



Australian Government



Australian
**Small Business and
Family Enterprise**
Ombudsman

6 December 2019

[Redacted]

Franchising Taskforce

Department of Employment, Skills Small and Family Business

CANBERRA ACT 2600

via email: franchising@employment.gov.au

Dear [Redacted]

Fairness in Franchising – ASBFEO response to the Regularity Impact Statement

The Australian Small Business and Family Enterprise Ombudsman is keenly interested in ensuring that reforms to the franchising sector establish a regulatory framework that helps neutralise the power imbalance between franchisors and franchisees.

The Parliamentary Joint Committee (PJC) report, *Fairness in Franchising*, highlighted a systemic lack of transparency and accountability and a power disparity in the operating relationship of many franchise models. Due to our provision of dispute resolution under the Franchising Code, the Ombudsman's Office is the agency that is generally the first port of call for assistance with franchising disputes. We urge effective and timely reform of the sector squarely focussed on fairness and creating and maintaining mutually beneficial business relationships.

ASBFEO is advocating for a four-pillar approach to sectoral reform of franchising, namely:

1. Better informed franchisees through reforming disclosure requirements and cooling off periods, and a national register of disclosure documents, verified for compliance with the Code;
2. Promoting a mutually beneficial operating environment through effective monitoring of compliance with the Code coupled with meaningful penalties to deter poor behaviour;
3. Fair and balanced termination provisions available to all parties; and
4. Effective and low cost dispute resolution with the option for arbitration should mediation not be successful.

Specific details of these recommendations are attached.

We welcome the opportunity to discuss with you these recommendations to achieve a franchising framework that is fair for all parties and helps all parties to grow and prosper.

Thank you for the opportunity to comment. If you would like to discuss this matter further, please contact [Redacted] or at [Redacted]

Yours sincerely,

Kate Carnell AO

Australian Small Business and Family Enterprise Ombudsman

Detailed response to the Options

Principle 1. Prospective franchisees should be able to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor	
Problem 1.1: Disclosure is hard to comprehend and critical information may be hidden or not included in the disclosure document.	
Option 1.1.1 Changes to the Franchising Code to increase disclosure	Disclosure Documents It is essential that potential franchisees be provided with all relevant information required to enable them to make an informed decision as to whether to purchase a franchise. This needs to be in a form that is accessible and able to be trusted. Potential franchisees should: <ul style="list-style-type: none">• Be separately provided a high level Information Statement containing a succinct overview of essential information;• Be provided with all documentation in electronic and hard copy formats;• Be provided with verified financial statements of the franchisor and other key financial and business governance information, including:<ul style="list-style-type: none">○ Where purchasing an existing franchise, two years' Business Activity Statements;○ Any projected earnings for a greenfields franchise business based on a similar operating franchised businesses;○ Statements detailing expenditure for marketing funds for the franchisor;○ Leasing information:<ul style="list-style-type: none">▪ For existing franchised businesses, two years leasing information;▪ For new franchised businesses, site requirements, required local government approvals and other relevant information and costs;▪ Fit-out requirements and estimated costs;▪ Any existing business relationships between the franchisor and landlord or property manager.○ Relevant staffing information:<ul style="list-style-type: none">▪ For existing franchised businesses, current workforce details including payroll data;▪ For new franchised businesses, estimates of workforce requirements;▪ Information on relevant awards and conditions for employees; and▪ Existing estimates of workload for the franchisee including likely own hours.
Option 1.1.2 (a) Electronic and hard copy disclosure	
Option 1.1.2 (b) Separate information statement	
Option 1.1.2 (c) Increased and formal financial disclosure	
Option 1.1.2 (d) Provision of the ACCC's Franchisee Manual	
Option 1.1.2 (e) Leasing disclosure	

