminate an agreement early or not take up an option to extend beyond an initial contract term. Where these reasons are beyond the control of a franchisor, it is unreasonable to expect a franchisor to pay compensation to a franchisee who has made the decision to terminate early.
- In some instances, where a franchisee elects not to enter into a new lease agreement at the same time as they choose to terminate their franchise agreement, the franchisor could still be required to pay compensation to a franchisee, even though the business in question may no longer be a going concern or have a place of business.
- It is also unclear how compensation would be calculated, particularly in relation to stockholdings purchased by the franchisee. In comparison to a motor dealership, which most likely stocks a relatively small number of high-value finished products, retail and hospitality franchisees purchase a range of finished product in addition to stock that goes into finished product. There are also concerns about who would be required to calculate compensation and whether the franchisor would be able to on-sell product to another franchisee.
- Our position is the transference of these compensation protections from automotive to general franchising is problematic but, without further clarity, these provisions are unworkable and would likely result in disputes.

### **Each party should wear the costs of dispute resolution**

- The proposal that would compel a franchisor to pay a franchisees’ costs in settling disputes runs counter to the long-established convention that each party wears their own costs in legal matters.
- While costs should not be a barrier to dispute resolution, the prospect of franchisors having to underwrite the costs for both parties will negatively impact the health of the franchise sector, discouraging good franchisors from entering into arrangements with new partners and providing a false sense of security for franchisees who may enter into cost-free dispute resolution without a meritorious case.
- These provisions also give rise to a perverse outcome whereby a franchisee could be found to be in breach of their agreement (say, as a result of proven fraudulent conduct) but a franchisor would still be required to cover the costs for the dispute resolution process for both parties.

### **Franchisors need the power to terminate franchisees immediately**

- The ARA made a number of recommendations in our submission from October 2023, that sought to provide some limited protections for franchisors in circumstances that would trigger immediate termination; broadly in-line with the protections in the pre-2022 version of the Code. The ARA is concerned that none of these recommendations have been reflected in Dr Schapers' recommendations nor the exposure draft.
- While the remade Code outlines some additional scenarios that could trigger immediate termination, including a number of contraventions of the Fair Work Act and Migration Act, these changes are unlikely to have any practical effect. These matters will first have to go through the court system and then there needs to be a conviction or a finding by the courts on each specific matter. In practical terms, the outcome of the process will take longer than a franchisor's need and right to terminate immediately.
- Provisions in relation to voluntary abandonment, fraud and public endangerment remain unchanged and still require the franchisor to provide seven days' notice, meaning that there are currently no circumstances under which a franchisor can terminate immediately, even where there is a risk to employees, customers and the general public as a result of a franchisee's conduct.
- In other instances, where a failed business has become insolvent, allowing the franchisee to continue trading for seven days creates a compliance risk for both parties that could result in penalties to the franchisor.
- We also note that in attempting to broaden the cases in which a franchisor may terminate on seven days' notice, the current drafting removes a franchisor's ability to terminate on reasonable notice (which need not be more than 30 days) even where the conduct falls under one of the seven-day termination provisions. This is not the case in the current Code and this drafting inadvertently removes franchisor discretion to allow more time for a franchisee to remedy.
- We also believe that while the Code is being remade, the opportunity should be taken to include the so called "three strikes" rule from the Oil Code of Conduct which provides the ability of a franchisor to terminate a franchise agreement following multiple breaches of a franchise agreement.

### **Small changes to disclosure statements will have a big impact on franchisors**

- The proposed changes to annual disclosure statements look innocuous but are unworkable for franchisors, creating significant administrative burden in the form of rework and duplication, without any material benefit to franchisees.
- In the example of a franchisor that prepares statements over a three-month period immediately following the end of a financial year, this amendment means that franchisors will need to constantly update statements during this time to reflect changes when statements are being prepared, but outside the term of the 12-month period of the statement.
- The requirement that disclosure documentation include financial statements of any marketing or other cooperative fund is also unworkable, presenting significant administrative burden for franchisors and the inclusion of commercially sensitive confidential information. The current Code only requires that the disclosure document include the fund's expenses in its last financial year including the percentage spent on production, marketing, administration and other stated expenses, which we believe provides sufficient transparency into the allocation of franchisee fundings into promotional activity.
- Other new requirements, such as the inclusion of a table of contents in agreements, will also create additional administrative burden for franchisors before 01 April 2025 and then each time a new provision is added by government, or a new inclusion is agreed to between franchisee and franchisor.

