

# FRANCHISE

## Australia



# Franchise

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Quick reference guide enabling side-by-side comparison of local insights, including franchise market overview; key considerations when forming and operating a franchise; offer and sale of franchises; franchise contracts and the franchisor/franchisee relationship; and recent trends.

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## MARKET OVERVIEW

### Franchising in the market

How widespread is franchising in your jurisdiction? In which sectors is franchising common? Are there any economic or regulatory issues in the market that are more or less hospitable to franchising or make it economically viable in your jurisdiction?

Franchising is a well-established and credible business method in Australia, with franchise systems operating in most industry sectors. According to the Franchise Council of Australia (FCA), there are 1,344 franchise systems in Australia, with an estimated 98,000 units turning over A\$184 billion and employing more than 598,000 people. The most recent industry survey in 2016 found that 26 per cent of franchisors were in non-food retail, 19 per cent in accommodation and food services, 15 per cent in business services (including travel agencies, office services, domestic and commercial cleaning, gardening services and lawn mowing) and 10 per cent in personal and other services (including pet grooming, automotive repairs and information technology services). Ninety-two per cent of the franchise systems reported that they were Australian-based operations.

Australia has a robust economy that has continued to perform strongly during the covid-19 pandemic. The impact of the pandemic has been limited by prompt, effective lockdown measures and a well-targeted government support and stimulus package. The main implication for foreign franchise systems was the restriction on travel to or from Australia. The Federal government also reviewed any foreign investment in Australia very closely during this period. Australia has subsequently opened up slowly to international travel in the first half of 2022.

The Australian market is relatively mature and highly competitive. Although many foreign systems have successfully entered the market, there have also been a substantial number of failures. The biggest challenge in a mature competitive market is achieving critical mass, which in turn can be dependent upon the level of commitment of the brand to the market and the quality and resources of any chosen local partner. For retail franchise systems, access to prime sites can also be challenging, although much retail is conducted at major shopping malls that are keen to provide opportunities for new concepts.

More broadly, foreign franchise systems entering the Australian market typically find the market to be a high-cost market. Labour rates are high by international standards, with a high minimum wage and penalty rates for out-of-hours work that often surprise foreign franchise systems. Real estate can be difficult to secure, with property rentals and energy costs high by international standards, particularly in major shopping centres. Foreign franchise systems seeking to enter the market should carefully review their cost structures as part of their market due diligence.

Australia has a sophisticated legal framework that includes specific regulation of franchising, foreign investment, and competition and consumer matters. There are significant compliance obligations that affect the way activities are conducted, but none of these laws are likely to materially impact the viability of franchising activities in Australia.

*Law stated - 16 May 2022*

### Associations

Are there any national or local franchise associations? What is their role in franchising, including any impact on laws or regulations? Are there any rules of conduct or membership requirements?

The Franchise Council of Australia (FCA) is the peak industry body, which acts as a trade association to represent the franchise sector in dealings with government. The FCA also provides a range of educational publications and programmes, franchise promotional activities, networking events, and member services for franchisors, franchisees and suppliers. The FCA has a set of member standards and guidelines that apply to FCA members, but they do not

have the force of law. The Franchising Code of Conduct and the Australian Consumer Law are the laws most relevant to franchising. They are federal laws that apply uniformly throughout Australia.

The Federal Chamber of Automotive Industries is the peak industry body for the automotive sector. There are also various bodies representing automotive franchisees or dealers.

*Law stated - 16 May 2022*

## **BUSINESS OVERVIEW**

### **Types of vehicle**

What forms of business entities are relevant to the typical franchisor?

Franchisors will typically trade as a corporate entity formed under the Corporations Act 2001 (Cth). Most franchisors are private companies, but there are some listed or unlisted public companies. However, there are no restrictions on using other vehicles such as a joint venture, partnership or trust to establish a franchise system.

Typically, a corporate franchisor entity will be part of a consolidated group, with other entities potentially holding intellectual property or real estate, operating company outlets or supplying goods or services to the franchise network.

*Law stated - 16 May 2022*

### **Regulation of business formation**

What laws and agencies govern the formation of business entities?

The Corporations Act 2001 (Cth) is a federal law regulating the formation of corporations, and the ongoing conduct of corporations and directors. The Australian Securities and Investment Commission (ASIC) oversees this legislation. This is the primary regulatory framework relevant to the formation of business entities.

Partnership structures are under the jurisdiction of state and territory legislation, as are business name registration laws that can impact the business conducted by franchisees. Similarly, trust structures are subject to the supreme courts of each state and territory through the equity divisions.

*Law stated - 16 May 2022*

### **Requirements for forming a business**

Provide an overview of the requirements for forming and maintaining a business entity.

The first step in forming a business entity is to decide on an appropriate business structure. The most common types of structure are company, trust, joint venture and partnership. Tax considerations play an important role in determining the choice of entity for commercialisation of a franchise system. A company structure must be registered with ASIC.

Before applying to register a company with ASIC, written consent must be received from individuals who have agreed to be a director, secretary or shareholder. Each director must hold a director identification number, before being appointed as a director of the company. The director identification number must be obtained from the Australian Business Registry Services (ABRS). This requires the director to have their personal identification documents verified.

Every company must have at least one shareholder. All companies conducting business in Australia are required to have at least one Australian-resident director. A registered office and principal place of business must also be nominated.

Once ASIC has processed the application, the entity will be given an Australian company number, which can be used to apply for an Australian business number (ABN). An ABN is necessary for trading purposes.

Each company will be required to complete annual compliance requirements, for example, passing a solvency resolution, filing financial reports (in some cases) and paying an annual review fee.

ASIC also requires companies to keep written financial records, for a minimum of seven years, that:

- record and explain their financial position and performance; and
- enable accurate financial statements to be prepared and audited.

*Law stated - 16 May 2022*

## Restrictions on foreign investors

### What restrictions apply to foreign business entities and foreign investment?

Generally, foreign business entities can transact as such with Australian entities. The decision to establish a business presence in Australia must be carefully considered, as there are significant consequences.

A foreign company wishing to establish a business presence in Australia must either register itself with ASIC as doing business in Australia, or establish or acquire an Australian subsidiary company.

A foreign entity conducting business in Australia may also be required to register with the Australian Tax Office (ATO) and pay taxes in Australia. This depends on whether there are any applicable tax treaties, and the nature and scale of the business. The ATO takes an active role in monitoring profit shifting between jurisdictions.

Foreign investment in Australia is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) and its related regulations. The legislation is supported by Australia's foreign investment policy and guidance notes. Certain proposals by foreign persons to invest in Australia require prior notification to and the approval of the treasurer of Australia. The treasurer is advised by the Foreign Investments Review Board (FIRB). However, the legislation only applies to particular transactions and monetary thresholds apply in most cases. Special rules apply to certain transactions, including transactions involving land-rich entities, national security businesses, government investors and others. Some transactions are not subject to a monetary threshold (for example, transactions involving investment in national security business, which is broadly defined).