<p>Option 1.1.3 Simplified disclosure requirements. Require that a simplified disclosure document, which provides all materially relevant information needed to assess the franchise business, is provided to prospective franchisees</p>	<p>The length and level of detail required in disclosure documentation may be daunting to potential franchisees, especially in cases where the franchisee may be new to business ownership or be from a culturally or linguistically diverse background.</p> <p>Franchisors should provide potential franchisees a high-level succinct summary of key information and costs. These should also indicate the location of the relevant complete details in the full disclosure document.</p>
<p>Options to address Problem 1.2: The reliability of information provided to prospective franchisees may be difficult to assess.</p>	
<p>Option 1.2.2 Requiring franchisors to verify financial statements and introducing a national franchise register</p> <p>Option 1.2.2 (a) Franchisors would be required to include a statement about the accuracy of financial statements</p> <p>Option 1.2.2 (b) National franchise register</p> <p>Option 1.2.2 (c) Third party brokers</p>	<p>Financial Statements</p> <p>ASBFEO strongly believes that it is essential that potential franchisees have confidence in the veracity of information provided to them prior to purchasing a franchised business.</p> <p>Financial statements should be validated by a person independent of the franchise with appropriate qualifications and expertise (such as an accountant to ensure that:</p> <ul style="list-style-type: none"> • Information accurately reflects the true financial status of the both the franchisor and the franchised business; and • a regulatory onus is placed on the franchisor to provide accurate and complete information and that financial information is in no way misleading or deliberately deficient. <p>Whilst providing false or misleading information is prohibited under the <i>Competition and Consumer Act 2010</i>, an additional statement of verification of the accuracy of the financial information by the franchisor would serve to increase confidence in the veracity of information provided.</p> <p>National Register of Disclosure Documents</p> <p>The completeness of the disclosure documentation is a key consideration for ensuring that potential franchisees are provided with the information required to make an informed decision on whether to buy into a franchise. ASBFEO strongly supports the establishment of a National Franchise Register managed by ASBFEO. The National Register should:</p>

	<ul style="list-style-type: none"> ○ Provide for third party verification of the “completeness” of the disclosure documents. This process would ensure that disclosure documents meet the content requirements of the Code but would not examine the accuracy of information contained in the disclosure documents; ○ Not provide any form of official endorsement; ○ Form a public register similar to the ASX 200 Company Listings or ASIC Offerlist portal making high level and non-commercially sensitive documents publically available. Information that is commercially sensitive, including any intellectual property considerations, specific detail of sales data for the franchised business or staffing, could be provided to the potential franchisee by the register owner at the request of the franchisor. ○ Whilst the National Register would slightly increase the regulatory burden on franchisors, this increased impost would be minimal as the documents should already be prepared and updated annually. The only actual administrative requirement would be the lodging process. ○ If arbitration is not mandatory under a revised Code, specifically state whether arbitration is included in the Franchise Agreement as an alternative dispute resolution option.
<p>Option 1.2.3 Pre-entry education</p>	<p>ASBFEO strongly supports making educational material available to all potential franchisees.</p> <p>With the creation of the National Register of Disclosure Documents, this information could be presented as a series of online modules for potential franchisees to complete as they see fit.</p> <p>ASBFEO is of the view that these education modules be optional and potential franchisees should not be compelled to undertake the training. This acknowledges differing degrees of business acumen amongst those buying into franchises. It would be disingenuous and an onerous burden to require potentially sophisticated business investors to complete basic entry level training aimed at new entrants. Similarly, other may rely on, and derive great benefit from, this support.</p>

