



A guide for business

# The franchisor compliance manual

December 2014



This manual provides an overview of a franchisor's rights and responsibilities under the Franchising Code of Conduct.

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# Contents

<b>1. Introduction</b>	<b>1</b>
Purpose of the Code	1
The role of the ACCC	1
Application of the Code	2
When the Code does <u>not</u> apply	2
Non-compliance with the Code	2
Pre-2015 agreements	3
Other resources	3
<b>2. Pre-entry disclosure and cooling off</b>	<b>4</b>
Information statement	4
Disclosure document	5
Content of the disclosure document	5
Financial details	6
Franchise agreement	6
Other documents you must provide	7
Confirmation of receipt of the disclosure document	7
Professional advice statement	7
Cooling-off period	7
<b>3. Disclosure during the term of the agreement</b>	<b>8</b>
Leasing arrangements	8
Updating the disclosure document	9
Requests for a disclosure document	9
Materially relevant facts	9
Marketing fund financial statements	9
Notice of end of term arrangements	10
<b>4. Other rights and obligations during the term of the agreement</b>	<b>11</b>
Your franchise agreement	11
Freedom of association	11
General releases and waivers	11
Jurisdiction for settling disputes	11
Costs of settling disputes	11
Former franchisees' details	12
Dealing with marketing and advertising fees	12
Significant capital expenditure	12
Record-keeping	12

<b>5. End of a franchise agreement</b>	<b>14</b>
Transfer	14
Termination	15
Breach by franchisee	15
No breach by franchisee	15
Special circumstances	16
End of the term	16
Restraints of trade	16
<b>6. Dealing with disputes</b>	<b>17</b>
Internal complaint-handling procedure	17
Code complaint-handling procedure	18
Termination of mediation	18
Cost of mediation	18
Alternatives to mediation	19
<b>7. Good faith</b>	<b>20</b>
What is 'good faith'?	20
Legitimate business conduct	20
Conduct that may show a lack of good faith	21
Things to consider	21
<b>8. Enforcement and compliance</b>	<b>22</b>
Who is liable for a breach of the Code?	22
The ACCC's approach to non-compliance	22
Information gathering powers	23
What should you do if you have breached the Code?	23
<b>9. Key terms</b>	<b>25</b>
<b>10. Additional sources of information</b>	<b>27</b>



## 1. Introduction

The Franchising Code of Conduct is a mandatory industry code that applies to all of the parties to a franchise agreement. The Code has the force of law and is binding on franchising participants.

The Code applies to conduct occurring on or after 1 January 2015<sup>1</sup> in relation to a franchise agreement entered into, renewed, extended or transferred on or after 1 October 1998.

This manual is designed to help you to understand:

- the minimum business conduct and disclosure requirements under the Code
- how to comply with your obligations under the Code
- how to resolve disputes under the Code.

### Purpose of the Code

The Code aims to regulate the conduct of franchising participants towards one another. In particular, the Code:

- requires franchisors to disclose certain information to prospective and existing franchisees before, and after, entering into a franchise agreement
- stipulates a number of conditions relating to the rights of a franchisor and a franchisee under a franchise agreement
- provides mechanisms for franchisees and franchisors to try to resolve disputes.

The Code also requires franchisors and franchisees to act in good faith towards one another at all stages of the franchise relationship, including during pre-contractual negotiations.

### The role of the ACCC

The ACCC is an independent statutory body that administers the *Competition and Consumer Act 2010* (the Act), under which the Code is prescribed. The ACCC promotes compliance with the Code and the Act and, where appropriate, takes enforcement action against businesses that breach the Code or the Act.

In addition to the Code, you should be aware of your broader obligations under the Act, such as the prohibitions against misleading or deceptive conduct and unconscionable conduct.

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<sup>1</sup> Other than to discharge an outstanding obligation, right or privilege that arose under the repealed 1998 Code.

## Application of the Code

The Code applies to franchise agreements. A 'franchise agreement' is an agreement (either written, verbal or implied) that meets the following conditions:

1. the franchisor has granted the franchisee the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor (or an associate of the franchisor)
2. the operation of the business is substantially or materially associated with a trademark, advertising or commercial symbol that is owned, used, licensed or specified by the franchisor (or their associate) and
3. the franchisee is required to pay, or has agreed to pay, a fee to the franchisor (or its associate) before starting or continuing the business, which may be:
  - an initial capital investment fee
  - a payment for goods or services
  - a fee based on a percentage of gross or net income
  - a training fee or training school fee.<sup>2</sup>

A motor vehicle dealership agreement will automatically be covered by the Code even if the above conditions have not been met.

If you are unsure whether your agreement meets the requirements of the Code you should seek legal advice.

### When the Code does not apply

The Code will not apply to a 'franchise agreement' where:

- the agreement was entered into before 1 October 1998 (unless that agreement has been transferred, renewed or extended on or after that date).
- another mandatory industry code (for example, the Oilcode) applies to the agreement
- the agreement is for goods or services that are substantially the same as those supplied by the franchisee for at least two years immediately prior to entering the franchise agreement, and are likely to provide no more than 20 per cent of the franchisee's gross turnover for goods or services in the first year of the franchise.<sup>3</sup>

## Non-compliance with the Code

Failure to comply with the Code may expose you to enforcement action by the ACCC. Financial penalties and infringement notices are available under 24 provisions of the Code. A list of the penalty provisions can be found at page 24.

For more information on the ACCC's approach to non-compliance with the Code, see page 22.

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<sup>2</sup> Excludes payment for goods or services supplied on a genuine wholesale basis, repayment by the franchisee of a loan from the franchisor (or an associate), payment on a genuine wholesale basis for goods taken on consignment, and payment of market value of a purchase or lease of real property, fixtures, equipment or supplies that are needed to start or continue business under the franchise agreement.

<sup>3</sup> This exception will cease to apply if the franchisee has told you that sales under the franchise have provided more than 20 per cent of the franchisee's gross turnover for three consecutive years.

## Pre-2015 agreements

While the Code applies to franchise agreements entered into on or after 1 October 1998, certain provisions of the Code will not apply to agreements entered into prior to 1 January 2015 (see table below).

If a franchise agreement is entered into	The following provisions will not apply
Between 1 July 1998 and 29 February 2008	<ul style="list-style-type: none"><li>• waiver of verbal or written representations by the franchisor—see page 11</li><li>• prohibition on actions or proceedings, including mediation, being brought in a State or Territory outside that in which the franchisee operates—see page 11</li><li>• costs of settling disputes—see page 11</li><li>• effect of restraint of trade clauses—see page 16</li></ul>
Between 1 March 2008 and 31 December 2014	<ul style="list-style-type: none"><li>• prohibition on actions or proceedings, including mediation, being brought in a State or Territory outside that in which the franchisee operates—see page 11</li><li>• costs of settling disputes—see page 11</li><li>• effect of restraint of trade clauses—see page 16</li></ul>

Importantly, a franchise agreement entered into prior to 1 January 2015 will be covered by the entire Code (including the provisions in the table above) if the agreement is varied, renewed or transferred on or after 1 January 2015.