Although investments in industries typically relevant to franchise systems (such as retail, services and food) do not usually require notification as they are likely to be below monetary thresholds, there were temporary changes introduced on 29 March 2020 as a result of the covid-19 pandemic that impacted all foreign investments by reducing the monetary thresholds on all investments to A\$0. These temporary measures were subsequently removed, although a broad prohibition on investments that may raise national security concerns mean that these investments still have an A\$0 threshold. Therefore, each transaction should be considered on a case-by-case basis to determine whether FIRB approval is required.

*Law stated - 16 May 2022*

## Taxation

### What aspects of the tax system are relevant to franchisors? How are foreign businesses and individuals taxed?

Australia has a sophisticated federal taxation system. Net income and capital gains are subject to taxation, and a comprehensive goods and services tax (conceptually akin to value added tax) is imposed on most transactions. Taxes on payroll and property transactions are levied at a state level, and local government levies apply to owned properties to cover utility services. The framework is complex, and specific taxation advice should be obtained in relation to its structure and operating arrangements. Different arrangements apply depending on whether the franchisor is resident in Australia for tax purposes or a foreign entity.

Typically, all amounts derived by an Australian resident franchisor – whether for initial fees, goodwill on any sale of business or ongoing royalties or other items – is received as income. From the franchisee's perspective, the initial franchise fee is likely to be considered a capital payment and is not eligible for deduction from the franchisee's income. However, this fee is relevant as part of the cost base when calculating any future taxable capital gain or loss. Royalties and ongoing fees are tax deductible for a franchisee. Payments made by a franchisee to the franchisor (such as initial franchise fees, franchise renewal fees, franchise service fees or royalties, advertising fees, transfer fees and training fees) generally incur goods and services tax (GST), which is 10 per cent as at May 2021. A franchisee that is GST-registered can claim a credit for the GST paid from the ATO.

Where the franchisor is incorporated or considered to be a resident of Australia (applicable to both corporations and individuals), it will be taxed in Australia in accordance with Australian law. If the franchisor is not a resident of Australia, a withholding tax regime applies to payments made from Australia to the franchisor. The rate of the withholding payment depends on the nature of the payment and other factors, including whether the franchisor resides in a country with which Australia has a double taxation agreement. The Australian resident franchisee or master franchisee is generally required to withhold a flat rate of 30 per cent from the gross amount of a royalty payment and 10 per cent from the gross amount of an interest payment. These amounts are paid to the ATO and are included on the franchisee's activity statement. A non-resident franchisor that is subject to a double taxation agreement may be eligible for a reduction of these rates if the appropriate amount has been reported, withheld and paid to the ATO. It is necessary to consider whether the GST is payable in relation to franchisee payments to a foreign franchisor, as in certain circumstances it may not be.

Terminating or transferring a franchise agreement may have tax implications for the franchisee, as may any amount received in settlement of a dispute.

*Law stated - 16 May 2022*

### **Labour and employment**

#### **Are there any relevant labour and employment considerations for typical franchisors?**

Australia has comprehensive labour laws covering workplace health and safety, workers compensation, sick leave, long service, and compulsory pension contributions. Labour rates are high by international standards, with high minimum wages and penalty rates for out-of-hours work that often surprise foreign franchise systems.

Although many jurisdictions have contemplated extending the responsibility of franchisors to the workplace law obligations of their franchisees, Australia has been the first to legislate such an obligation. Section 558B was introduced to the Fair Work Act 2009 by the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 to make a responsible franchisor entity liable for workplace law breaches of a franchisee in certain circumstances.

The legislation provides that a responsible franchisor entity is liable for certain contraventions of the Fair Work Act 2009 by an employer that is a franchisee entity where the franchisor or an officer of the franchisor, 'knew or could reasonably be expected to have known that the contravention by the franchisee entity would occur, or a contravention of the same or similar character was likely to occur'. Section 558(3) and (4) of the amendment set out a defence for a person (which would include a responsible franchisor or an individual that aids and abets a breach) that takes reasonable steps to prevent the contravention.

The legislation links back to the much broader Corporations Act 2001 (Cth) definition of a franchise, rather than that contained in the Franchising Code of Conduct (the Code). Section 9 of the Corporations Act 2001 (Cth) defines a franchise as:

an arrangement under which a person earns profits or income by exploiting a right, conferred by the owner of a right, to use a trade mark or design or other intellectual property or the goodwill attached to it in connection with the supply of goods or services. An arrangement is not a franchise if the person engages the owner of the right, or an associate of the owner, to exploit the right on the person's behalf.

Many licence and distribution arrangements are likely to fall within the ambit of the legislation.

Franchise systems looking to do business in Australia must obtain specific advice on the extent of their potential liability and the steps they must take to ensure they can either escape the ambit of the legislation or satisfy the test of taking reasonable steps to prevent contraventions.

Franchise systems where the franchisee derives income largely from the individual franchisee's personal exertion must be watchful of sham contractor laws or franchisees being deemed employees. However, this risk is manageable, including by ensuring franchisees are incorporated entities rather than individuals.

*Law stated - 16 May 2022*

## Intellectual property

### How are trademarks and other intellectual property and know-how protected?

Trademarks and other intellectual property are protected through registration with IP Australia. Australia is a first-to-register rather than first-to-use jurisdiction, so foreign franchise systems must focus on trademark protection well in advance of market entry. There are several classes (ie, goods or services) to which registration can attach. The protection afforded by initial registration is 10 years with the ability to renew on application.

Trademark registration in Australia also facilitates applications for registration in most overseas jurisdictions if they are party to the relevant treaties. The list of countries in which a priority registration can be claimed is determined by the signatories to the Paris Convention of 1979, as amended, with signatory countries listed in the regulations to the Trade Marks Act 1995 (Cth).

The phrase 'trade secret' refers to the type of confidential information associated with commercial purposes, defined as 'a device, or technique used in a particular trade or occupation and giving an advantage not generally known'. Trade secrets are protected without registration and there are statutory acknowledgements, such as prohibitions on the improper use by employees of this information, under the Corporations Act 2001 (Cth).

Trade secrets are also protected by equity and careful contractual drafting in franchise agreements. Remedies against breach are founded on allegations of breach of confidentiality. It must be established that the information has the necessary quality of confidence and was conveyed in circumstances where the confidence obligation was evident, and that there was unauthorised use causing detriment. There is also a requirement that the trade secret has a nexus to a trade or occupation.