- These changes will increase costs, divert management focus away from growth and increase compliance risks for franchisors, providing disincentives to franchise system operators that will undermine the health of the sector. For these reasons, we believe that the requirement for a table of contents should be removed and that a requirement for disclosure statements to be accurate at the end of the financial year satisfies the reasonable expectation of franchisees in relation to disclosure, without additional burden on franchisors.

**Licensing regime should be removed from consideration**

- While we welcome the Government’s decision to defer establishment of a licensing system, the ARA remains concerned that this recommendation from the Schaper review is still open for consideration.
- In our view, any additional layer of regulation adds unnecessary cost and complexity to the system, that will provide disincentives to franchise network operators from entering the market or growing their networks, to the detriment of franchisors, franchisees and their customers.

**Regulators should support overall health of the system, not just franchisees’ interests**

- We welcome the additional funding that will be provided to ASBFEO to provide additional support, dispute mechanisms and transparency, but these measures must be applied equally to franchisees and franchisors to support overall health of the franchise system.

**ARA RESPONSE TO REVIEW**

SCHAPER REVIEW	GOVERNMENT RESPONSE	ARA RESPONSE
<p><b>Recommendation 1</b></p> <p>The Government should ensure the provision of more comprehensive, robust statistics about the franchising sector.</p>	<p><b>Agree</b></p> <p>The Government notes the limitations of existing data collected by public and private bodies about the franchising sector.</p>	<p><b>Agree</b></p> <p>The ARA supports the availability of more data, and better data, about the franchising sector. However, data capture and management should not result in an undue administrative burden for either franchisors or franchisees.</p>
<p><b>Recommendation 2</b></p> <p>The Code should be remade, largely in its current format.</p>	<p><b>Agree</b></p> <p>The Government agrees that the Code should be remade prior to sunseting in April 2025, having regard to the changes recommended by the Review.</p>	<p><b>Do not agree</b></p> <p>The ARA supports clarification and simplification of the Code but has previously cautioned against major changes that may impose further administrative and compliance burden on both franchisors and franchisees.</p>
<p><b>Recommendation 3</b></p> <p>A clear statement of purpose should be inserted into the Code.</p>	<p><b>Agree</b></p> <p>The Government agrees that it is important for there to be a common understanding of the purpose of the Code and what it is intended to achieve for franchisees and franchisors.</p>	<p><b>Agree in principle</b></p> <p>The ARA supports the inclusion of purpose statement in the Code.</p> <p><b>Do not agree to drafting</b></p> <p>The proposed drafting about “the imbalance of power between franchisors and franchisees” assumes an imbalance in all franchise relationships. This assumption is not reflective of feedback received during the review, or by the ARA, that highlights the many positive relationships between franchisors and franchisees.</p>