<p>Options to address problem 1.3: A potential franchisee might be unaware of which information is crucial to inform their decision to enter an agreement.</p>	
<p>Option 1.3.2 A new government online educational resource for the franchising sector</p>	<p>The process for starting any new business can be daunting for those who have no previous exposure to the processes and requirements that must be undertaken before a business can open.</p> <p>There is a plethora of information available both from Government (often at Federal, State and local level), industry associations and other sources. In many cases this information is duplicative, sometimes confusing and occasionally out of date. ASBFEO is supportive of any move to consolidate available information for potential franchisees.</p> <p>The establishment of a National Register of Disclosure Documents would provide a platform that any potential franchisee can engage with and present an opportunity to consolidate available information available to new franchisees or links to other relevant information.</p> <p>The online educational resource could also contain key franchising specific information such as:</p> <ul style="list-style-type: none"> • The Franchising Code • Fact sheets on disclosure requirements, marketing funds and other components of a franchising agreement; • Links to financial literacy resources • Dispute resolution processes; and • Key links to Regulators and other Statutory bodies such as ASBFEO, the Fair Work Ombudsman, ASIC and the ACCC.
<p>Option 1.3.3 Mandate all prospective franchisees receive legal and financial advice before entering into a franchising agreement</p>	<p>The Ombudsman does not support mandating legal and financial advice. Whilst we would very strongly advise any potential franchisee to seek independent legal and financial advice, we believe that it is not appropriate to mandate what may be a costly process with varying results.</p> <p>Mandating third party advice, whilst clearly beneficial for franchisees, may serve to place additional barriers to purchasing a franchise and increase costs of entry for the franchisee. This may prove prohibitively costly for certain cohorts of franchisees who may enter into a franchised in order to “buy a job”.</p> <p>ASBFEO strongly advocates for the creation of a low cost, accessible and trusted panel of advisors that potential franchisees can approach for advice before purchasing a franchise.</p>

Principle 2. Franchisees should have time to consider whether the relationship is right for them before committing to an agreement	
Problem 2.1: Cooling off rights expire before franchisees and franchisors have adequate time to review materials at entry, and reappraise their business arrangements after entering the agreement	
Option 2.1.2 Extend cooling off to 14 days and modify the circumstances which trigger the commencement of the cooling off period	<p>ASBFEO supports the extension of initial cooling off period to a minimum of 14 days. The trigger for commencement of the cooling off period should be the signing of the Franchise Agreement and/or initial payment made.</p> <p>ASBFEO does not support provisions to allow for cooling off period waivers for new or existing franchises. All potential franchisees need sufficient time to undertake relevant checks and seek advice as appropriate.</p> <p>The need for extended cooling off periods should also be viewed alongside additional protections afforded by enhanced no-penalty termination rights for all parties. Where there is a failure to disclose relevant information or that information is shown to be factually incorrect or misleading, franchisees or franchisors should have the ability to terminate the agreement without penalty.</p>
Problem 2.2 Cooling off rights may expire before lease arrangement are finalised	
Option 2.2.2 Extend cooling off periods, transparency, and termination rights in relation to leases	<p>ASBFEO recommends that relevant leasing information be included in the disclosure documentation. ASBFEO recognises that lease negotiations can be protracted and some elements of securing a site, such as planning approval, are beyond the control of the franchisor or franchisee. Where the franchisor has responsibility for securing a site or involvement in lease arrangements, provisions should allow for a no-penalty termination of the agreement beyond any cooling off period if the franchisor cannot secure a site or delays access to a site for a new franchisee.</p> <p>Leasing information and site requirement information that should be included in the disclosure documents includes:</p> <ul style="list-style-type: none"> • For existing franchised businesses, two years leasing information of costs, any capital works undertaken and other relevant leasing information; • For new franchised businesses, site requirements, required local government approvals and other relevant information and costs; • Fit-out requirements and estimated costs as well as any set requirements for future or regular refits in the Franchising Agreement;

	<ul style="list-style-type: none"> Any existing business relationships between the franchisor and landlord or property manager. <p>Any new regulation or legislation stemming from current work on unfair contract terms should be reflected in (or captured at a later date as amendments to) a revised Code.</p>
Option 2.2.3 Provide a new cooling off period of seven days where lease terms are 10 per cent above maximum estimates provided in disclosure documents	No-penalty termination provisions detailed the ASBFEO recommendations under Option 2.1.2 would alleviate any need for additional specified cooling off periods relating to lease terms that vary from those in the disclosure documents.
Option 2.2.4 Improve education and awareness around leasing and franchising	Any newly developed educational information should include leasing arrangements.
Options to address Problem 2.3: Cooling off rights in transfers, extensions and renewals are unclear	
Option 2.3.2 Extend cooling off to transfers, extensions and renewals Option 2.3.3 Extend cooling off to transfers only	<p>Transfers of a franchised business to a new franchisee should have applicable cooling off periods apply.</p> <p>Where there is an extension or renewal of a franchise agreements that includes unilateral variations that significantly alter the previous operational agreement to the detriment to the franchisee, no-penalty termination provisions should apply.</p>