Copyright protection applies to documents and other works, and vests in the author by virtue of the Copyright Act 1968 (Cth) without the need for registration. There is also federal legislation to protect patents and designs.

*Law stated - 16 May 2022*

## Real estate

What are the relevant aspects of the real estate market and real estate law? What is the practice of real estate ownership versus leasing?

The vast majority of franchised businesses operate from leased premises, with exceptions only common in the petroleum, automotive and hotel sectors. Major brands often take the head lease of premises, then grant an occupancy right to the franchisee. Smaller franchise systems may permit the franchisee to hold the lease, preferring to avoid the liability to the owner of the premises should the franchised business fail. Shopping mall proprietors often insist on the brand owner holding the head lease. Hybrid arrangements, wherein the franchisee holds the lease but the brand owner has contractual step-in rights if the franchisee fails, are also possible, particularly in the restaurant and casual dining sector.

Property law is state-based rather than federal and premises are often also subject to planning laws enacted by local government. Franchise systems seeking to occupy premises in major shopping malls should consider obtaining expert assistance, as rentals can be a high percentage of turnover and lease terms can be one-sided and onerous. Food businesses are particularly vulnerable to the continued introduction of new competitors. There is usually a significant information imbalance between mall owners and tenants.

*Law stated - 16 May 2022*

## Competition law

What aspects of competition law are relevant to the typical franchisor in your jurisdiction? How is competition law enforced in the franchising sector?

The Competition and Consumer Act (CCA) is a federal law that regulates business conduct in Australia, promoting fair and effective competition and consumer protection. The CCA is administered by the Australian Competition and Consumer Commission (ACCC), which takes an assertive and public role in enforcement. This role is in addition to the supervision of compliance with the Code. The ACCC may act at any time against a franchisor for non-compliance with the Code. The ACCC is also the first point of contact for reporting serious franchisor non-compliance.

The CCA and the Australian Consumer Law (ACL), which is incorporated in Schedule 2 of the CCA, makes certain conduct (including misleading or deceptive representations, unconscionable conduct, third line forcing and resale price maintenance) illegal. Disclosing illegal conduct in the disclosure document does not prevent that conduct from being a breach of the CCA. The important sections of the CCA and the ACL that must be kept in mind are the following.

- Section 18 of the ACL prohibits misleading or deceptive conduct. Section 4 of the CCA augments section 18 by providing that a person making any statement as to a future event (such as a projection of turnover) must be able to prove they had reasonable grounds for making it.
- Section 22 of the ACL provides that a corporation must not, in trade or commerce, engage in conduct that is, in all circumstances, 'unconscionable'.
- Chapters 2, 3 and 4 of the CCA, which contain a whole range of prohibitions against restrictive trade practices such as price fixing, misuse of market power, resale price maintenance and covenants affecting competition.

Contravention of the provisions of the CCA can result in severe penalties. In the case of breaches of some provisions in Chapters 2, 3 and 4, including the price-fixing provisions, these penalties can include fines up to A\$500,000 for individuals. For corporations, fines can be up to the greater of:

- A\$10 million;
- three times the value of the benefit attributable to the breach (when that value can be ascertained); or
- 10 per cent of the corporation's annual turnover when the value of the benefit attributable to the breach cannot be ascertained.

However, it is possible for certain conduct to be authorised or enforcement action avoided by using the ACCC's authorisation or notification processes. These processes can be helpful in tied-supply situations or where there is a technical breach of the CCA, but the conduct has little commercial impact or there is a public benefit associated with the conduct.

The ACCC has a range of enforcement options open to it. When choosing which option to take, the ACCC assesses how blatant the breach is, the public detriment, the educative effect and if it must create a new law or a new market issue. When assessing appropriate enforcement action for breach of the Code, the ACCC may also investigate, among other things, whether franchisors have effective compliance systems in place to prevent further problems in relation to compliance with the Code and the CCA.

The ACL was amended in 2015 by legislation that prohibits unfair terms in standard form small business contracts (see the Treasury Legislation Amendment (Unfair Contract Terms) Act 2015), in effect as of 12 November 2016. As a small business is defined as a business with fewer than 20 employees and a typical franchise agreement exhibits many of the characteristics of a standard form contract, the legislation has significant potential application to franchise agreements. Foreign and domestic franchise systems must carefully consider the application of the unfair contract provisions of the ACL to their franchise agreement and other documentation.

If the court declares a provision of a contract unfair, that provision will be void. The contract does, however, continue to bind the parties if the contract can operate without the unfair term. There are legislative amendments currently under consideration that would introduce penalties for the inclusion of an unfair contract term into a standard form small business contract. If enacted, these amendments are likely to be a game-changer for businesses, as it will no longer be possible to take a 'wait and see' approach as to whether a court determines a clause to be an unfair term.

*Law stated - 16 May 2022*

## OFFER AND SALE OF FRANCHISES

### Legal definition

What is the legal definition of a franchise?

The application of the Franchising Code of Conduct (the Code) is largely determined by the definition of a franchise agreement, which is broadly described as an agreement that takes the form, in whole or in part, of a written, oral or implied agreement. The Code defines a franchise agreement in clause 5(1), including in its definition any form of franchise, master franchise, licence or distribution agreement. The essence of the definition is as follows:

The definition has two requirements:

- that 'the operation of the business will be substantially or materially associated with a trade mark, advertising or commercial symbol owned, used or licensed by the franchisor or an associate of the franchisor; or specified by the franchisor or an associate of the franchisor'; and
- that 'before starting the business or continuing the business the franchisee must pay or agree to pay to the

franchisor or an associate of the franchisor an amount, including for example an initial capital investment fee, a payment for goods and services or a fee based on a percentage of gross or net turnover whether or not called a royalty or franchise service fee, or a training fee or training school fee'.

The only exemption to the application of the Code is a fractional franchise exemption where sales under the franchise are no more than 20 per cent of the franchisee's gross turnover. All motor vehicle dealerships (being a business of buying, selling, exchanging or leasing any form of motor vehicle, however structured) are deemed to be franchise agreements. There are additional provisions in the Code, mainly in relation to end of term arrangements and capital expenditure, that only apply to automotive franchise agreements. Oil industry franchise agreements are subject to different, but similar, legislation known as the Oil Code of Conduct.

Following the introduction of amendments to the Code in April 2022, franchisors are now required to register with the Franchise Disclosure Registry. This must be done by November 2022, when the registry will become live for all franchisors' profiles and documents to be publicly searchable.

There is no state regulation of franchising in Australia other than the legislation in South Australia that relates to the resolution of disputes in franchise agreements connected to South Australia. Franchisors are also able to conduct meetings and generally undertake preliminary marketing and prospecting in Australia, but may not enter into a binding agreement or take any non-refundable amount from a prospective franchisee or master franchisee without complying with the Code.