Franchisors who are not required by the Code to comply with the provisions referred to above may nevertheless agree with their franchisees to be bound by those provisions.

The ACCC has developed a deed of variation which can be signed by you and a franchisee to ensure all the rights and obligations under the Code apply to the franchise agreement, regardless of when they entered into their agreement. You should seek independent legal advice prior to signing the deed of variation.

The deed of variation is available for [download](#).

## Other resources

The Code and the Minister's explanatory statement on how the Code will operate are available from the [ComLaw website](#).



## 2. Pre-entry disclosure and cooling off

The Code requires franchisors to disclose certain information, and provide specific documents to a person who proposes to become a franchisee, or to renew or extend a franchise agreement. This information is intended to assist the party to make an informed decision about whether to proceed with the agreement.

Your disclosure obligations will vary depending on whether you are proposing to enter into a franchise agreement, or renew or extend an agreement.

Under the Code, you must provide an information statement to a party who proposes to enter into a franchise agreement. You are also required to provide a disclosure document, franchise agreement and a copy of the Code to a party at least 14 days before they:

- enter into a franchise agreement (or an agreement to enter into a franchise agreement)
- pay any non-refundable money or other valuable consideration to you or an associate in connection with the franchise agreement
- renew or extend their agreement.

**Example:** A franchisor and prospective franchisee discuss entering into a franchise agreement. To cover the costs of setting up the franchised business, the franchisor asks the prospective franchisee to cover certain upfront costs, including legal fees and design fees. The prospective franchisee pays the fees. At this stage, despite lengthy discussions about the franchise opportunity, the franchisor has not provided the prospective franchisee with the disclosure document or the franchise agreement.

The prospective franchisee subsequently decides not to proceed with the agreement.

The franchisor must refund all of the money paid by the prospective franchisee as payments made prior to receiving the pre-disclosure documents must be refundable.

The obligation to provide disclosure exists between a franchisor and its prospective or existing franchisees (including a master franchisor in its dealings with subfranchisors). A master franchisor is not required to comply with these obligations in relation to a subfranchisee unless the master franchisor is a party to the subfranchise agreement.

### Information statement

When a person proposes to enter into a franchise agreement for the first time (as opposed to renewing or extending an existing agreement), you must provide them with a copy of the information statement

contained in Annexure 2 of the Code. The information statement is a generic statement that highlights the risks and rewards of franchising.

The information statement should be provided to the prospective franchisee as soon as practicable after they formally apply, or express an interest in, acquiring a franchised business.

The information statement must be set out in size 11 font and be contained on no more than two pages. A copy of the information statement is available for [download](#).

**Example:** A franchisor receives an unsolicited phone call from a prospective franchisee asking general questions about its franchise system. After receiving the information, the prospective franchisee says that she would like to think about it. In this situation, the franchisor would not be expected to provide an information statement.

**Example:** A franchisor receives a phone call from a prospective franchisee. The prospective franchisee asks detailed questions about the system, the price of a franchise and the next steps in obtaining more information. The franchisor directs the prospective franchisee to the application form on its website, which she completes.

In this situation, the franchisor must provide the prospective franchisee with an information statement as soon as practicable after it receives the completed form.

## Disclosure document

The Code requires you to maintain a disclosure document. You are required to provide a disclosure document to a person proposing to enter into, renew or extend a franchise agreement.

The purpose of a disclosure document is to give a prospective franchisee key information about the franchise system, and an existing franchisee current information about the running of the franchise.

Information you are required to disclose includes:

- details of certain types of legal proceedings against the franchisor or its directors
- contact details of current as well as former franchisees (unless the former franchisee has requested in writing that their details not be disclosed)
- the franchisee's costs to start operating the franchised business and other payments or fees they may be required to make
- details of the arrangements that will apply when the franchise agreement comes to an end (including whether the franchisee will have an option to renew or extend the agreement or enter into a new agreement).

### Content of the disclosure document

The disclosure document must adopt the format, order, headings and numbering used in Annexure 1 of the Code. It must also be signed by the franchisor, or a director, officer or authorised agent of the franchisor.

If no applicable information exists for a particular item of the disclosure document, you may delete the applicable headings from the disclosure document. However, you must list the deleted headings in an attachment so that the prospective or existing franchisee is aware of what information has not been provided.

The disclosure document must also contain a table of contents. If the disclosure document attaches other documents, these documents must be listed in the table of contents.

The ACCC has developed a model disclosure document, with tips on how to fill in the details, to assist you to fulfil your disclosure obligations under the Code. This model disclosure document is available for [download](#).

## Financial details

Financial details are a key piece of information for prospective and existing franchisees as they provide an insight into the immediate status of the franchise system. The Code requires that certain financial details be included under item 21 of the disclosure document.

If updated financial details (including any statement, declaration or document referred to in item 21 of Annexure 1 of the Code) become available after a prospective franchisee has received a disclosure document, but before they enter into a franchise agreement, those details must be provided to the prospective franchisee as soon as reasonably practicable. You must not enter into the franchise agreement until after you provide the prospective franchisee with the updated financial details.

**Example:** A franchisor provides a prospective franchisee with a disclosure document in May. At the time it is provided, the document is up-to-date. The prospective franchisee does not enter into the franchise agreement until August. The franchisor operates on the Australian financial year (1 July—30 June) and prepares a new financial report in July.

The franchisor would be required to provide the prospective franchisee with the new financial report before it enters into the franchise agreement, irrespective of whether the report shows an improvement or deterioration of the franchisor's financial position.

## Franchise agreement

The franchise agreement is the contract between you and a franchisee. It sets out each party's rights and responsibilities in relation to the franchised business, as well as each other.

The franchise agreement you provide during the pre-entry disclosure period must be in the form in which it is to be executed. This means that you cannot simply give a draft copy of the agreement.

However, you may make changes to the franchise agreement within the 14 day pre-entry disclosure period if the change is to:

- give effect to a franchisee's request
- fill in required particulars
- reflect changes of address or other circumstances
- make a minor clarification
- correct errors or references.

**Example:** A franchisor provides a prospective franchisee with its pre-disclosure documents, including the franchise agreement, as required by the Code. During negotiations, the prospective franchisee requests that the term of the agreement be changed from five years to seven. The prospective franchisee also advises that his registered office will be his accountant's office not his principal place of business.

