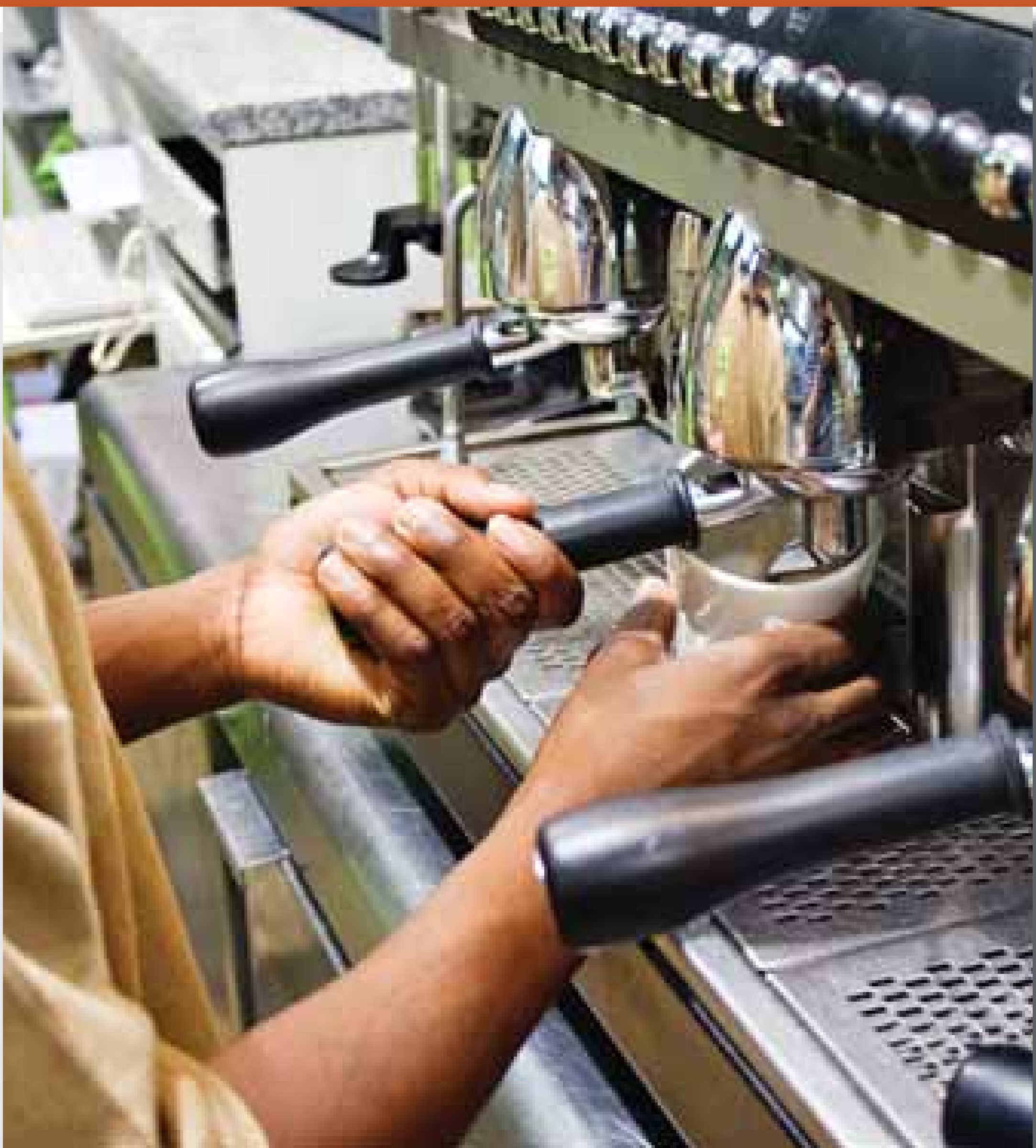
Australian Competition & Consumer Commission

THE FRANCHISEE MANUAL



THE FRANCHISEE MANUAL

Australian Competition and Consumer Commission
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On 1 July 2010 the Australian Government implemented a number of amendments to the Franchising Code of Conduct. This manual reflects the law and legislation as it stands at the date of publication including these amendments. Where there is any inconsistency between the code and this manual, you should always refer to the code.

You should check whether there is any inconsistency before you rely on this document.

Where it applies, the code will have the force of law as a mandatory code under s. 51AD of the *Competition and Consumer Act 2010* (the Act). The ACCC is responsible for administering and enforcing both the Act and the code. The code is not an ACCC publication; however, a copy of it can be accessed through the ACCC website (www.accc.gov.au).