*Law stated - 16 May 2022*

## Laws and agencies

What laws and government agencies regulate the offer and sale of franchises?

The Code and the prohibitions on misleading or deceptive conduct contained in the Australian Consumer Law (ACL) regulate the offer and sale of franchises.

*Law stated - 16 May 2022*

## Principal requirements

What are the principal requirements governing the offer and sale of franchises under the relevant laws?

The Code includes comprehensive disclosure and franchise relationship provisions. It is supplemented by prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms in standard form small business contracts contained in the ACL. Amendments to the Code that took effect on 1 July 2021 also extend the 14-day cooling-off period to franchisee-to-franchisee sales.

*Law stated - 16 May 2022*

## Franchisor eligibility

Must franchisors satisfy any eligibility requirements in order to offer franchises? Are there any related practical issues or guidelines that franchisors should consider before offering franchises?

There are no eligibility requirements for franchisors before they can offer franchises.

From November 2022, most franchisors will be required to register and provide certain information about their franchise to the Franchise Disclosure Register. This includes the name, Australian business number, registered address, and contact details of the franchisor. Certain other information may be prescribed for inclusion in the franchisor's registration. This information will need to be updated annually. Franchisors may also elect to upload their franchise agreement, disclosure document and key facts sheet. These documents must not include personal information.

The comprehensive Code pre-contractual disclosure process and the prohibition on engaging in misleading or deceptive conduct contained in the ACL place some natural barriers to entry in a competitive market, particularly where franchisees follow the Code's process and obtain legal and business advice prior to signing the franchise agreement.

*Law stated - 16 May 2022*

### **Franchisee and supplier selection**

Are there any legal restrictions or requirements relating to the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers? What practical considerations are relevant when selecting franchisees and suppliers?

There are no legal restrictions or requirements in relation to the manner in which a franchisor recruits franchisees or selects its own or its franchisees' suppliers. Supply arrangements must be disclosed in the disclosure document, with amendments to the Code in effect as of 1 July 2021 significantly expanding disclosure obligations in relation to rebates and financial benefits. The general prohibition on unconscionable conduct contained in the ACL can apply if the mandated supply chain arrangements are unnecessarily onerous or place the franchisee at a substantial competitive disadvantage.

*Law stated - 16 May 2022*

### **Pre-contractual disclosure – procedures and formalities**

What procedures and formalities for pre-contractual disclosure are required or advised in your jurisdiction? How often must the disclosures be updated?

There are two pre-contractual disclosure obligations under the Code in Australia. Franchisors must provide an information statement (essentially a brochure on the advantages and disadvantages of franchising) in the prescribed form to a prospective franchisee at the earliest opportunity after the prospect formally expresses interest in a franchise (which must not be later than seven days). The intent of this disclosure obligation is to highlight the potential risks of franchising and emphasise the importance of due diligence to prospective franchisees well before they decide to enter into the franchise agreement. The information statement must be in the form prescribed, which is available on the Australian Competition and Consumer Commission's (ACCC's) website.

In addition, franchisors are required to produce a disclosure document that strictly complies in form and content with the terms of Annexure 1 (full form) of the Code. The disclosure document is required to be 'in the form and the order and under the numbering' and 'under the titles' set out in the annexures to the Code. Although some of the information contained in existing disclosure materials assists in the preparation of the Australian document, foreign systems must instruct local counsel to undertake a comprehensive redraft to meet the format requirements of the Code. Supplementing the general disclosure obligation is a Code requirement to provide a key facts sheet in the prescribed form. The key facts sheet is, in essence, a summary of important facts contained in the disclosure document. The prescribed information statement and the form of the key facts sheet are now accessible on the ACCC's website.

Certain modifications to the franchise agreement must be made concerning releases of liability, franchisee freedom of association, cooling-off periods, assignment and termination. A franchisor is prohibited from passing on to franchisees

a franchisor's legal costs, subject to very limited exceptions. There are also provisions limiting termination, providing cooling-off protections and dealing with dispute resolution, including mechanisms for group franchise dispute resolution.

A general review of documentation for Competition and Consumer Act compliance is also highly desirable, as the terms and language of a franchise agreement are relevant in assessing conduct such as unconscionable conduct. Plain-English drafting is highly desirable.

A franchisor must, under the Code, give a disclosure document and a key facts sheet to a prospective franchisee or a franchisee proposing to renew or extend a franchise. A franchisor must give a copy of the Code and a disclosure document to a prospective franchisee at least 14 days before the prospective franchisee:

- enters into a franchise agreement;
- makes an agreement to enter into a franchise agreement; or
- pays non-refundable money to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement.

The franchisor must also provide at this time a copy of the franchise agreement 'in the form in which it is to be executed', which means that the document must contain all commercial terms and be essentially ready to be signed. Failure to comply with this requirement can invalidate disclosure and is a pitfall for foreign franchisors that are used to providing more of a template franchise agreement with the disclosure material.

A foreign franchisor entering into a master franchise agreement with a master franchisee that has the right to grant unit franchises and sub-franchises in Australia must also provide to the master franchisee a disclosure document relating to the terms of the master franchise agreement. As of 1 January 2015, a franchisor is required to give a disclosure document to a master franchisee, but the franchisor is not required to give a disclosure document to a sub-franchisee of the master franchisee. These disclosure requirements can create potential liability for foreign franchisors, so it is important that legal advice from an experienced franchise attorney is obtained regarding the form of these documents before entering into the Australian market.

Franchisors are required to update their disclosure document annually within four months of the end of their financial year. They are also required to provide a copy of their current disclosure document to an existing franchisee within 14 days of written request. However, there are some exemptions from updating for franchisors that have granted no more than one franchise agreement in the year and do not intend to grant a franchise in the following year.

The Code contains somewhat unusual provisions in relation to legal and business advice, and to cooling-off periods:

- A franchisor must not, by virtue of the Code, enter into, renew or extend a franchise agreement unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.
- Before a franchise agreement is made, the franchisor must have received from the prospective franchisee signed statements that the prospective franchisee has been given advice about the proposed franchise business from at least one independent legal adviser, business adviser or accountant, or has been told that this advice should be sought but has decided not to seek it.
- A franchisee may terminate a franchise agreement without cause within 14 days after entering into the agreement or paying any money under the agreement, whichever comes first. If the franchisee terminates such an agreement, the franchisor must, within 14 days, repay all money paid by the franchisee to the franchisor under the agreement less reasonable expenses, provided that those expenses have been disclosed in the disclosure document provided to the franchisee.

## Pre-contractual disclosure – content

### What information is the disclosure document required or advised to contain?

The disclosure requirements are complex and highly prescriptive. The disclosure document must be in the prescribed form and layout and under the headings prescribed in the Code.