The franchisor agrees to the prospective franchisee's requests and amends the agreement. The parties enter into the agreement 14 days after the documents were initially provided. In these circumstances, the franchisor has complied with the 14 day period, even though changes were made to the agreement, as the changes were made to give effect to the franchisee's request and to reflect a change of address.

**Example:** While amending the franchise agreement to reflect the above changes, the franchisor also changes the agreement to require the prospective franchisee to comply with new sales targets and reporting obligations.

In these circumstances, the franchisor must not enter into the agreement or accept a non-refundable payment until 14 days have passed after the prospective franchisee was provided with the updated agreement. This is because the changes to the agreement were not for one of the reasons permitted by the Code.

## Other documents you must provide

If you will require a franchisee to enter into any of the following types of agreements as a condition of their franchise agreement, you must provide copies of these agreements to the franchisee:

- a lease or hire purchase agreement for goods
- an agreement under which the franchisee gains ownership of, or is authorised to use, any intellectual property
- a security agreement, including a guarantee, mortgage, security deposit, indemnity, loan agreement or obligation to provide a bank guarantee to a third party
- a confidentiality agreement
- an agreement not to carry on business within an area or for a time after the franchise agreement is terminated.

You must give these documents to the franchisee at least 14 days before the franchise agreement is signed, or as soon as they become available.

## Confirmation of receipt of the disclosure document

You must not enter into, extend, renew or transfer a franchise agreement (or receive any non-refundable payment in relation to a franchise agreement or an agreement to enter into a franchise agreement) if you have not received a written statement from the franchisee or prospective franchisee that they have received, read and had a reasonable opportunity to understand the disclosure document and the Code.

In practice, the confirmation of receipt is often attached to the disclosure document itself.

## Professional advice statement

You also must not enter into a franchise agreement until you have received written statements from an independent legal adviser, business adviser or accountant that they have provided advice to the prospective franchisee. It is not sufficient for the prospective franchisee to provide a statement that they have sought this advice.

If the prospective franchisee chooses not to seek this advice, they must provide you with a signed statement indicating that they were told that they should obtain advice of this kind but decided not to seek it.

While the Code does not require you to obtain a professional advice statement from a franchisee prior to renewing or extending their agreement, it may be a good idea to do so.

## Cooling-off period

A prospective franchisee is entitled to a cooling-off period of seven days after entering into a new franchise agreement or making any payment under the agreement, whichever occurs earlier.

If a franchisee terminates the agreement within the cooling-off period, you must fully refund all payments made by the franchisee under the agreement within 14 days. However, you may deduct your reasonable expenses from the amount to be refunded if the expenses or their method of calculation have been set out in the agreement.

The cooling-off period does not apply to the renewal, extension or transfer of an existing franchise agreement.



### 3. Disclosure during the term of the agreement

Your disclosure obligations do not stop after you enter into, renew or extend a franchise agreement.

You will also have to disclose certain information during the life of the agreement. This information enables the franchisee to stay up-to-date on matters that are material to the franchise system or their franchised business.

The obligations set out in this chapter apply to a franchisor in its dealings with a prospective or existing franchisee. A master franchisor is not required to comply with these obligations in relation to a subfranchisee unless the master franchisor is a party to the subfranchise agreement.

#### Leasing arrangements

If a franchisee leases premises from you (or your associate) for their franchised business, you must give them a copy of the lease or agreement to lease within one month after the document is signed. You must, at the same time, provide the franchisee with the details of any incentive or financial benefit you or your associate will receive as a result of the agreement, including the name of the business providing the incentive or financial benefit.

Similarly, if a franchisee occupies premises leased by you (or your associate) without a lease, you are required to give to the franchisee either:

- these two documents:
  1. a copy of the lease or agreement to lease
  2. details of any incentive or financial benefit you or your associate would be entitled to receive as a result of that agreement or
- these three documents:
  1. a copy of the documents that give the franchisee the right to occupy the premises
  2. written details of the conditions of occupation
  3. details of any incentive or financial benefit you or your associate would be entitled to receive as a result of the franchisee's right to occupy the premises.

The documents that give the franchisee the right to occupy the premises must be provided within one month after the document is signed. The other documents and details must be provided to the franchisee within one month after occupation commences.

## Updating the disclosure document

Once you have entered into a franchise agreement, the Code requires you to update your disclosure document within four months after the end of each financial year.

However, you are not required to update your disclosure document if you did not enter into more than one franchise agreement during the last financial year (including transferring, renewing or extending a franchise agreement) and you do not intend to enter into another agreement in the following financial year (the disclosure exemption).

The disclosure exemption will cease to apply if a franchisee requests a copy of your disclosure document (see below). If a franchisee requests a disclosure document in these circumstances, you must update the disclosure document so that it reflects the position of the franchise as at the end of the financial year before the financial year in which the request is made.

## Requests for a disclosure document

Under the Code, your franchisees can request, and you must provide, a copy of your disclosure document once every 12 months. This request must be made in writing. The Code specifies that you must provide a franchisee with a copy of your latest disclosure document within 14 days of the franchisee's request.

If you do not have an updated disclosure document because you were covered by the disclosure exemption, the Code allows you up to two months to update the disclosure document and provide a copy to the franchisee.

## Materially relevant facts

There are some important matters that may arise after you have provided a franchisee or prospective franchisee with a disclosure document. As a franchisor, you must provide your franchisees and prospective franchisees with updated disclosure of matters that are materially relevant facts.

A 'materially relevant fact' is a key piece of information about a franchisor or its franchise system, which could have an effect on a franchisee's business. Materially relevant facts include:

- changes in majority ownership or control of the franchisor, franchise system, or an associate of the franchisor
- certain court proceedings or judgements against the franchisor or one of its directors
- a change in the intellectual property, or ownership or control of the intellectual property, that is material to the franchise system.

If your disclosure document does not include a materially relevant fact, you must tell a franchisee or prospective franchisee about it, in writing, within a reasonable time (but not more than 14 days) after you become aware of it.

## Marketing fund financial statements

If you require a franchisee to contribute to a marketing or other cooperative fund, you must provide certain information to the franchisee about the fund.

You must prepare an annual financial statement detailing all of the fund's receipts and expenses. The statement must provide the franchisee with meaningful information about sources of income and items of expenditure (that is, who contributes to the fund and what the money is spent on). For more information about your obligations when dealing with marketing fund money, see page 12.

You must have the statement audited by a registered company auditor, unless 75 per cent of the franchisees in Australia that contribute to the fund vote not to audit the statement. This agreement must be made annually within three months of the end of the financial year.