Foreword

The Australian Competition and Consumer Commission (ACCC) plays a key role in the regulation of a fair and competitive market environment for the operation of efficient and innovative small businesses, including franchises.

The franchise sector is continuing to experience strong growth in Australia and is a significant contributor to the economy and business community. As the sector grows, so does the importance of the ACCC's role as a regulator through the administration of the Franchising Code of Conduct (the code).

The ACCC is responsible for the enforcement of the code and has the power to investigate and prosecute breaches. The ACCC also has a responsibility to educate the sector and ensure that both potential and existing franchise participants are aware of their rights and obligations under the code.

The franchisee manual is one of a number of ACCC publications that will help you to understand your rights and obligations under the code.

Dr Michael Schaper

ACCC Deputy Chairman


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Introduction

The code has the force of law and requires franchisors to disclose specific information about a franchise to both potential and existing franchisees. It regulates the dealings between both parties in a franchise relationship and provides for dispute resolution mechanisms.

The franchisee manual will tell you:

- what franchising is
- whether the code applies to you and your business
- the advantages, disadvantages and responsibilities of being a franchisee
- steps you should take before choosing a franchise
- how you should research and verify information given to you about a franchise
- steps you should take to understand and evaluate your franchise agreement
- what you should do if you have a dispute with your franchisor
- answers to frequently asked questions
- where you should go for more information.

What is franchising?

Franchising is a business system. It involves one party (the franchisor) granting another (the franchisee) the right to operate a replicated franchise business under the same trade name and use established management, marketing and operating procedures. In return the franchisee commits to paying the franchisor a capital investment and ongoing fees and complying with franchise procedures.

Does the Franchising Code of Conduct apply to me?

The code applies to all agreements that meet the definition of a franchise agreement under the code. The franchise agreement must contain the requisite four elements stated in this definition. (See '**Common terms**' on p. 3).

However, the code will not apply in either of the following situations:

- the agreement is covered by another mandatory code
- sales under the franchise are likely to provide no more than 20 per cent of the gross turnover for the first year of the franchise, where the same goods and services have been supplied for two years immediately before entering into the agreement.

Common terms

Franchisor:

the person or company granting the franchisee the right to operate the business under the trade name and in accordance with the established operating system.

Franchisee:

the person to whom the franchise is granted under a franchise agreement or who participates in the operation of the franchise as a franchisee.

Franchise agreement:

an agreement that has the following four elements:

- an agreement between the parties, which may be written, oral or implied
- a grant by the franchisor to the franchisee of the right to carry on the business
- substantial or material association with a trademark, advertising or commercial symbol
- an agreement by the franchisee to pay the franchisor, or an associate, an amount in return for the grant of these rights and usages.

Disclosure document:

the document which provides detailed information about a franchise and is required to be given to potential and existing franchisees, by the franchisor, at various stages in the franchise relationship.

Advantages, disadvantages and responsibilities of franchising

Franchising can be an excellent way for you to own your own small business while benefiting from the experience and security of a franchise system. However, purchasing a franchise is not a guarantee of success. You should carefully evaluate the advantages and disadvantages of a franchise before entering into a franchise agreement and make sure you are aware of what your responsibilities will be as a franchisee.

Advantages

The advantages of being a franchisee may include:

- owning your own small business with the benefit of a larger business network and system, which may provide added security
- access to business knowledge and planning, management skills, marketing skills and product knowledge
- pre-opening support from the franchisor, including site selection and fit-out, financing, training and market knowledge
- ongoing support from the franchisor, including training and management, advertising, operating procedures and assistance, and growth of the product or service and the franchise
- building on an established product or service with existing brand recognition and an established reputation and image, which may reduce business venture risks
- the franchisor being able to negotiate favourable conditions or rates with your financial institutions or suppliers
- consistency in service and product.