Comprehensive disclosure is required for:

- franchisor details;
- business experience;
- litigation history;
- existing franchisees (which must be listed);
- intellectual property;
- site or territory information;
- supply of goods or services;
- establishment or operating costs;
- the operation of marketing funds;
- financing;
- end of term arrangements; and
- financial details.

Although a franchisor's current foreign disclosure document's content is useful, it cannot be used for compliance as significant additional information is typically required in Australia.

## Pre-sale disclosure to sub-franchisees

In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the sub-franchisor?

Disclosure to sub-franchisees is typically undertaken by the sub-franchisor, as it is the 'franchisor' for the purposes of a franchise agreement in the Code. Joint disclosure may be required if the franchisor is also a party to the franchise agreement, so this should be avoided if possible.

Item 7 in the disclosure document to be provided by the sub-franchisor to the sub-franchisee includes specific disclosure obligations concerning the franchisor in relation to business details, senior employees and franchise agreement termination. It also includes key provisions of the franchise agreement between the franchisor and the sub-franchisor, such as the agreement's term, territory, renewal, extension, scope, transfer, termination and consequences of termination.

Item 8 in the disclosure document requires information to be provided in relation to ownership of intellectual property and details of any agreement that significantly affects the sub-franchisor's right to use or give others the right to use

the intellectual property. This is likely to require some disclosure in relation to the agreement between the franchisor and the sub-franchisor.

*Law stated - 16 May 2022*

## **Due diligence**

**What due diligence should both the franchisor and the franchisee undertake before entering a franchise relationship?**

The Code provides a strong framework for franchisee due diligence, combining preliminary disclosure through the information statement with the more common formal pre-contractual disclosure process. The information statement broadly explains franchising, the franchise relationship and the risks of franchising, and outlines how to undertake due diligence, obtain advice, read documents, understand the franchisee's rights and obtain further information. The disclosure document contains extensive information, and is provided as part of a process that allows 14 days between provision and signing to facilitate obtaining legal and business advice. Not only is obtaining advice strongly encouraged, but franchisees must certify as part of the pre-contractual process that they have obtained advice or have been told to obtain advice but have elected not to do so. A list of franchisees' and former franchisees' contact details is provided as part of the disclosure document, which is an excellent reference point. Franchisees should speak to several existing and former franchisees, read documentation carefully, and obtain legal and business advice.

Franchisors should conduct their own due diligence of prospective franchisees, particularly in relation to financial resources, business acumen and customer service skills.

*Law stated - 16 May 2022*

## **Failure to disclose – enforcement and remedies**

**What actions may franchisees or any relevant government agencies take in response to a franchisor's failure to make required disclosures? What legal remedies are available? What penalties may apply?**

In situations of material and substantive non-disclosure by a franchisor, a franchisee can take legal action via civil proceedings to obtain various common law and equitable remedies, including damages, rescission, injunctions and other orders a court may deem fit. Damages are typically calculated by reference to the actual damage suffered by the franchisee and can be awarded in addition to other remedies such as rescission, amendment or termination of the franchise agreement, or other order a court may see fit.

In addition, the ACCC takes an active enforcement role. The ACCC has the power to investigate and seek penalties for contraventions of the Code. The ACCC's use of enforcement tools varies on a case-by-case basis depending on the circumstances of the contravention. Where there are reasonable grounds for believing a contravention of a penalty provision has occurred, the ACCC can issue an infringement notice of A\$11,100 to a franchisor without the need to apply to any court. The ACCC can also enforce the Code by court proceedings with the power to seek a civil penalty of A \$133,200 for each contravention. Additionally, the ACCC can obtain orders against the franchisor that include compensation and damages, disqualification of directors, and injunctions. The ACCC also has the power to accept formal undertakings by which a franchisor can commit to specific remedies for the breach.

Some provisions of the Code contain greater financial penalties. These provisions relate to:

- disclosure of materially relevant facts;
- restricting the freedom of association of franchisees or prospective franchisees; and

- certain terms of new vehicle dealership agreements.

For companies, the maximum penalty per contravention will be the greater of:

- A\$10 million;
- three times the value of the benefit received; or
- 10 per cent of annual turnover in the preceding 12 months, if a court cannot determine the benefit obtained from the offence.

For individuals, the maximum penalty per contravention will be A\$500,000.

Often action in relation to disclosure breaches is coupled with claims for misleading or deceptive conduct, or unconscionable conduct (or both), which attract higher financial penalties. Recent cases have seen damages awards in excess of A\$2 million against franchisors that have breached the Code and the ACL, such as Australian Competition and Consumer Commission v Ultra Tune Australia Pty Ltd [2019] FCA 12, and Australian Competition and Consumer Commission v Geowash Pty Ltd (Subject to a Deed of Company Arrangement) (No 4) [2020] FCA 23.

*Law stated - 16 May 2022*

### **Failure to disclose – apportionment of liability**

In the case of sub-franchising, how is liability for disclosure violations shared between franchisor and sub-franchisor? Are individual officers, directors and employees of the franchisor or the sub-franchisor exposed to liability? If so, what liability?

As a general rule, liability rests with the party legally obliged to comply with the law under the Code and the ACL, which is usually the sub-franchisor. However, both laws include potential liability for corporations and individuals that aid, abet, counsel, procure or are knowingly involved in any breach. Liability relates both to pecuniary penalties under the legislation and to civil damages claims. In the case of serious breaches of the law, it is common for action to be taken against individuals knowingly involved in the breach.

*Law stated - 16 May 2022*

### **General legal principles and codes of conduct**

In addition to any laws or government agencies that specifically regulate offering and selling franchises, what general principles of law affect the offer and sale of franchises? What industry codes of conduct may affect the offer and sale of franchises?

The offering and selling of a franchise is a commercial dealing subject to the provisions of the ACL contained in Schedule 2 of the Competition and Consumer Act 2010 (Cth). The ACL governs the conduct of both the franchisor and franchisee in such dealings and, among other things, prohibits them from engaging in conduct that is unconscionable, misleading, deceptive, or likely to mislead or deceive.

General common law contract principles also apply to franchise agreements. These principles can affect the validity and enforceability of a franchise agreement depending on the terms of the agreement, surrounding circumstances, and conduct of the parties prior to and after its execution. For example, a franchise agreement may be avoided where misleading or deceptive conduct, duress, unconscionable conduct, or undue influence has taken place.

There are a number of mandatory industry codes in Australia that may apply to the franchise agreement and are enforceable by the ACCC including:

- the Food and Grocery Code of Conduct;
- the Horticulture Code of Conduct;
- the Oil Code of Conduct; and
- the Unit Pricing Code.

Additionally, voluntary industry codes may apply to parties to franchise agreements where they have elected to be bound by them.