The statement and auditor's report (if required) must be prepared within four months of the end of your financial year.

You must give a copy of the statement and the auditor's report (if required) to the franchisees that contribute to the fund, within 30 days of the preparation of the documents.

**Example:** A franchisor has 50 franchised businesses within its system, including 10 units which it operates as corporate stores. All franchised businesses contribute to the system's marketing fund.

The franchisor is concerned that it is too costly to audit the marketing and holds a vote of its franchisees to determine whether to audit the fund's statements. The franchisor is entitled to vote on behalf of the 10 units it operates.

Of the 60 franchises entitled to vote, 36 vote against the audit, 11 vote in favour of the audit and 3 do not vote at all. The franchisor is still required to audit the marketing fund because only 72 per cent voted against the audit.

## Notice of end of term arrangements

The Code requires you to notify a franchisee, in writing, as to whether you intend to either extend the franchise agreement or enter into a new agreement when the term of the agreement ends.

- If the **term of the franchise agreement is six months or longer**, you must notify the franchisee of your decision at least six months before the end of the term of the franchise agreement.
- If the **term of the franchise agreement is less than six months**, you must notify the franchisee of your decision at least one month before the end of the term of the franchise agreement.

If you intend to extend the franchise agreement, you must include a statement in the notice to the effect that the franchisee may request a copy of the disclosure document.



## 4. Other rights and obligations during the term of the agreement

The Code outlines a number of conditions relating to the rights and obligations of a franchisor and a franchisee under a franchise agreement.

### Your franchise agreement

#### Freedom of association

You must not restrict or impair the freedom of existing or prospective franchisees to form an association or their ability to associate with one another for a lawful purpose.

#### General releases and waivers

You must not require a franchisee to sign a general release of the franchisor from liability towards the franchisee.

In addition, a franchise agreement must not contain, or require a franchisee to sign a waiver of any verbal or written representation that you have made.<sup>4</sup>

#### Jurisdiction for settling disputes<sup>5</sup>

Your franchise agreement must not require mediation to be conducted, or actions or proceedings to be brought outside of the State or Territory of the franchisee, or any jurisdiction outside Australia.

If a franchise agreement contains such a clause, the clause is of no effect.

#### Costs of settling disputes<sup>6</sup>

A franchise agreement must not contain a clause that requires a franchisee to pay the franchisor's costs to settle a dispute under the agreement.

If a franchise agreement contains such a clause, the clause is of no effect.

<sup>4</sup> This prohibition does not apply to agreements entered into prior to 1 March 2008 unless the agreement was subsequently transferred or varied.

<sup>5</sup> This prohibition does not apply to agreements entered into prior to 1 January 2015 unless the agreement was subsequently transferred or varied.

<sup>6</sup> This prohibition does not apply to agreements entered into prior to 1 January 2015 unless the agreement was subsequently transferred or varied.

## Former franchisees' details

You must not do, or omit to do, anything with the intention of influencing a former franchisee to make a request that their details not be disclosed to prospective franchisees.

## Dealing with marketing and advertising fees

If you operate a marketing fund, the Code imposes certain restrictions on how you deal with the marketing and advertising fees contributed to that fund.

Firstly, you must maintain a separate bank account for marketing and advertising fees. You must also contribute to the fund on the same basis as other franchisees for each company-owned store that you operate.

Marketing and advertising fees may only be used to meet expenses that:

- have been disclosed in the disclosure document
- are legitimate marketing or advertising expenses
- have been agreed to by a majority of franchisees or
- reflect the reasonable costs of administering and auditing the fund.

## Significant capital expenditure

During the term of a franchise agreement you must not require a franchisee to undertake significant capital expenditure. The Code does not define what 'significant capital expenditure' means.

However, a franchisor can require franchisees to incur expenses where the expenditure:

- was disclosed to the franchisee in the disclosure document that they received before entering into, renewing, or extending their franchise agreement
- will be incurred by a majority of franchisees and a majority of those franchisees approve the expense
- is necessary to comply with legislative obligations
- has been agreed to by the franchisee
- is considered necessary by the franchisor as a capital investment in the franchised business, justified by a statement which sets out the:
  - rationale for making the investment
  - amount of capital expenditure required
  - anticipated outcomes and benefits
  - expected risks associated with the investment.

## Record-keeping

Record-keeping is necessary to both monitor, and provide evidence of, compliance with the Code and any other applicable legislation. Under the Code you are required to generate or publish certain documents such as disclosure documents, franchise agreements and marketing fund statements.

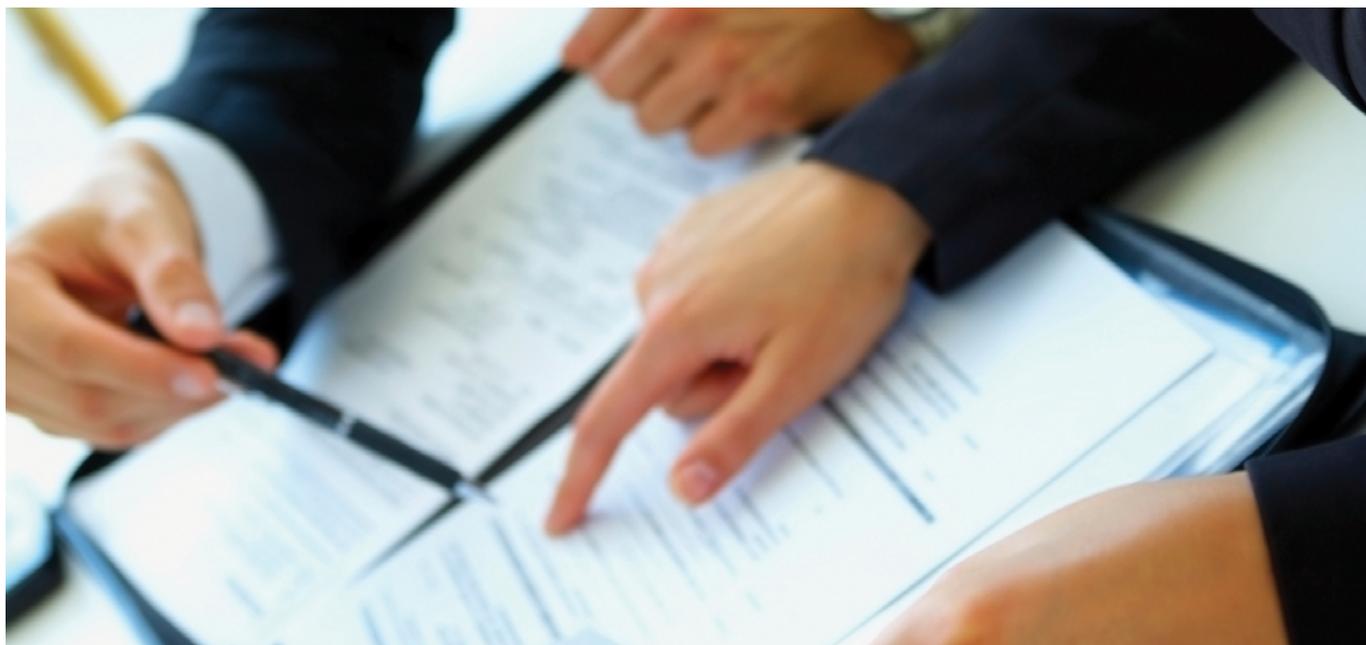
In addition, if the Code requires, or allows, a franchisee or prospective franchisee to give something to you in writing, you are required to keep this type of document or a copy of it. This includes any documents provided electronically. For example, you must keep the following documents:

- confirmation of receipt of the disclosure document
- professional advice statement
- marketing fund audit votes
- request to transfer a franchise to a third party (and any additional information provided regarding the transfer)
- request for a disclosure document
- notice of dispute
- request not to disclose former franchisee's details.

If you make any statements or claims in your disclosure document which rely on another document to support the statement or claim, you must keep that document. For example, if you provide a prospective franchisee with projected earnings for the franchised business, you must keep the documents that support those figures.

You must keep these documents for six years after they were created.

The ACCC has the power to obtain documents or information from a franchisor that the franchisor is required to keep, generate or publish under the Code. For more information, see page 23.



## 5. End of a franchise agreement

A franchise agreement can come to an end in a number of ways, such as by:

- the franchisee transferring the agreement to a third party
- a party terminating the agreement
- the term of the agreement coming to an end.

### Transfer

The Code does not provide a franchisee with an automatic right to transfer their franchise agreement to a third party. What the Code does is provide a process by which a franchisee may seek your consent to a transfer.

Under the Code, a franchisee may request your consent to transfer a franchise agreement. Such a request must be in writing and accompanied by all the information that you would reasonably require and expect to be given to make an informed decision. If you require further information to make your decision, you can request in writing that the franchisee provide the necessary information to you.

You must advise in writing whether you consent to the transfer and whether consent is subject to any conditions. You may revoke your consent to the transfer within 14 days of granting it by advising the party in writing that consent is revoked and setting out the reasons. You must not unreasonably revoke your consent to a transfer.

If you do not consent to the transfer, you must advise the party in writing and set out reasons why not.

You will be taken to have consented to the transfer if you do not object to the transfer within 42 days of receiving the franchisee's written request (or if you have requested further information, the date the information was provided to you). Your consent cannot be revoked in these circumstances.

You must not unreasonably withhold consent to the transfer of a franchise agreement. Circumstances in which you may reasonably withhold consent include:

Where the proposed transferee:	Where the franchisee:
<ul style="list-style-type: none"> <li>• is unlikely to be able to meet the financial obligations of the franchise agreement</li> <li>• does not meet a reasonable requirement of the franchise agreement for the transfer of the agreement</li> <li>• does not meet the selection criteria of the franchisor</li> <li>• does not agree, in writing, to comply with the obligations of the franchisee under the franchise agreement.</li> </ul>	<ul style="list-style-type: none"> <li>• has not paid or made reasonable provision to pay an amount owing to the franchisor</li> <li>• has not remedied a breach of the franchise agreement</li> <li>• has not provided to the franchisor a written statement that the transferee has received, read and had a reasonable opportunity to understand the disclosure document and the Code.</li> </ul>

Care should be taken when exercising this discretion to avoid the possibility of breaching your obligation to act in good faith.

## Termination

The Code does not provide you with a right to terminate a franchise agreement. Whether you have the right to terminate an agreement, and in which circumstances, will normally be determined by the terms of your franchise agreement.

What the Code does is require you to follow certain processes if you propose to terminate a franchise agreement.

### Breach by franchisee

If you propose to terminate a franchise agreement because the franchisee has breached the agreement, you must first give the franchisee reasonable written notice of your intention to terminate the agreement because of the breach. You must also notify the franchisee of what they must do to remedy the breach and allow them a reasonable time to remedy the breach (you are not required to allow more than 30 days).

If the franchisee remedies the breach in the allotted time frame, you cannot then terminate because of that breach.

If a dispute arises in relation to a proposed or actual termination, the dispute resolution framework outlined in Part 4 of the Code will apply (see page 17).

### No breach by franchisee

Under the terms of your franchise agreement, you may have the right to terminate an agreement before it expires, even if the franchisee has not breached the agreement or consented to the termination.

In these circumstances, you must give the franchisee reasonable written notice of the proposed termination and the reasons for it.

If a dispute arises in relation to a proposed or actual termination, the dispute resolution framework outlined in Part 4 of the Code will apply (see page 17).

## Special circumstances

You do not have to comply with the termination procedures outlined above if you intend to terminate a franchise for one of the following reasons (and your franchise agreement allows you to terminate the franchisee for that reason):

- no longer holding a licence needed to carry on the business
- becoming bankrupt, insolvent under administration or externally-administered
- becoming de-registered (if they are a company)
- abandoning the franchise or franchise relationship
- being convicted of a serious offence
- operating the business in a way that endangers public health or safety
- fraudulently operating the business.

You also do not have to comply with the termination procedures if you and the franchisee mutually agree to terminate the franchise agreement.

## End of the term

The Code does not require that you extend a franchise agreement or enter into a new agreement once the term of the agreement ends. However, as mentioned previously, you must notify the franchisee in writing whether you intend to extend the term or enter into a new agreement with the franchisee.

## Restraints of trade

If the franchisee seeks to extend the agreement and you decide against the extension, the Code may provide protection to the franchisee if you later attempt to enforce a restraint of trade clause against them.

The protection will only apply if:

- the franchisee had indicated, in writing, that it wanted to extend the agreement on substantially the same terms as those contained in your current franchise agreement
- the franchisee was not in breach of the agreement at the time it expired
- the franchisee had not infringed upon your intellectual property, or breached its confidentiality agreement with you, during the term of the agreement, and either:
  - the franchisee claimed compensation for goodwill because the agreement was not extended, but the compensation given was merely a nominal amount and did not provide genuine compensation for goodwill or
  - the agreement did not allow the franchisee to claim compensation for goodwill in the event that it was not extended.

Whether the compensation offered is genuine will depend on the circumstances.



## 6. Dealing with disputes

Part 4 of the Code promotes the cost-effective and timely resolution of franchising disputes.