Disadvantages

The disadvantages of being a franchisee may include:

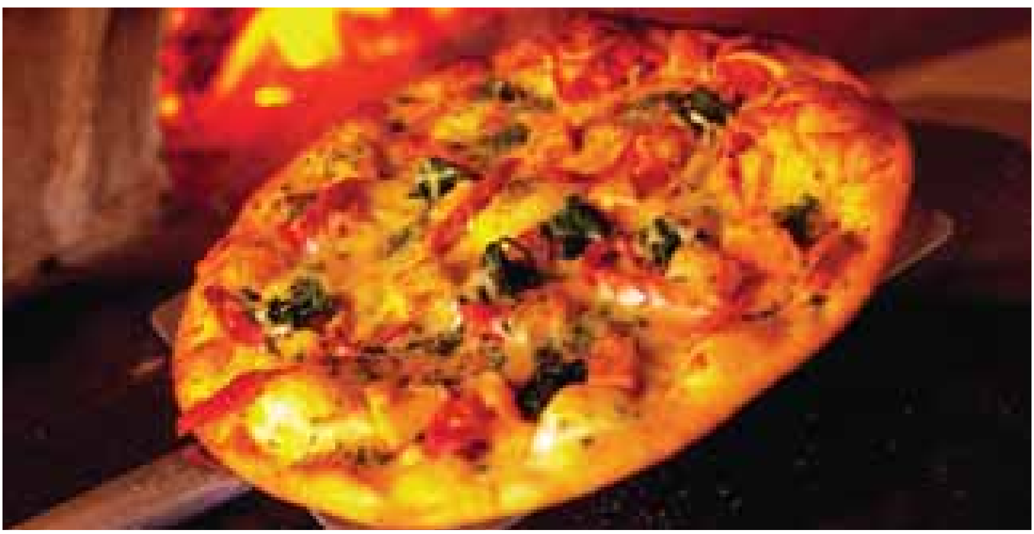
- restrictions being imposed on the way you operate the business, as you will be required to adhere to the franchise agreement and the franchise system operations manual—e.g. on opening hours, advertising requirements, products and services sold, pricing and geographic territory
- an ongoing commitment to pay royalties and advertising fees in addition to your initial capital investment
- a requirement to upgrade the franchise premises and fit-out periodically

- a requirement to acquire goods or services from an approved supplier, which may include the franchisor
- the risk of the reputation and future profitability of your franchise being damaged by the behaviour of a rogue franchisee or a bad business decision by the franchisor
- the limited term of the franchise agreement, with little input from you on renewal options or termination, depending on the terms of your contract
- the possibility of your franchise being terminated if you breach the franchise agreement.
- the terms of the franchise agreement and the operations manual restricting you from being able to respond independently to market fluctuations and changes to market dynamics
- dependence on your franchisor for flexibility and innovations in product and service delivery.

Your franchise agreement responsibilities

As a franchisee your responsibilities will centre around running the franchise efficiently and effectively in accordance with good business practice and franchise procedures.

Your franchise agreement will primarily determine your responsibilities and you should make sure you understand these requirements **before** you sign the agreement.



Before choosing a franchise

Franchise scams

The benefits of franchising attract legitimate franchisors and franchise systems, and enable them to operate successfully. However, these benefits may also attract unscrupulous operators seeking to take advantage of potential franchisees through fraudulent business activities—franchise scams.

Scam franchise opportunities usually offer investors the chance to join a 'proven business system' that requires minimum effort, experience or skill but promises instant rewards. These promises may be made in advertisements, seminars or workshops where the incentive of a special 'join today' bonus may be offered to induce people to sign up on the spot. The scammers may misrepresent the franchise earning potential, ease of operation, success of existing franchises, 'head office' or franchise system support, initial outlay and business structure. These scams usually promise a risk-free investment with immediate high returns.

Other scammers may attempt to deliberately structure their business to avoid the obligations of the Franchising Code of Conduct by calling it a 'distributorship' or 'licence agreement'. However, simply because a business is not called a franchise does not mean that it cannot fall under the definition of a franchise agreement under the code. **Remember**, if it contains the requisite four elements referred to in the definition of a franchise agreement (p. 3), it is a franchise and the franchisor is obliged to comply with the law.

The ACCC is active in monitoring the franchising sector for any fraudulent activity and taking enforcement action when and where it detects a breach of the law. The existence of the code and this enforcement action has deterred illegitimate and dubious scam franchise systems from operating in Australia, and has provided a safer investment environment for franchisees.

Warning signs

Warning signs of scam franchise opportunities include:

- ✗ claims you can make large amounts of money quickly and with little effort—i.e. 'get rich quick' schemes
- ✗ a reluctance to give details of the other franchisees
- ✗ franchisors or master franchisees who are reluctant to provide any written information
- ✗ a requirement that payment be made up front before any information is released
- ✗ provision of inconsistent financial information about the business's profitability
- ✗ a franchise advertisement with only a post office box as identification.