*Law stated - 16 May 2022*

### **Fraudulent sale**

What actions may franchisees take if a franchisor engages in fraudulent or deceptive practices in connection with the offer and sale of franchises?

Under the ACL, several remedies are available to a franchisee where a franchisor has engaged in fraudulent or deceptive practices regarding the offer and sale of a franchise. These remedies include the voiding or varying of parts or the entirety of the franchise agreement, monetary damages and orders (or injunctions) compelling certain actions by the franchisor.

Under common law contract principles, a franchisee may obtain an order of rescission whereby the franchise agreement is rendered void and unenforceable. Additionally or alternatively, a franchisee may be awarded monetary damages.

*Law stated - 16 May 2022*

## **FRANCHISE CONTRACTS AND THE FRANCHISOR/FRANCHISEE RELATIONSHIP**

### **Franchise relationship laws**

What laws regulate the ongoing relationship between franchisor and franchisee after the franchise contract comes into effect?

Franchising in Australia is, in essence, a contractual relationship supplemented by specific requirements contained in the Franchising Code of Conduct (the Code) including the obligation to act in good faith. In many cases, franchising is subject to the general prohibition on unfair contract terms in standard form small business contracts.

The general prohibitions on misleading or deceptive conduct and unconscionable conduct contained in the Australian Consumer Law (ACL) apply to regulate the ongoing relationship between franchisor and franchisee.

Franchise agreements should be reviewed to assess if the prohibition on unfair contract terms applies to the agreement. As a small business is defined as a business with fewer than 20 employees and a typical franchise agreement exhibits many of the characteristics of a standard form contract, the legislation has significant potential application to franchise agreements.

There are some exclusions, such as agreements in which the upfront fee is more than A\$300,000 (or A\$1 million for a contract with a term of more than a year) and certain special types of contract. Further, where an agreement, including

a franchise agreement, is negotiated and there are genuine opportunities for amendment, it may not be considered a standard form contract presented on a 'take it or leave it' basis.

If the prohibition applies, a more detailed assessment of the contractual provisions should be conducted. The legislation gives numerous examples of provisions that could potentially be unfair, including a term that:

- permits one party (but not another party) to avoid or limit performance of the contract;
- permits one party (but not another party) to terminate the contract;
- permits one party (but not another party) to vary the terms of the contract;
- limits one party's liability or right to sue; or
- permits one party to assign the contract to the detriment of another party without that other party's consent.

The legislation provides that a provision in a small business contract is unfair if the contract:

- would cause a significant imbalance in the parties' rights and obligations arising under the contract;
- is not reasonably necessary to protect the legitimate interests of the party that would be advantaged by the term; and
- would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied upon.

For a court to declare that a term is unfair, all three of the above elements must be proven.

The burden of proof is on the party advantaged by the term to prove it is reasonably necessary to protect its legitimate interests. In determining whether a term is unfair, the court may take into account such matters it considers relevant, but must take into account the extent to which the term is transparent and the context of the provision in the contract as a whole.

Generally, few changes are likely to be necessary to template documentation, with the main areas of focus likely to be in relation to provisions dealing with liquidated damages, altering or purporting to exclude legal liability, termination and dispute resolution. If a court declares a provision of a contract to be unfair, that provision is void. However, the contract continues to bind the parties if it can operate without the unfair term. This legislation is currently under review. Possible legislative amendments to introduce penalties for the inclusion of an unfair contract term into a standard form small business contract would be a game-changer for businesses, as it would no longer be possible to take a 'wait and see' approach on whether a court determines a clause to be an unfair term.

Clause 6 of the Code obliges each party to a franchise agreement to act in good faith, essentially codifying the common law good faith obligation but also extending it to specific franchising situations, such as any matter arising out of the Code, negotiation of the franchise agreement and disputes.

If, as part of the franchise scheme, the franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor must prepare an annual financial statement of the fund's receipts and expenses for the last financial year, including the percentage spent on production, advertising, administration and other stated expenses. The franchisor must have the statement audited by a registered company auditor within four months of the end of the financial year to which it relates. The franchisor must give to the franchisee a copy of the statement within 30 days of preparing the statement and a copy of the audit report (if applicable) within 30 days of preparing the report. The requirement for the franchise statement to be audited does not apply for a financial year if 75 per cent of the franchisees in Australia that contribute to the fund agree and such agreement is made within the period prescribed by the Code.

Franchisors have additional disclosure obligations to clarify for franchisees what, if any, arrangements exist in relation

to arrangements that apply at the end of the franchise term. In addition, franchisors must give at least six months' notice of their decision to renew or not to renew a franchise agreement, or enter into a new franchise agreement. Where a franchise agreement is less than six months, the notice period is at least one month.

The disclosure document is to be updated annually within four months of the end of the financial year. However, a franchisor is required to disclose to a franchisee within a reasonable time, but not more than 14 days after the franchisor becomes aware of certain materially relevant facts, including:

- any change in majority ownership or control of the franchisor;
- any proceedings by a public agency such as the Australian Competition and Consumer Commission;
- a judgment or arbitration award in criminal or civil proceedings in Australia against the franchisor alleging:
  - breach of a franchise agreement;
  - contravention of trade practices law or the Competition and Consumer Act (CCA);
  - unconscionable conduct;
  - misconduct; or
  - an offence of dishonesty;
- a judgment against the franchisor under certain workplace relations and industrial relations laws; and
- civil proceedings in Australia against the franchisor or an associate of the franchisor by 10 per cent or 10 (whichever is the lower) of the franchisor's franchisees in Australia.

The Code provides that a franchisor cannot unreasonably withhold consent to a franchisee's request to assign a franchise agreement and curtails somewhat a franchisor's ability to terminate a franchise agreement. Immediate termination is only available in very limited circumstances, with most cases requiring a franchisee to be given written notice of default and an opportunity (of not more than 30 days) to cure the default. The Code also requires disclosure of whether the franchisor will amend the franchise agreement prior to, or on transfer of, a franchise agreement.

The Code contains a dispute resolution process that, if activated by a party, is mandatory. This may be by mediation or arbitration. The mediation process has been extremely successful in resolving disputes, with a success rate in excess of 80 per cent.

All motor vehicle dealerships are deemed franchise agreements and are therefore subject to the general provisions of the Code. There are additional provisions in the Code, mainly in relation to end of term arrangements and capital expenditure, that only apply to automotive franchise agreements. The changes made to the Code in 2020, 2021 and 2022 deal with the duration of a franchise agreement as well as return on investment, goodwill and compensation in the event of an early withdrawal from the Australian market, rationalisation of a network or changes to distribution model in Australia. Amendments to the good faith obligation now provide that a court must consider whether the terms of the franchise agreement are fair and reasonable.