If a dispute arises between the parties to a franchise agreement, either party may take action to resolve the dispute by commencing the internal complaint-handling procedure set out in the franchise agreement, or the procedure under the Code.

Regardless of whether you are using the procedure outlined in your franchise agreement or the Code, you and the franchisee must try to resolve the dispute.

You will be taken to be trying to resolve the dispute if you approach the resolution of the dispute in a reconciliatory manner, including by:

- attending and participating in meetings at reasonable times
- making your intentions clear, at the beginning of the process, as to what you are trying to achieve
- complying with any confidentiality obligations that apply during or after the process.

The obligation to act in good faith will also apply to you and the franchisee during the dispute resolution process.

### **Tips for resolving disputes**

- Make sure you are properly prepared before attending any meetings.
- Consider what is realistically achievable.
- Make sure you are clear on the process that will apply for resolving the dispute.
- Try to find areas of common ground with the other party.
- Be prepared to listen to the other party's view.

### **Internal complaint-handling procedure**

The Code requires you to develop an internal complaint-handling procedure, which should be set out in the franchise agreement. This procedure should aim to:

- provide a speedy, cost-efficient process for resolving most commercial disputes between franchisors and franchisees
- preserve the relationship between the parties to the dispute
- create a solution that is acceptable to the parties and commercially viable.

This procedure must comply with the steps outlined in the Code for dealing with a dispute (see steps 1-3 below).

## Code complaint-handling procedure

The internal complaint-handling procedure represents the minimum standard for complaint handling. As an alternative to using your internal complaint-handling procedure, you or the franchisee may try to resolve a dispute using the procedure set out in the Code, which is more comprehensive.

### Step one: inform the other party of the dispute

The complainant (this could either be you or the franchisee) must inform the respondent (the person with whom the complainant has a dispute) in writing of the dispute.

The complainant must tell the respondent the nature of the dispute, the outcome they want and what action they think will settle the dispute.

### Step two: try to resolve the dispute

The parties should then try to agree about how to resolve the dispute. This involves the parties concerned trying to negotiate a resolution.

### Step three: mediate

If you cannot resolve the dispute within three weeks, either the complainant or respondent may refer the matter to a mediator. If a dispute is referred to mediation, both parties must be represented at the mediation by a person who has the authority to enter an agreement to settle the dispute.

The mediator may decide the time and place for mediation, although it must be conducted in Australia.

There is no requirement to have legal representation at mediation. However, if you do decide to have your lawyer present, you should inform the mediator of this prior to mediation, as the franchisee may also wish to be legally represented.

If mediation is initiated, both parties must attend and try to resolve the dispute.

If you and the franchisee cannot agree about who should be the mediator, either party may ask the Mediation Adviser to appoint a mediator. The role of the Mediation Adviser is to help the parties resolve disputes that arise under the Code.

Further information about the role of the Mediation Adviser can be found on its website, [www.franchisingmediationadviser.com.au](http://www.franchisingmediationadviser.com.au), or by calling 1800 150 667 (toll-free within Australia) or (02) 9267 0167.

## Termination of mediation

If a dispute is unresolved after 30 days from when you started mediation under the Code complaint-handling procedure, you or the franchisee may ask the mediator to terminate the mediation. If such a request is made, the mediator is required to terminate the mediation.

The mediator may also terminate the mediation without a request from either you or the franchisee at any time unless it is satisfied that a resolution of the dispute is imminent. If the mediation has not been successful and has been terminated, the mediator must issue a certificate of termination stating the names of the parties, the nature of the dispute, that the mediation is finished and that the dispute has not been resolved. The mediator must give a copy of this certificate to the Mediation Adviser and both you and the franchisee.

## Cost of mediation

Parties must pay for their own costs of attending mediation under the Code complaint-handling procedure. Unless you have agreed otherwise, you and the franchisee are equally liable for the other costs of mediation specified under the Code. These include:

- the cost of the mediator

- the cost of room hire
- the cost of any additional input (including expert reports) agreed by both parties to be necessary to the conduct of the mediation.

## Alternatives to mediation

Any action taken under the Code or your agreement to try to resolve a dispute does not affect your right, or that of the franchisee, to commence legal action. In addition, the dispute resolution scheme does not prevent you (or the franchisee) from approaching the ACCC directly.

When there has been a breach of the Code, the affected party may be entitled to claim damages, obtain court orders to stop the contravention, or obtain other orders such as those requiring changes to the franchise agreement. You should seek legal advice on these issues.

**Court action can be costly and time consuming; it can damage relationships, and there is no guarantee that it will provide the desired outcome. It may therefore be more practical to first try to resolve the dispute using the mechanisms provided for in the Code.**



## 7. Good faith

You must act in good faith when dealing with a prospective or existing franchisee. Similarly franchisees and prospective franchisees are required to act in good faith in their dealings with you.

You should be mindful of your obligation to act in good faith when exercising your rights, and performing your obligations, under an agreement or the Code.

### What is 'good faith'?

The meaning of 'good faith' under the Code takes on the same meaning that exists at common law, which will continue to develop and evolve in Australia over time.

Under common law, the duty of good faith will require you to act reasonably and not exercise your powers arbitrarily or for some irrelevant purpose. Your conduct may lack good faith if you act dishonestly, for an ulterior motive or in a way that undermines or denies the other party the benefits of a contract.

The obligation of good faith will extend to all aspects of the franchising relationship, including:

- pre-contractual negotiations
- performance of the contract
- dispute resolution
- the end (including termination) of an agreement.

The obligation to act in good faith may not end when your agreement comes to an end. For example, if your agreement imposes obligations that will continue after the agreement has ended, you or the franchisee may be required to carry out these obligations in good faith.

### Legitimate business conduct

While good faith requires a party to have due regard to the rights and interests of the other party, it does not require a party to act in the interests of the other party. Neither does it prevent a party from acting in their own legitimate commercial interests.

For example, while good faith will require parties to act honestly and cooperatively during the negotiation of a franchise agreement, it is unlikely to compel a franchisor to make requested additions or changes to an agreement. Similarly, the decision by a franchisor not to offer a franchisee an option to renew or extend their franchise agreement does not mean that the franchisor has not acted in good faith in negotiating the agreement.

## Conduct that may show a lack of good faith

Conduct that may raise concerns under the obligation of good faith include:

- a franchisor treating a franchisee differently to other franchisees because the franchisee has raised concerns about the system
- a franchisor raising numerous minor and immaterial breaches with a franchisee in an aggressive and intimidatory manner designed to extract concessions or cessation of complaints
- franchisees using confidential information provided by the franchisor to compete with the franchisor
- franchisees using social media to post negative comments about their franchisor or their dispute with their franchisor.