Principle 3. Each party to a franchise agreement should be able to verify the other party is meeting its obligations and is generating value for both parties	
Problem 3.1 Transparency of marketing funds	
<p>Option 3.1.2 Address inconsistency in the Franchising Code on the treatment of marketing funds and increase reporting standards</p> <p>Option 3.1.2 (a) Improve consistency within the Franchising Code about the treatment of marketing funds, particularly clauses 15 and 31</p>	<p>ASBFEO supports the introduction of civil pecuniary penalties for a breach of clause 31 of the Code in line with the ASBFEO recommendations against Option 702 in this response.</p> <p>ASBFEO supports the need for increased frequency and established standards of reporting for marketing funds. All dispersals on funds from a marketing fund should be reported to franchisees by the franchisor quarterly. Quarterly reporting would not impose significant additional reporting burden as it would be reasonable to expect that this information would be collated on quarterly basis as part of general business activity and reporting requirements to Boards and other bodies. This reporting requirement should detail:</p> <ul style="list-style-type: none"> ○ The purpose of the payment; ○ To whom the payment was made; and ○ A detailed breakdown specific expenditure <p>Where significant expenditure from a marketing fund is planned, the franchisor should prepare a business case detailing the proposal, the total expenditure and any likely benefits stemming from the expenditure.</p> <p>ASBFEO supports the introduction of civil pecuniary penalties for a breach of clause 31 of the Code in line with the ASBFEO recommended penalty regime detailed in this response.</p>
<p>Option 3.1.3 Increase awareness and provide guidance around existing legal obligations</p>	<p>ASBFEO supports the generation of educational material to support the adoption of best practice financial reporting and disclosure for franchisors. Educational material could be drawn from existing ASIC regulatory Guidelines and Information Sheets (such as ASIC Information Sheet (INFO 183) <i>Directors and financial reporting</i>) and contextualised to suit the franchising sector.</p>

<p>Principle 4. A healthy franchising model fosters mutually beneficial cooperation between the franchisor and the franchisee, with shared risk and reward, free from exploitation and conflicts of interest</p>	
<p>Options to address Problem 4.1 Supplier rebates can lead to conflicts of interest</p>	
<p>Option 4.1.2 Address conflicts of interest in the handling of supplier rebates to franchisors by requiring increased disclosure</p>	<p>ASBFEO supports the need for increased frequency and established standards for reporting of supplier rebates.</p> <p>This should include the quarterly disclosure of:</p> <ul style="list-style-type: none"> • data on resale pricing and purchase prices of items sold by franchisees; • all supplier rebates as a percentage of purchase price for franchisees; • the relative proportions of the supplier rebate retained by the franchisor and directed to franchisees; and • supplier rebates received by the master franchisor.
<p>Option 4.1.3 Prohibition of supplier rebates in circumstances where franchisor specifies maximum franchisee sale prices</p>	<p>ASBFEO supports the prohibition of sales rebates where there are franchisor imposed maximum sale prices that may cause financial impediment to the franchisee. There has been a significant body of evidence of the financial burden of maximum price impositions causing significant detriment to franchisees and the profitability of the franchised business. Where a supplier rebate has been paid, the imposition by the franchisor of maximum retail sales prices that are lower than wholesale prices should not be permissible under any circumstances unless there is an agreement to indemnify the franchisor for loss of profit resulting from the reduced sales price.</p>
<p>Options to address Problem 4.2 Conflicts of interest in the context of capital expenditure</p>	
<p>Option 4.2.2 Modify the Franchising Code to define significant capital expenditure and provide rights for franchisees to recoup the value of significant capital expenditure</p>	<p>The Franchising Code of Conduct (Clause 30) currently specifies that <i>A franchisor must not require a franchisee to undertake significant capital expenditure in relation to a franchised business during the term of an agreement.</i> It goes on to specify what is not classified as significant capital expenditure.</p> <p>ASBFEO sees the benefit of clarity in the definition of what is considered to be significant capital expenditure.</p> <p>In line with the ASBFEO recommendation for significant expenditure under the Marketing Fund, where significant capital expenditure is recommended or requested, the franchisor should prepare a business case</p>