Network rationalisation and changes to the distribution model are particularly relevant issues for many automotive brands in Australia as distribution options for new products, such as electric and autonomous vehicles, must be considered. Great care must be taken before entering any agreement.

*Law stated - 16 May 2022*

## **Operational compliance**

What mechanisms are commonly incorporated in agreements to ensure operational consistency and adherence to brand standards?

Franchise agreements typically contain extensive inspection and audit powers to enable a franchisor to ensure operational consistency and adherence to brand standards.

*Law stated - 16 May 2022*

### **Amendment of operational terms**

May the franchisor unilaterally change operational terms and standards during the franchise relationship?

Yes, subject to having the contractual power to do so in the franchise agreement, and the obligations to act in good faith and to avoid unconscionable conduct. The Code also contains a requirement to set out in the disclosure document the circumstances in which the franchisor has unilaterally varied a franchise agreement in the past three financial years and the circumstances in which the franchise agreement may be unilaterally varied.

*Law stated - 16 May 2022*

### **Policy affecting franchise relations**

Do other government or trade association policies affect the franchise relationship?

No.

*Law stated - 16 May 2022*

### **Termination by franchisor**

In what circumstances may a franchisor terminate a franchise relationship? What are the specific legal restrictions on a franchisor's ability to terminate a franchise relationship?

Provided the franchisor has the contractual right to terminate in the franchise agreement, a franchisor may terminate a franchise agreement:

- for breach, provided the franchisor has given the franchisee reasonable written notice and an opportunity to remedy the breach;
- on reasonable notice where there is no breach provided the franchisor gives the reasons for termination; and
- by giving no less than seven days' notice, in special circumstances limited to:
  - the loss of any licence the franchisee needs to carry on the business;
  - insolvency;
  - company deregistration;
  - abandonment of the franchised business or the franchise relationship;
  - conviction of a serious offence;
  - business operations endangering public health or safety; and
  - fraud.

*Law stated - 16 May 2022*

## Termination by franchisee

In what circumstances may a franchisee terminate a franchise relationship?

A franchisee has a statutory right to terminate the franchise agreement under cooling-off provisions that have been significantly amended with effect as of 1 July 2021. The essence of the cooling-off arrangement is that a franchisee is entitled to terminate the franchise agreement within 14 days of entering into the agreement or making any payment under the agreement. However, the new provisions potentially link the cooling-off period to the provision of lease details or documentation and also now apply to franchisee-to-franchisee sales.

The franchisee may also provide a written proposal to terminate at any time. Although this does not give the franchisee a specific right to terminate, it does create a framework that requires careful navigation by the franchisor. The franchisor must provide a substantive written response to any proposal within 28 days, including the franchisor's reasons if the franchisor refuses to terminate on the grounds proposed. Both the franchisor and franchisee must act in good faith and a refusal to terminate on the grounds proposed may give rise to a dispute to which the alternative dispute resolution process applies.

*Law stated - 16 May 2022*

## Renewal

How are renewals of franchise agreements usually effected? Do formal or substantive requirements apply?

Franchise agreements are often drafted with a defined initial term and a further term at the franchisee's discretion. The franchisee is typically required to elect to renew in writing and the franchisor can only refuse to renew if the franchisee is in breach or fails to satisfy reasonable renewal preconditions.

*Law stated - 16 May 2022*

## Refusal to renew

May a franchisor refuse to renew the franchise agreement with a franchisee? If yes, in what circumstances may a franchisor refuse to renew?

Upon the expiry of the franchise agreement, a franchisee has no legal right to an extension. However, a franchisor must disclose what will happen at the end of the agreement's term in the disclosure document and must advise the franchisee of its intention in relation to any extension (typically at least six months' notice is required) prior to the end of the term. If the franchisor refuses to extend the agreement of a compliant franchisee that wishes to extend and no genuine goodwill compensation is paid to the franchisee, any non-compete provision in the franchise agreement that might otherwise restrict the franchisee at the end of the term has no effect.

*Law stated - 16 May 2022*

## Transfer restrictions

May a franchisor restrict a franchisee's ability to transfer its franchise or restrict transfers of ownership interests in a franchisee entity?

Yes. A franchisor may withhold consent to a transfer of a franchise, if it is reasonable to do so. A franchise agreement typically sets out the conditions to be satisfied to obtain a franchisor's consent to the transfer of a franchise.

The franchisor is deemed to have consented to the transfer if it does not give or withhold its consent to a transfer within 42 days of the date of the transfer request.

The franchise agreement also typically restricts a change in ownership of the franchisee entity without the franchisor's consent.

*Law stated - 16 May 2022*

## **Fees**

**Are there laws or regulations affecting the nature, amount or payment of fees?**

No. There are no restrictions on the initial upfront fees or ongoing royalties payable by a franchisee.

There are restrictions on charging franchisees for legal fees in connection with the franchise agreement, unless the fee is for the preparation of the documents at the start of the franchise and the fee is set out in the franchise agreement.

*Law stated - 16 May 2022*

## **Usury**

**Are there restrictions on the amount of interest that can be charged on overdue payments?**

There are no specific usury laws relating to interest payments. However, interest charged for overdue payments should reflect a genuine estimate of the loss that the non-defaulting party will incur as a result of the default and is often linked to specific state-based legislation that prescribes penalty interest rates or bank indicator lending rates plus several percentage points. Agreed provisions for the late payment of fees should also be drafted to ensure they are not rendered unenforceable as penalties. A franchisee may challenge a late fee provision on the basis that it is an unfair term under the ACL or that the charging of an exorbitant fee is unconscionable conduct.

*Law stated - 16 May 2022*

## **Foreign exchange controls**

**Are there laws or regulations restricting a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency?**

There are no laws that specifically restrict a franchisee's ability to make payments to a foreign franchisor in the franchisor's domestic currency.

If the franchisee is a financial services or gambling activity provider, or is otherwise classified as a 'reporting entity' under the Anti-Money Laundering and Counter-terrorism Financing Act 2006 (Cth), then they are required under the Act to report certain cross-border transactions to the Australian Transaction Reports and Analysis Centre.

*Law stated - 16 May 2022*

## **Confidentiality covenant enforceability**

## Are confidentiality covenants in franchise agreements enforceable?

Yes.

*Law stated - 16 May 2022*

## Good-faith obligation

Is there a general legal obligation on parties to deal with each other in good faith during the term of the franchise agreement? If so, how does it affect franchise relationships?

In addition to the common law duty of good faith, there is now a statutory obligation for each party to a franchise agreement to act towards another party in good faith in relation to any matter arising under, or in relation to, the franchise agreement or the Code. Pecuniary penalties apply to any breach of this duty. Although the duty itself remains a common law duty, the Code explicitly applies good faith to franchise agreements and extends the application of the duty to the Code itself, as well as to the negotiation of franchise agreements and disputes. For automotive franchisors, the Code now requires a court to consider, in the context of assessing good faith, whether the terms of a franchise agreement are fair and reasonable.