## Things to consider

When considering whether your conduct is in good faith, potential questions to ask include:

- Have you been honest with the other party?
- Have you considered the other party's interests?
- Have you made timely decisions?
- Have you consulted with the other party regarding proposed changes?
- Are you imposing any conditions on the other party that aren't necessary to protect your interests?
- Where a dispute has arisen, have you attempted to resolve the dispute (either directly with the other party, or through mediation)?
- Are you acting for some ulterior purpose?

**Example:** The franchisor of a video rental franchise system granted a franchisee an exclusive licence over a particular territory. This meant that the franchisor was not allowed to be involved in the rental and/or sale of video products, or a business of a similar nature, within the franchisee's territory.

During the agreement, a business that was related to the franchisor sold DVDs via its website to consumers who lived in the franchisee's territory. The franchisor did not take any action to prevent these online sales.

By allowing its related business to sell DVDs within the franchisee's territory, the franchisor has not acted in good faith as it failed to remain loyal to the promise of the franchise agreement.

**Example:** The franchisor of a motor vehicle service franchise system entered into a franchise agreement that required the franchisee to follow specific procedures for invoicing and reporting.

During the agreement, the franchisee experienced difficulty in accurately processing invoices using software and hardware supplied by the franchisor. Meetings with the franchisor failed to resolve these issues, leading to a breakdown in the franchising relationship.

The franchisor subsequently issued a number of default notices to the franchisee, alleging that the franchisee had not complied with its invoicing and reporting requirements. However, the franchisor did not have a solid basis for the alleged breaches as it was unclear whether the franchisee had failed to follow these requirements. The franchisor's default notices were motivated by its desire to eventually terminate the franchise agreement.

The franchisor later terminated the agreement on the basis that the franchisee had failed to remedy the alleged breaches.

In this instance, the franchisor has not acted in good faith because it was acting for an ulterior purpose.



## 8. Enforcement and compliance

If you do not comply with the Code, you will be in breach of the Act. The ACCC is responsible for ensuring compliance with the Code and the Act.

Failure to comply with the provisions of the Code may result in the ACCC taking enforcement action against you or your business. The Act also allows affected parties (e.g. prospective and existing franchisees) to take legal action for a breach of the Code.

### Who is liable for a breach of the Code?

While section 51AD of the Act prohibits businesses from contravening the Code, individuals can also be liable. Individuals' liability can extend to the directors, the secretary, other officers or the board members of a company. Liability can also extend to employees of the company.

A person may be liable if they:

- attempt to breach the Code
- assist, or induce, another party to breach the Code
- are a party to the breach of the Code
- are knowingly concerned with a breach of the Code.

### The ACCC's approach to non-compliance

The ACCC's [Compliance and Enforcement Policy](#) outlines the ACCC's enforcement powers, functions, priorities and strategies and sets out the principles it adopts to achieve compliance with the law.

The ACCC determines the appropriate enforcement tools to address concerns on a case by case basis, taking into consideration the alleged contravention, the business involved and the impact of the conduct.

The Act provides for a number of sanctions and orders for non-compliance with the Code, including financial penalties for breaches of certain Code provisions. If you fail to comply with a penalty provision, the ACCC may take the matter to court, seeking a penalty of up to \$51 000 for each breach. Other orders a court can make include:

- injunctions to stop the conduct or to require some action to be taken
- compensation and damages
- disqualification orders to prevent directors from managing corporations for a period of time.

Alternatively, the ACCC may issue an infringement notice of \$8500 on a body corporate (or \$1700 on an individual or unincorporated entity) which it has reasonable grounds to believe has contravened a penalty provision.

The Act also confers upon the ACCC the ability to accept formal undertakings in which the ACCC and the party agree to certain actions, such as admitting a contravention, stopping the offending conduct or requiring the non-compliant party to review its compliance program (or, in the absence of a such a program, setting one up). If one of these undertakings is breached, the Federal Court may make enforcement and compensation orders.

The ACCC can also resolve a matter administratively at any stage of the investigation process (for example, by a franchisor agreeing to stop the conduct and compensate those affected).

### **Information gathering powers**

The ACCC can use a range of tools to gather information and documents that may assist with the investigation of an alleged breach of the Code or the Act, or to monitor your compliance with the Code.

### **Audit power**

Section 51ADD of the Act gives the ACCC the power to require you to provide information or documents that you are required to keep, generate or publish under the Code. This may include disclosure documents, franchise agreements, marketing fund statements, documents provided to you by a prospective or existing franchisee, or documents that you rely upon to support a claim in your disclosure document. If you are issued with a written notice, you have 21 days to produce the documents.

### **Power to obtain information, documents and evidence**

Section 155 of the Act gives the ACCC the power to obtain information, documents and evidence when investigating possible contraventions of the Act. This power can be used by the ACCC where there is reason to believe that the information, documents or evidence being sought are relevant to the investigation. Criminal penalties apply for failing to comply with a section 155 notice.

### **Substantiation notices**

The ACCC can require you to substantiate a claim or representation you have made to a franchisee or prospective franchisee regarding the supply or possible supply of goods or services. This includes entering into a franchise agreement. If you are issued with a substantiation notice, you have 21 days to respond.

## **What should you do if you have breached the Code?**

If you believe you may be in breach of the Code you should:

- immediately stop the activity
- seek legal advice on whether you are in breach of the Code
- provide a remedy to the affected parties
- review how the breach came about
- put in place an effective compliance program (including staff training) to avoid future recurrences.

## Civil penalty provisions under the Code

Obligation	Relevant clause
Failure to act in good faith	subclause 6(1)
Failure to create a Code compliant disclosure document	subclause 8(1)
Failure to update the disclosure document within 4 months after the end of each financial year	subclause 8(6)
Failure to update the disclosure document to reflect the position of the franchisee as at the end of the last financial year in circumstances where the franchisor was not required to update but a franchisee has requested a disclosure document	subclause 8(8)
Failure to provide pre-entry disclosure documents as required by the Code	subclauses 9(1) and (2)
Failure to provide lease documents where franchisee leases premises from the franchisor or its associate or failure to do so within one month	subclauses 13(1) and (2)
Failure to provide lease information where franchisee occupies premises without a lease or failure to do so within the specified time	subclauses 13(3) and (4)
Failure to provide certain agreements to the franchisee	subclause 14(1)
Failure to comply with reporting obligations for marketing or cooperative funds	subclause 15(1)
Failure to provide a copy of the disclosure document to a franchisee within specified time (after receiving a written request)	subclause 16(1)
Failure to disclose a materially relevant fact	subclauses 17(1) and (2)
Failure to provide notice of end of term arrangements	subclauses 18(2)
Failure to inform a franchisee that it may request a disclosure document when providing notice of end of term arrangements	subclause 18(3)
Failure to repay all payments (whether of money or of other valuable consideration) made by the franchisee to the franchisor within the specified time after the franchisee has exercised their cooling off rights	subclause 26(3)
Failure to provide reasonable written notice of proposed termination for breach	subclause 27(2)
Failure to provide reasonable written notice of proposed termination, and the reasons for it, where the franchisee is not in breach	subclause 28(3)
Franchisor influencing, or attempting to influence a former franchisee to request that its details not be disclosed	subclause 32(3)
Franchisor engaging in conduct that restricts or impairs the freedom or ability of franchisees or prospective franchisees to form an association	clause 33
Failure to attend mediation under the internal complaint-handling procedure	subclause 39(3)
Failure to attend mediation under the code complaint-handling procedure	subclause 41(3)