<p>Option 4.2.3 Clarify franchisee rights when significant capital expenditure is required</p>	<p>detailing the proposal, the total expenditure and any likely benefits stemming from the expenditure. Termination provisions should also be available to the franchisee in cases of mandated significant capital expenditure where the benefit to the franchisee does not outweigh the cost.</p>
<p>Options to address problem 4.3 Unilateral variations can lead to conflicts of interest and exploitation</p>	
<p>Option 4.3.2 Banning or limiting the circumstances in which franchisors can unilaterally vary franchise agreements</p>	<p>ASBFEO supports the limitation of circumstances in which franchisors can unilaterally vary franchise agreements. ASBFEO recognises that there may be circumstances that require unilateral variations to franchise agreements, such as changes of business practices to reflect legislative or regulatory change or changing economic conditions, however, these changes should be made in consultation with all affected parties and agreed to by a majority of franchises within the franchise brand.</p>
<p>Option 4.3.3 Increase awareness around legal rights</p>	<p>ASBFEO supports this option. Any material should reflect any changes to legislation or regulation in relation to unfair contract terms.</p>
<p>Principle 5. Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties</p>	
<p>Options to address Problem 5.1: Some disputes are not being resolved in a fair, timely and cost effective manner</p>	
<p>Option 5.1.2 Expand options for dispute resolution, and streamline mediation procedures and services</p> <p>Option 5.1.2(a) Merge OFMA and ASBFEO</p> <p>Option 5.1.2(b) Strengthen third party involvement in dispute resolution, including pathways for binding dispute resolution</p> <p>Option 5.1.2(c) Clarify the availability of multi-party mediation</p>	<p>The Code must have appropriate and enforceable dispute resolution mechanisms. This should include both mediation and arbitration, including the capacity for particular parts of a mediation, where agreement is not able to be reached, to be separated and sent to arbitration, in order to allow the mediation to proceed. These dispute resolution mechanisms, including the role of the Franchising Mediation Adviser should be administered wholly by ASBFEO in order to consistently and efficiently manage the information provision and ADR processes.</p> <p>ASBFEO, under the functions of the <i>Australian Small Business and Family Enterprise Ombudsman Act 2015</i>, provides access to meaningful pathways to resolve disputes outside of court systems through alternative dispute resolution pathways including mediation. Since ASBFEO assumed the ADR functions of the Office of the Franchising Mediation Adviser (OFMA), our Office has provided information on the mandated dispute resolution process under the Code and provided access to mediation for disputes as per the code. This will sit alongside the Ombudsman’s dispute general resolution function.</p>