*Law stated - 16 May 2022*

## Franchisees as consumers

Does any law treat franchisees as consumers for the purposes of consumer protection or other legislation?

As the franchise relationship is comprehensively covered by the Code and the ACL, there is little relevance to franchisees being treated generally as consumers. Where goods or services are supplied to franchisees for consumption, as opposed to resale, the provisions of the ACL and the CCA concerning fitness for purpose and product liability can apply.

*Law stated - 16 May 2022*

## Language of the agreement

Must disclosure documents and franchise agreements be in the language of your country?

There is no explicit requirement that the franchise agreement be in English, but the authors are not aware of a case where a franchise agreement has been made in a language other than English in Australia.

*Law stated - 16 May 2022*

## Restrictions on franchisees

What types of restrictions are commonly placed on the franchisees in franchise contracts?

Franchise agreements commonly contain extensive restrictions on franchisees, including in relation to:

- territorial operations;

- product sourcing;
- exclusivity of product offerings;
- product ranging and services;
- merchandising and display;
- maximum (but not minimum) pricing;
- internet selling; and
- sales and marketing.

Employee solicitation clauses are not common and governing law clauses typically choose Australian law given that conduct (which is extensively regulated) is regulated by Australian law. Foreign choice of law and jurisdiction clauses are permissible, subject to a requirement that dispute resolution must first involve mediation in Australia under the prescribed process set out in the Code.

*Law stated - 16 May 2022*

### **Courts and dispute resolution**

Describe the court system. What types of dispute resolution procedures are available relevant to franchising?

When franchisors, domestic or foreign, commence a dispute with a franchisee, they are required to follow the dispute resolution procedures outlined in the franchise agreement, which must provide for mediation.

Mediation is highly effective at resolving franchise disputes, but if it is unsuccessful, franchisors often initiate proceedings in the federal courts (including the Federal Circuit Court and the Federal Court), which have jurisdiction to hear matters relating to a breach of federal law (of which the Code is an example).

Franchisors can instead bring their dispute through the state or territory courts under the common law. The appropriate court may depend on the value of claims, as lower courts (including the Federal Circuit Court and the lower state and territory courts) only hear matters up to certain values. Appeals can be made from the Federal Circuit Court, and Federal Court decisions can be appealed to the Full Court of the Federal Court. Likewise, appeals from the lower state courts are heard in the supreme court of each state or territory. Appeals from either the Full Court of the Federal Court or the state's supreme court can be made to the High Court.

*Law stated - 16 May 2022*

### **Governing law**

Are there any restrictions on designating a foreign governing law in franchise contracts in your jurisdiction? How does the governing law affect the contract's enforceability?

Foreign choice of law and jurisdiction clauses are permissible, subject to a requirement that dispute resolution must first involve mediation in Australia under the prescribed process set out in the Code. Governing law clauses often choose Australian law given that conduct (which is extensively regulated) is regulated by Australian law, and Australian courts are reliable and efficient.

*Law stated - 16 May 2022*

## Arbitration – advantages for franchisors

What are the principal advantages and disadvantages of arbitration for foreign franchisors considering doing business in your jurisdiction? Are any other alternative dispute resolution (ADR) procedures particularly favoured or disfavoured in your jurisdiction?

Arbitration is not commonly used in Australia, mainly because the Australian court system is effective and efficient, and mediation has proved to be highly successful in resolving disputes in Australian franchising. In Australia, there are very few arbitrators qualified in franchising and no particular advantages of arbitration over court litigation. Unlike in the United States, damages awards in Australia do not feature treble damages and rarely involve punitive damages. In court proceedings, it is normal for the unsuccessful party to pay the legal costs for both parties.

Most commonly, mediation is used as an alternative dispute resolution mechanism to resolve franchise disputes. Mediation must be included in dispute resolution provisions of franchise agreements and is also available under the Code. Further, federal courts are also able to order parties to undertake mediation prior to trial. Mediation is therefore frequently used and highly effective at resolving franchise disputes.

Amendments to the Code in effect as of 2 June 2021 broaden the alternative dispute resolution options to conciliation and arbitration, including binding voluntary arbitration. However, arbitration remains voluntary and franchise systems are unlikely to choose to adopt these new options.

*Law stated - 16 May 2022*

## National treatment

In what respects, if at all, are foreign franchisors treated differently (legally, or as a practical matter) from domestic franchisors?

Foreign franchisors are not treated any differently to domestic franchisors in Australia.

*Law stated - 16 May 2022*

## UPDATE AND TRENDS

### Legal and other current developments

Are there any proposals for new legislation or regulation, or to revise existing legislation and regulation? Are there other current developments or trends to note?

The Franchising Code of Conduct (the Code) was amended in April 2022.

The ease with which the Code can be amended, being by regulation rather than legislation that must pass both Houses of Parliament, means that change can occur quite quickly and with minimal public scrutiny. Australia's most recent legislative changes take the country further away from international regulatory norms and demonstrate a highly prescriptive approach to franchise sector regulation. Following the recent changes to the Code, fundamental changes to the regulatory framework are unlikely for several years.

It is expected that amendments will be made to the unfair contract terms legislation in 2022, to expand the application of those laws, as well as to broaden the types of business contracts captured within the scope of the legislation.

*Law stated - 16 May 2022*

## Jurisdictions

	<b>Australia</b>	Norton Rose Fulbright
	<b>Canada</b>	Lapointe Rosenstein Marchand Melançon LLP
	<b>China</b>	Jones & Co
	<b>Finland</b>	ADVOCARE Law Office
	<b>France</b>	Bersay
	<b>Germany</b>	Taylor Wessing
	<b>India</b>	G&W Legal
	<b>Israel</b>	Gilat Bareket & Co, Reinhold Cohn Group
	<b>Italy</b>	Rödl & Partner
	<b>Japan</b>	Anderson Mōri & Tomotsune
	<b>Malaysia</b>	Wong Jin Nee & Teo
	<b>Mexico</b>	Gonzalez Calvillo SC
	<b>Netherlands</b>	Parker Advocaten
	<b>New Zealand</b>	Stewart Germann Law Office
	<b>Norway</b>	CLP
	<b>South Africa</b>	Spoor & Fisher
	<b>South Korea</b>	Lee & Ko
	<b>Switzerland</b>	Kellerhals Carrard
	<b>Turkey</b>	Özdağıştanlı Ekici Attorney Partnership
	<b>United Kingdom</b>	Ashtons Legal
	<b>USA</b>	Lathrop GPM