## 9. Key terms

**Associate (of a franchisor)**—a person:

(a) who:

- (i) is a partner, director or related body corporate of the franchisor, or a director of a related body corporate or
- (ii) for a franchisor that is a proprietary company—directly or indirectly owns, controls, or holds with power to vote, at least 15 per cent of the issued voting shares in the franchisor and

(b) whose relationship with the franchisor is relevant to the franchise system, including because they:

- (i) supply goods or services to a franchisee
- (ii) give the franchisee a right to occupy premises
- (iii) own intellectual property used in the franchise system or
- (iv) are involved in business development of the franchise system (e.g. market research and development, sales promotion or management).

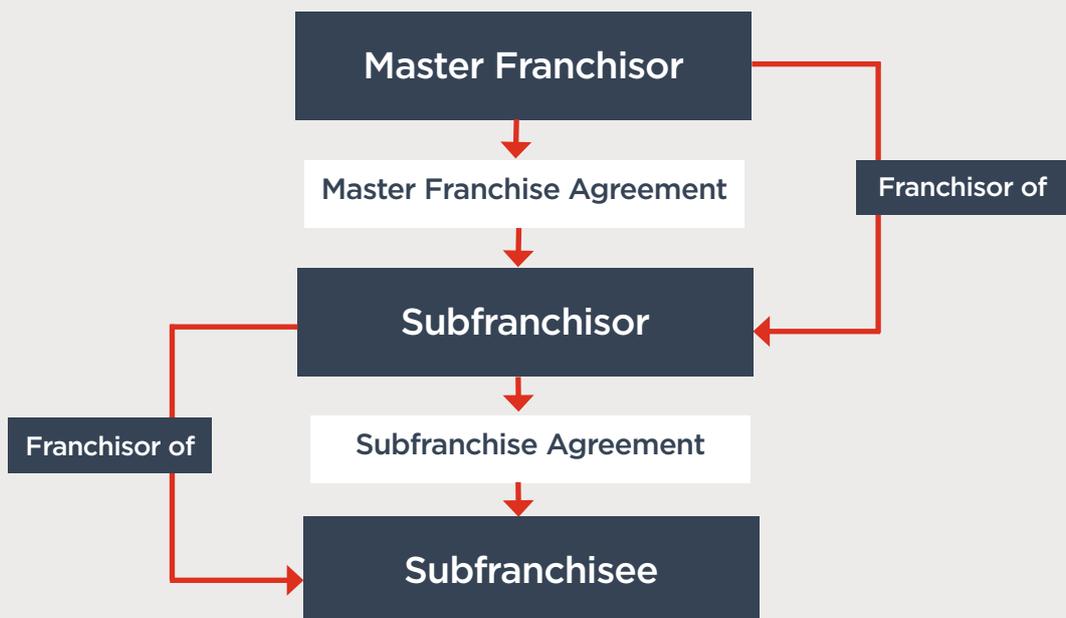
**Extend**—when the term of a franchise agreement is extended (other than because of renewal) or when there has been a material change to:

- the terms and conditions of the agreement or
- the rights or liabilities under or in relation to the agreement.

**Franchisee**—a person to whom a franchise is granted or otherwise participates in a franchise as a franchisee.

**Franchisor**—a person who grants a franchise or who otherwise participates in a franchise as a franchisor.

**Master franchise**—a type of franchise system where the 'master franchisor' grants to another party (the subfranchisor) control over the franchising activities in an area. The subfranchisor then enters into franchise agreements with individual franchisees (subfranchisees).



**Prospective franchisee**—a person who deals with a franchisor for the right to be granted a franchise.

**Renew**—when the franchisee exercises an option during the term of the agreement to renew the agreement.

**Restraint of trade**—a restriction on the ability of a franchisee to operate a similar business to the franchise after their franchise agreement has come to an end.

**Transfer**—includes:

- a franchisor entering into a new franchise agreement with a prospective transferee and terminating the existing agreement
- a franchisee's rights and obligations under a franchise agreement being assigned to a prospective transferee
- any other transfer circumstances contemplated by a franchise agreement.

**Varied**—any change to a franchise agreement.

## 10. Additional sources of information

### ACCC

Small business helpline: 1300 302 021

Website: [www.accc.gov.au/franchisingcode](http://www.accc.gov.au/franchisingcode)

Email updates: To receive updates from the ACCC's Franchising Information Network, email your contact details to [franchisingcode@acc.gov.au](mailto:franchisingcode@acc.gov.au)

Publications: Visit [www.accc.gov.au/publications](http://www.accc.gov.au/publications) to access more ACCC publications including a copy of the ACCC's franchisee manual.

### Griffith University online pre-entry franchise education program

Website: [www.franchise.edu.au/home/education/for-franchisees/pre-entry-franchise-education](http://www.franchise.edu.au/home/education/for-franchisees/pre-entry-franchise-education)

### Office of the Franchising Mediation Adviser

Telephone: 1800 150 667 (free call from Australia)

Website: [www.franchisingmediationadviser.com.au](http://www.franchisingmediationadviser.com.au)

For other business information go to [www.business.gov.au](http://www.business.gov.au)

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### Small Business Commissioners

Australian Small Business Commissioner	<a href="http://www.asbc.gov.au">www.asbc.gov.au</a>
New South Wales Small Business Commissioner	<a href="http://www.smallbusiness.nsw.gov.au">www.smallbusiness.nsw.gov.au</a>
South Australian Small Business Commissioner	<a href="http://www.sasbc.sa.gov.au">www.sasbc.sa.gov.au</a>
Victorian Small Business Commissioner	<a href="http://www.vsbv.vic.gov.au">www.vsbv.vic.gov.au</a>
Western Australian Small Business Commissioner	<a href="http://www.smallbusiness.wa.gov.au">www.smallbusiness.wa.gov.au</a>

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