<p>Option 5.1.2(d) Require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed</p>	<p>Arbitration</p> <p>ASBFEO strongly recommends that arbitration be included and mandated within the Code as a further progression to existing alternative dispute resolution pathways. Arbitration would only be accessed where a dispute has not been completely resolved through the Notice of Dispute or mediation process. Additionally, arbitration should be available to bind parties to action against a discrete component of a dispute. There may be cases where the bulk of issues raised in a franchising dispute can be resolved through mediation but the a determinative resolution is needed for part of the resolution.</p> <p>At a minimum, if arbitration is not mandated under the Code, the Franchising Code should include arbitration as a voluntary carve out as per the draft <i>Competition and Consumer (Industry Codes— Dairy) Regulations 2019</i>. This inclusion should exclude the requirement for agreements, in this case the franchising agreement, to specifically include arbitration. If it is not possible to include mandated arbitration as a progression of ADR in the Code, ASBFEO recommends that arbitration be at the agreement of all parties.</p> <p>Whether arbitration is available for disputes and is included in the franchising agreement would form part of the high level disclosure statement detailed in option 1.2.2.</p> <p>Group or Multiparty Mediation</p> <p>There is a clear need for establishing processes for addressing systemic issues within the franchise or franchising sector by allowing a group of franchisees (or franchisors) to lodge a single complaint for investigation by the regulator. This process could be coordinated through ASBFEO. The complaints would be:</p> <ul style="list-style-type: none"> • Lodged only in response to widespread concerns regarding behaviour or alleged misconduct by a party to a franchise agreement impacting on a number of other parties: • Evidentiary requirements to lodge a Collective Complaint would include anti-consumer conduct, consumer harm or safety risks, anti-competitive conduct or significant systemic breaches of legislation or regulation, • The regulator would be obliged to investigate the matter and respond to the complaint (including binding actions to rectify or recommending further investigation or prosecution) within a specified period of time.
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	<p>Timeframes</p> <p>There is no set timeframe for commencement of mediation under the Current Code. However, ASBFEO has established expectations for reasonable timeframes for the commencement of mediation being four weeks from the issuance of the Notice to Mediate to all parties. Given the established process under the Code for the issuance of a Notice of Dispute, the three week window to address the issue and the communication by ASBFEO/OFMA in selecting mediators, we would expect that a four week timeframe for commencement of mediation is maintained. We do, however, recognise that there may be some extenuating circumstances that may prevent mediation from commencing within four weeks, such as busy trading or reporting periods, illness or travel. Where this is the case, ASBFEO would expect notification from parties of the reason for the delay and commitments to commence as soon as practical. ASBFEO would then provide an extension in the appropriate circumstances.</p>
<p>Option 5.1.3 Clarify the complaint handling procedure requirements in the Franchising Code, to require dispute resolution processes be included in franchise agreements. Provide best practice guides.</p>	<p>All franchising agreements should detail a dispute resolution process that, at a minimum, complies with the requirements of the Code. Franchising agreements should also reference and link to the Code and the relevant dispute resolution Clauses.</p>
<p>Principle 6. Franchisees and franchisors should be able to exit in a way that is reasonable to both parties</p>	
<p>Options to address Problem 6.1: Reasonable exit arrangements may not be, or may not be perceived to be, available or accessible for some franchisees</p>	
<p>Option 6.1.2 Limit termination in circumstances where the franchisee seeks mediation, and/or breaches have occurred for fraud or public health and safety reasons, and</p>	<p>ASBFEO strongly supports the inclusion of statutory termination rights for all parties to a franchising agreement. The current Code has allowances for <i>franchisor</i> initiated termination for breach of the franchising agreement, breaches of applicable laws, regulations and statues and for no-cause termination, but no allowance for the <i>franchisee</i> to initiate termination for the same reasons. As an example, the current Code allows for termination of a franchising agreement where the franchisee becomes insolvent but no such</p>

<p>introduce statutory termination rights into the Franchising Code</p> <p>Option 6.1.2(a) Additional requirements where the franchisor is terminating in special circumstances</p> <p>Option 6.1.2(b) Provide statutory termination rights to franchisees</p> <p>Option 6.1.3 Clarify the termination processes available to franchisees and support greater awareness of negotiation pathways</p>	<p>provision exists to allow the franchisee to terminate in cases where the franchisor become insolvent. This imbalance of rights to exit an agreement must be addressed.</p> <p>A revised Code should establish balanced termination provisions that reflect both party's obligation to act in good faith. The existing clauses in Division 5 of the code relating to termination should be revised to provide the same rights for termination where that termination is initiated by the franchisee as by the franchisor. Additionally, termination provisions for all parties to a franchising agreement should also be available where there is:</p> <ul style="list-style-type: none"> • Non-resolution of a dispute where a party did not act in good faith; • Unilateral variations to franchising agreements; and • Changes in practice leading to significant hardship, exploitation or business failure.
<p>Problem 6.2 Excessive restraint of trade clauses may inhibit lawful pursuit of subsequent business interests</p>	
<p>Options to address problem 6.2: Excessive restraint of trade clauses may inhibit lawful pursuit of subsequent business interests.</p>	
<p>Option 6.2.2 Amend franchising agreement requirements and clarify wording of clause 23 of the Franchising Code</p> <p>Option 6.2.3 Codify common law that restraints of trade should go no further than reasonable to protect legitimate interests</p>	<p>ASBFEO recognises the need for fair restraint of trade clauses in certain circumstances to protect franchised brands and the franchise network. These clauses should not unduly restrict the franchisee and reflect reasonable provisions such as:</p> <ul style="list-style-type: none"> • No removal of business clauses to protect new franchisees where a franchised business has been transferred ; and • Protect intellectual property. <p>Restraint of trade clauses should not unfairly restrict legitimate competition within a local area or place onerous restraints on the exiting franchisee from working or owning a business in the same industry sector.</p>
<p>Principle 7. The framework for industry codes should support regulatory compliance, enforcement and appropriate consistency</p>	
<p>Options to address Problem 7.1: Some franchisors experience additional regulatory burden from having to comply with both the Franchising Code and the Oil Code</p>	
<p>Option 7.1.2 Increase the number of common provisions between the Oil</p>	<p>ASBFEO understands that whilst the Oil Code and the Franchising Code have substantial commonality, the Oil Code does include additional provisions specific to the supply and vendor arrangements in the sector.</p>