The ACCC strongly recommends that you seriously consider turning away from a particular business opportunity if you see any of these warning signs. If you decide to ignore them and elect to accept the offer, it may later amount to a bad business decision for which the ACCC, the courts and the Act can provide no remedy.

However, remember that only a minority of business opportunities available in the marketplace are scams. Provided you do sufficient research about a franchise opportunity, you should not be caught by a scam.

Disclosure requirements

Under the code, franchisors are required to provide prospective franchisees with certain current information that is relevant to the franchise, in the form of a disclosure document.

The disclosure document will contain financial information and details about the franchise owners and the franchise system.

Under the law, prospective franchisees must be provided, at least 14 days before entering into a franchise agreement or making a non-refundable payment in connection with the agreement, with:

- a disclosure document
- a copy of the Franchising Code of Conduct
- a copy of the franchise agreement in the form in which it is to be executed.

Additional requirements apply to sub-franchising. This 14-day period also applies to renewals, extensions and extensions of the scope of a franchise agreement.

All other agreements that the franchisee is required to enter into under the franchise agreement—such as lease, hire purchase, security or confidentiality agreements, or restrictions on business—must be provided to the prospective franchisee at least 14 days before signing the franchise agreement or as soon as they become available.

The disclosure document must follow the format set out in the code and must take one of two forms—long-form disclosure or short-form disclosure. Where the annual turnover of the proposed franchise is more than $50 000 at any time during the term of the franchise agreement, the franchisor has to provide a long-form disclosure document. If turnover is less than $50 000 per annum for the entire agreement, the franchisor may choose to provide a short-form disclosure document, which contains less information. If you are given a short-form disclosure document, you may still request the additional information that is included in a long-form disclosure document. If you do request additional information, then the franchisor must provide it.

A long-form disclosure document must follow the format set out in annexure 1 of the code. The information disclosed must include:

1. A statement that franchising is a business and, like any business, the franchise (or franchisor) could fail during the franchise term and this could have consequences for the franchisee (item 1).
2. Information about the franchisor, including the business experience of the people running the franchise (items 2 and 3).
3. Details of any past and present criminal, trade practices and other relevant litigation (as defined in the code) (item 4).
4. Details of any payments that the franchisor will make to other parties for the introduction of the prospective franchisee to the system—i.e. as a ‘finder’s fee’ or commission (item 5).
5. Details of existing franchise outlets (including similar businesses operated by the franchisor) and franchises that have been terminated (were not renewed, transferred or bought back) during the last three years (item 6).
6. Any trademark, patent, design or copyright that is significant to the franchise system (item 7).
7. The proposed franchise territory, including whether:
   - the territory is exclusive to the franchisee
   - the franchisor can alter the assigned territory
   - franchisees may operate other similar businesses outside the territory (item 8).
8. Details of any goods, services, equipment or products the franchisee must acquire or provide, including restrictions and obligations on where these may be purchased or acquired (items 9 and 10).

9. The franchisor's policy on site and territory selection, with details on the history of the site where a franchise has previously operated from the site—including the reasons why the previous franchise is no longer operating (item 11).
10. Details of marketing and cooperative funds that the franchisee must contribute to (item 12).
11. Details of any money the franchisee is required to pay before signing the franchise agreement, including entitlements to a refund (item 13).
12. Details of all required payments and costs for entering and establishing the franchise, including any financing arrangements, and details of other payments that are reasonably foreseeable by the franchisor (item 13).
13. Whether the franchisor will require the franchisee, through the franchise agreement, the operations manual or any other means, to undertake unforeseen capital expenditure not disclosed before the franchisee entered into the agreement (item 13A).
14. Whether the franchisor will attribute the costs it incurs in dispute resolution (including legal costs) to the franchisee (item 13B).
15. References to the conditions of the franchise agreement that deal with the obligations of both the franchisor and franchisee (items 15 and 16).
16. References to the conditions of the franchise agreement that deal with the term of the agreement, variations, renewal and extension, termination, goodwill (if any), transfer, mediation, the franchisor's right to inspect records, and any restriction on the franchisee's operations during and after the agreement (item 17).
17. Details of unilateral (one-sided) variations that the franchisor has made to franchise agreements in the past, and the circumstances in which the franchise agreement may be unilaterally varied in the future (item 17A).
18. Details of confidentiality obligations that will be imposed on the franchisee (item 17B).
19. Details of the process for determining arrangements to apply at the end of the agreement, such as (item 17C.1):
    - whether the franchisee will have any option to renew, extend, or extend the scope of the franchise agreement
    - whether the franchisee will receive an exit payment
    - arrangements that will apply to unsold stock, equipment and other assets purchased by the franchisee.