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<p><b>Recommendation 4</b></p> <p>Service and repair work conducted by motor vehicle dealerships should be explicitly captured by the Code.</p>	<p><b>Agree</b></p> <p>When remaking the Code, the Government will clarify that service and repair work performed by motor vehicle dealerships is within the scope of the Code.</p>	<p><b>Not applicable</b></p> <p>The ARA does not represent motor vehicle dealerships.</p>
<p><b>Recommendation 5</b></p> <p>Reviews of the Code should be conducted in five yearly cycles in the future.</p>	<p><b>Agree</b></p> <p>The Government agrees reviews of the Code should be conducted every five years to ensure the Code is delivering on its purpose and operating efficiently and effectively.</p>	<p><b>Agree</b></p> <p>The ARA supports a review every five years, to ensure the Code is operating efficiently and effectively, provided the review also operates efficiently and effectively.</p>
<p><b>Recommendation 6</b></p> <p>Simplify and consolidate the pre-entry information given to prospective franchisees.</p>	<p><b>Agree</b></p> <p>The Government supports streamlining information available to franchisees in a way that will reduce compliance burden and cost, while maintaining important protections for franchisees.</p>	<p><b>Agree</b></p> <p>The ARA supports the Government's intent to reduce costs and complexity in the provision of pre-entry information to prospective franchisees.</p>
<p><b>Recommendation 7</b></p> <p>Franchisor obligations under the Code in relation to existing franchisees should be simplified.</p>	<p><b>Agree</b></p> <p>The Government recognises there is an opportunity to streamline disclosure requirements for franchisees, for example where a franchisee is renewing or extending an existing agreement.</p>	<p><b>Agree in principle</b></p> <p>The ARA supports any measure to streamline disclosure requirements provided any relaxation in requirements for franchisees does not present an undue commercial or operational risk to franchisors.</p>
<p><b>Recommendation 8</b></p> <p>The existing requirement that new vehicle dealership agreements must provide a reasonable opportunity to make a return on investment should be extended to all franchise agreements.</p>	<p><b>Agree</b></p> <p>The Government agrees that all franchise agreements should provide a reasonable opportunity for the franchisee to make a return on their investment.</p>	<p><b>Do not agree</b></p> <p>The ARA does not believe that protections for motor vehicle dealership franchisees are fit-for-purpose for retail and hospitality franchise systems.</p> <p>We believe that the requirement for franchisors to guarantee a reasonable rate of return will drive a more risk averse culture amongst franchisors and reduce the onus on franchisees to manage their business in a financially responsible manner.</p>
<p><b>Recommendation 9</b></p> <p>The existing requirement that new vehicle dealership agreements must include provisions for compensation for franchisees in the event of early termination should be extended to all franchise agreements.</p>	<p><b>Agree</b></p> <p>The Government agrees that all franchise agreements should include provisions for compensation in the event of early termination.</p>	<p><b>Do not agree</b></p> <p>The ARA does not believe that protections for motor vehicle dealership franchisees are fit-for-purpose for general franchising. Compensation for early termination will discourage good franchisors from entering into arrangements with new partners.</p>
<p><b>Recommendation 9</b></p> <p>The existing requirement that new vehicle dealership agreements must include provisions for compensation for franchisees in the event of early termination should be extended to all franchise agreements.</p>	<p><b>Agree</b></p> <p>The Government agrees that all franchise agreements should include provisions for compensation in the event of early termination.</p>	<p><b>Do not agree</b></p> <p>The ARA does not believe that protections for motor vehicle dealership franchisees are fit-for-purpose for general franchising. We believe that the prospect of compensation for early termination will discourage good franchisors from entering into arrangements with new partners.</p>