<p>and Franchising Codes to reduce the regulatory burden for some franchisors</p>	<p>Harmonisation of provisions between the Oil Code and the Franchising Code should be undertaken following the revision of the Franchising Code. However, the specific provisions pertaining to supply and vendor agreements under the Oil Code should remain separate to the Franchising Code. Any changes to the Oil Code would require broad consultation with the sector.</p>
<p>Options to address problem 7.2: Compliance with the Franchising Code, Oil Code and where relevant the CCA and ACL remains imperfect</p>	
<p>Option 7.2.2 Application and enhancement of civil penalties to all breaches of the Franchising and Oil Codes</p>	<p>As highlighted by the evidence presented to the Parliamentary Joint Committee examining the operation and effectiveness of the Franchising Code of Conduct, there is a need to have a more effective means for deterrence of poor behavior in the franchising sector. The use of administrative penalties would enable the appropriate authority, be it the Office of the Franchising Mediation Advisor (OFMA), ASBFEO or the Australian Competition and Consumer Commission (ACCC), to apply a lower level of penalty for minor contraventions of the Franchising Code.</p> <p>Including administrative penalties gives the Code owner additional powers to enforce compliance. Under the current compliance regime with its strata of civil penalties, the ACCC rarely pursues minor non-compliance due to the requirement for action to be taken through court. Administrative penalties effectively remove the requirement to pursue the franchisor (or franchisee in some cases) through court and allow basic penalties to be administered by the regulator. There would be a need to allow appropriate right of reply to contest an administrative penalty through the regulator.</p> <p>ASBFEO is proposing a tiered penalty regime:</p> <ol style="list-style-type: none"> 1. Administrative penalties for minor breaches of the Code. This could include monetary penalties and adverse publication, enforceable undertakings or restriction of trade. (Issued by ASBFEO or ACCC). 2. Civil penalties as currently imposed under the Code and Australian Consumer Law as set out in Schedule 2 of the Competition and Consumer Act 2010 (pursued in AAT or court). Civil penalties would apply for systemic or repeated Code breaches or willful, negligent or blatant disregard of provisions of the Code with the requirement that the ACCC pursue the matter. 3. Other penalties imposed by other regulatory bodies (such as Franchisor Responsibilities under the Fair Work Act 2009).

	<p>4. Criminal penalties where appropriate administered by the relevant agency or enforcement body.</p> <p>As an example, based on the ASBFEO recommendation of a Register of Franchising Documents, if a franchisor failed to provide documents, omitted documents or failed to update documents annually, the Registry owner could apply an administrative penalty (such as a monetary fine as well as an enforceable undertaking to provide the required information) to the franchisor. Repeated failures could attract adverse publication (similar to Sect 74 of the Australian Small Business and Family Enterprise Ombudsman Act 2016) enabling the regulating body to publish the lack of cooperation in any media considered appropriate. Adverse publication would also extend to dispute resolution and failure to act in good faith. Where systemic breaches of the Code are identified, restriction of trade provisions could enable the appropriate body to restrict the ability of franchisors to market or sell the franchise model until such time as the breach of the Code is rectified.</p>
<p>Option 7.2.3 Improved education and guidance on expectations around compliance with the code</p>	<p>ASBFEO supports additional education and guidance to all parties on compliance with the Code.</p>