20. If a franchise agreement is entered into in the financial year commencing on 1 July 2011, 1 July 2012 or 1 July 2013, details of whether the franchisor has, since 1 July 2010, considered any significant capital expenditure by franchisees in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees (item 17C.2).
21. If a franchise agreement is entered into in a financial year commencing after 1 July 2013, details of whether the franchisor has, in the last three financial years, considered any significant capital expenditure by franchisees in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees (item 17C.3).
22. Whether the franchisor will amend the franchise agreement on or before the time it is transferred or novated (item 17D).
23. Details of any other agreements that may be required under the franchise agreement, such as agreements for lease, hire purchase, security, confidentiality or restrictions on business (item 18).
24. Complete financial information about earnings and projections, if these are mentioned, including any assumptions made in preparing the information; and full financial reports for the previous two financial years, or an independently audited statement of liquidity (items 19 and 20).

Franchise features you should look out for

When reviewing your disclosure document, you may wish to pay particular attention to:

- **Franchise territory**

  Item 8 of the disclosure document will tell you whether the franchise is for an exclusive or non-exclusive territory or is limited to a particular site. It may also tell you whether the franchisor can operate or establish a business that is substantially the same as the franchise in the franchised territory and whether the territory may be changed.

  If your territory is not exclusive, you may wish to find out whether you have a first right of refusal option if any additional franchises are proposed within your area. A first right of refusal may give you, as an existing franchisee, the option to purchase any additional franchise within this area before others have an opportunity to do so.

- **Site selection**

  Item 11 will give you details about the franchisor's policy on selecting a site for your franchise and the territory in which it will operate. If a site has been selected you should make sure you are happy with the basis on which the selection was made.

  If another franchisee has previously operated a franchise granted by the franchisor from the site selected for your franchise, the franchisor must also provide you, in a separate document, with details of that franchise, including the circumstances in which the previous franchisee ceased to operate.

  It may also be important to obtain demographic and statistical information about your site and surrounding areas because this will give you an indication of how successful your franchise may be. The information should include age, buyer preferences, spending habits, previous tenant performance irrespective of business type, competitor activity and people traffic count. You should also consider the potential for any new external competition in the defined area.

- **Leasing arrangement**

  Item 18 will tell you what your franchise leasing requirements will be. You may be required to enter directly into a lease, sub-lease or occupancy agreement.

- **Training and support**

  You should consider the level and type of ongoing training and support you are likely to receive from the franchisor.

- **Market expansion**

  You should consider how the franchise and/or franchisor has taken into account the ability of the product or service to be flexible and respond and adapt (if necessary) to changes in market behaviour.

- **End of term arrangements**

  Item 17C will provide you with the details of the process for determining arrangements that will apply at the end of the franchise agreement. You should carefully review these arrangements and determine whether you would like to negotiate any of the terms or include any additional arrangements.

Matching your own abilities to the challenge

Before you buy a franchise, it is important to consider why you want to buy it and assess your ability to run the business.

Your personal attributes and abilities

You may want to consider the suitability of your education, skills, personal experience and temperament to the nature of the business you are considering buying. You may benefit from seeking advice from others such as a mentor or existing franchisees in testing your suitability.

Your reasons for considering a franchise

Your reasons for buying a franchise are also significant. You should look at why you want to own the franchise and consider:

- whether it will be a primary or secondary source of income for you and whether you can afford the investment risk
- whether you have adequate borrowing capacity to fully set up the franchise
- the ongoing commitment of owning a small business, including the hours you are able to work
- family and lifestyle commitments that may be affected by owning a franchise.

Considering why you want to buy a franchise may help you minimise the risk of joining a system that is not right for you and avoid disputes with your franchisor.

It is also a good idea to complete a pre-entry franchise education program to help you assess franchise opportunities before making a decision.