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<p><b>Recommendation 10</b></p> <p>Enhance the public visibility and usage of the Franchise Disclosure Register.</p>	<p><b>Agree</b></p> <p>The Government notes support for the Franchise Disclosure Register to remain a part of the regulatory environment, leveraging existing mechanisms to promote the public visibility and use of the Franchise Disclosure Register.</p>	<p><b>Agree in principle</b></p> <p>The ARA regards the Franchise Disclosure Register as instrumental in fostering transparency within the franchising system. However, we remain concerned about the administrative burden that maintaining the register places on both parties.</p> <p><b>Do not agree with drafting</b></p> <p>The proposed changes to annual disclosure statements look innocuous but create significant administrative burden for franchisors, without benefit to franchisees.</p>
<p><b>Recommendation 11</b></p> <p>Additional information should be included on the Franchise Disclosure Register relating to dispute resolution and adverse actions brought by enforcement agencies.</p>	<p><b>Agree</b></p> <p>The Government agrees there may be value in requiring the inclusion of additional information on the Franchise Disclosure Register.</p>	<p><b>Agree in principle</b></p> <p>The ARA supports any measure to increase the quality of disclosure requirements provided any changes do not create significant administrative burden for franchisors or franchisees.</p>
<p><b>Recommendation 12</b></p> <p>Franchise systems should be encouraged, through education, to consult franchisees regarding any major change to the business model during the term of the franchise agreement.</p>	<p><b>Agree</b></p> <p>The Government acknowledges there is an opportunity to support improved franchise relationships through improving the nature and access to education and guidance materials for the sector.</p>	<p><b>Agree</b></p> <p>The ARA supports the allocation of funding to ASBFEO to lead the development of best practice guidance in consultation with the sector and the ACCC.</p>
<p><b>Recommendation 13</b></p> <p>Provisions relating to termination for serious breaches should be simplified. Changes made in 2021 relating to termination under clause 29 of the Code should be revisited.</p>	<p><b>Agree</b></p> <p>The Government recognises there is an opportunity to simplify provisions relating to termination for serious breaches and the importance of doing this in a way that will not diminish protections for franchisees.</p>	<p><b>Do not agree</b></p> <p>While the ARA supports simplification of the Code, any changes should not reduce the already limited rights that a franchisor has to termination for serious breaches. In principle, the design intent to simplify the Code, provided that protections for franchisees are not diminished, should be extended to franchisors so that neither party is worse-off due to drafting changes.</p>
<p><b>Recommendation 14</b></p> <p>Best practice guidance should be provided to franchisees and franchisors regarding franchisee-initiated exit, to enhance the effectiveness of clause 26B of the Code.</p>	<p><b>Agree</b></p> <p>The Government acknowledges there is an opportunity to improve the nature of, and access to, education and guidance materials for the sector.</p>	<p><b>Agree</b></p> <p>The ARA agrees there is a need to improve general guidance to franchisees, to supplement materials that franchisors already provide to prospective franchisees.</p>
<p><b>Recommendation 15</b></p> <p>Further work should be done to limit the use of unreasonable restraints of trade in franchise agreements.</p>	<p><b>Agree</b></p> <p>The Government will direct the Competition Taskforce to consider how restraints of trade and other non-compete may be affecting franchise workers.</p>	<p><b>Noted</b></p>
<p><b>Recommendation 16</b></p> <p>A comprehensive online government resource should be created, in the nature of ASIC's MoneySmart website.</p>	<p><b>Agree in principle</b></p> <p>Education and awareness-raising are important elements of an effective regulatory regime.</p>	<p><b>Agree</b></p> <p>The ARA agrees that once a decision on licensing occurs, the Government should revisit the creation of an online resource for franchising. However, we note that any additional information provided for franchisors and franchisees, ahead of that decision, would still be beneficial.</p>



SCHAPER REVIEW	GOVERNMENT RESPONSE	ARA RESPONSE
<p><b>Recommendation 17</b></p> <p>Australian Government agencies should work with relevant sector participants to improve standards of conduct in franchising by developing best practice guidance and education.</p>	<p><b>Agree</b></p> <p>The Government agrees that small businesses need greater support to recognise and act against unfair contract terms and prospective new unfair trading practices under Australian Consumer Law.</p>	<p><b>Agree</b></p> <p>The ARA supports the allocation of funding to ASBFEO to lead the development of best practice guidance in consultation with the sector and the ACCC.</p> <p>However, the ARA supports other industry bodies in recommending thresholds for Unfair Contract Terms be removed to avoid confusion and unnecessary complexity.</p>
<p><b>Recommendation 18</b></p> <p>ASBFEO should be given additional powers to name franchisors who have not participated meaningfully in alternative dispute resolution.</p>	<p><b>Agree</b></p> <p>The Government recognises there are benefits in allowing for the naming of franchisors who have not participated meaningfully in dispute resolution, such as encouraging active participation.</p>	<p><b>Agree in principle</b></p> <p>The ARA supports any measure to improve transparency. However, the power to publicly name franchisors that fail to participate meaningfully in alternative dispute resolution should also be applied to franchisees that fail to participate meaningfully in alternative dispute resolution, to ensure equity.</p>
<p><b>Recommendation 19</b></p> <p>The Australian Government should assist franchisees to access low-cost legal advice on prospects prior to formal ADR.</p>	<p><b>Agree</b></p> <p>Being able to obtain low-cost assistance for resolving franchising disputes is important for supporting access to justice for franchisees.</p>	<p><b>Agree</b></p> <p>The ARA supports the allocation of funding to ASBFEO to provide franchisees and franchisors access to low-cost legal advice on alternative dispute resolution prospects. If additional recourse is required, the Code should direct both user-pays appeal process through the courts system.</p>
<p><b>Recommendation 20</b></p> <p>The Australian Government should consider an appropriate role for franchise interests when implementing its commitment to a designated complaints function for the ACCC.</p>	<p><b>Agree</b></p> <p>The Government has progressed its commitment to establish the designated complaints function within the ACCC.</p>	<p><b>Noted</b></p>
<p><b>Recommendation 21</b></p> <p>Franchisees should be able to seek a 'no adverse costs' order when bringing a matter against a franchisor for breach of the Code or the Australian Consumer Law.</p>	<p><b>Agree in principle</b></p> <p>The Government supports improving access to justice for franchisees and low-cost means to resolve franchising disputes. However, the Government notes that 'no adverse costs' orders are not common in Commonwealth legislation.</p>	<p><b>Do not agree</b></p> <p>The ARA does not support 'no adverse cost orders' for franchising matters.</p>
<p><b>Recommendation 22</b></p> <p>The scope of penalties under the Code and associated investigation powers and infringement notice regime in Part IVB of the Competition and Consumer Act 2010 (CCA) should be increased.</p>	<p><b>Agree</b></p> <p>The Government will increase the scope of penalties to all substantive obligations placed on parties under the Code and set those penalties at 600 penalty units.</p>	<p><b>Do not agree</b></p> <p>The ARA does not support the increase in penalties for either party, provided that a franchisor has the right to seek immediate termination for fraudulent conduct, public endangerment or contravention of workplace or migration laws.</p>
<p><b>Recommendation 23</b></p> <p>The Australian Government should investigate the feasibility of introducing a licensing regime to better regulate most aspects of the franchisee-franchisor relationship.</p>	<p><b>Agree</b></p> <p>The Government will establish a Taskforce in Treasury to conduct a comprehensive cost benefit analysis of introducing a licensing regime for the franchising sector.</p>	<p><b>Noted</b></p> <p>While the ARA welcomes the decision to defer establishment of a licensing system, the ARA remains concerned that this recommendation from the Schaper review is still open for consideration.</p>

## ARA RECOMMENDATIONS

To address these concerns, the ARA makes the following recommendations in relation to the remade Code.

1. Given the remade Code includes significant changes to language and structure, that the current Code remains in operation until October 2025 and then be replaced by the remade Code.
2. That the Purpose of Code [S2] be amended to replace “the” imbalances” with “any imbalances” as in *“to address **any imbalances** of power between franchisors and franchisees and prospective franchisees;”*
3. That the increase in penalties for both franchisors and franchisees be removed from the remade Code.
4. That the remade Code provides a mechanism for franchisors to terminate immediately, not after seven days’ notice, if a franchisee has engaged in fraudulent activity, if a franchisee is endangering the public or if there is sufficient evidence to establish a breach of provisions in Section 54.
5. That the remade Code reinstates a franchisor’s right to terminate on reasonable notice (which need not be more than 30 days) even where the conduct falls under one of the seven-day termination provisions.
6. That provisions in relation to a reasonable rate of return be removed from the remade Code.
7. That franchisees be required to seek their own legal and financial advice at their own cost before entering into a franchisee agreement, and to provide evidence of such engagement to the franchisor.
8. That compensation provisions for early termination be removed from the remade Code for general franchising. In instances where compensation would have been payable under the current Code, then greater clarity in relation to the calculation of compensation would be beneficial to avoid ambiguity that will need to be addressed by costly court proceedings in the future.
9. That the new provisions in relation to dispute resolution be removed from the remade Code, in favour of the existing arrangements that franchisors have in place to manage disputes with franchisees. If additional recourse is required, the Code should direct both parties to a cost-free process managed by ASBFEO and then a user-pays appeal process through the courts system.
10. That provisions in relation to Disclosure Statements be clarified, so as to ensure that the position of the franchisor is explicitly noted in the Code as the end of the last financial year.
11. That the remade Code should require ASBFEO to disclose all refusals by franchisors - and franchisees - to engage in dispute resolution or mediation.

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Thank you again for the opportunity to comment on the remade Franchising Code of Conduct. Any queries in relation to this submission can be directed to our policy team at [policy@retail.org.au](mailto:policy@retail.org.au).