Research and verification

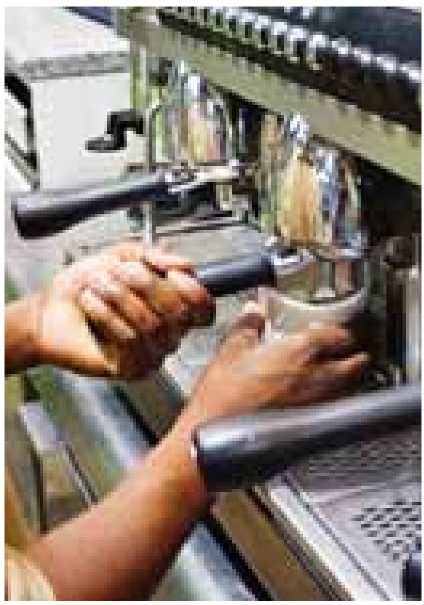
Researching and investigating the franchise you are considering buying will greatly assist you to make an informed decision about the franchise's likely success and its short-term and long-term viability before you purchase it. Your research should also involve the verification of any information provided to you by the franchisor in the disclosure document and in any other documents. It is **important** that you seek legal, accounting and professional business planning advice from experienced practitioners to help you do this.

Existing franchisees

Speaking to existing franchisees will give you an insight into how the franchise system works and the relationship that the franchisees have with their franchisor.

Item 6 of annexure 1 of the code requires franchisors to provide you with a list of current franchisees. You should try to speak to as many franchisees as you are able to, in addition to those that are already on the list. You should bear in mind that they may become your future colleagues and consider asking them about:

- their experience with the franchisor regarding contractual obligations
- whether they are generally satisfied with the quality and level of support provided
- their experience of training, supply of products or services, and earnings representations as compared to actual earnings
- their experience of the quality of the service and/or product and any quality control measures within the franchise system
- whether they would consider purchasing an additional outlet.



If possible, it is a great idea to work with an existing franchisee so that you are able to see how the business operates first hand, including turnover and staffing requirements.

Previous franchisees

It is also important to speak to previous franchisees so that you are able to see who has left the franchise system, how long they remained a franchisee and why they left. When combined with information you have received from existing franchisees, this should give you a balanced picture of how the franchise system and franchisor operate.

Item 6 of annexure 1 of the code also requires franchisors to provide you with details of franchises that have been terminated (not renewed, transferred or bought back) in the previous three years.

You should consider asking previous franchisees questions similar to those you asked the existing franchisees. It is also recommended that you ask your franchisor about previous franchise and site owners so that you can see how many times a site has been used for a franchise and whether it has been successful.

Financial information

Financial information about the franchise system and your franchise is extremely important when you are considering the short-term and long-term viability of your franchise and assessing it as an investment risk. The disclosure document will contain financial information that your franchisor must provide to you. You should be aware that your franchisor **may choose** to provide you with additional information.

It is important that you verify all the financial information given to you. This is especially the case with representations made to you about earnings, profitability and site selection.

You should obtain as much financial information as possible about the franchise and the individual franchisor, from the franchisor directly and from previous and existing franchisees. This will allow you to compare and verify any figures or projections given to you by your prospective franchisor.

Financial details you should look at closely include:

The franchisor

- how long the franchisor has been in business
- number of current franchisees
- business expansion plan
- financial standing and reputation
- personal attributes and goals of the franchisor.

The total fees payable

- any initial capital investment and ongoing loan or interest repayments
- royalties, advertising funds or other ongoing fees that are fixed or are a proportion of turnover
- wages and employee pay entitlements—e.g. superannuation, personal leave and annual leave
- leasing and any fit-out payments
- the cost of supplies, including where you are going to source them from—you may be obliged to purchase them directly from your franchisor and, if so, you should compare the cost of this to the cost of getting supplies from other sources
- other costs incidental to running the business—e.g. electricity and telephone accounts.

You should look at the payments that you will be making and use them to evaluate the earnings and growth potential of the franchise.

Market research

The position of the franchise in the market in which it trades is a vital consideration.

You should research the market for your product or service and the wider industry thoroughly. It is important that you consider the short-term and long-term sustainability of the product or service in detail by looking at whether it is:

- new or seasonal
- unique and with distinguishing characteristics and staying power
- easily substituted
- based upon a trademark or symbol
- in a market that is declining or expanding
- in an already very competitive environment
- able to be modified or replaced in line with changing market demands.

Once you understand the market for your product or service, you should then research the proposed franchise territory to see whether it is suitable for your franchise. You should look at the demographics, culture and spending habits of consumers within the area. You should also check whether the franchisor has a continuous and steady growth plan that is flexible enough to deal with market changes.

Background checks

Litigation

Under item 4 of annexure 1 of the code a franchisor must tell you details of criminal, trade practices and other litigation against them as an individual or against the business.

If your franchisor has provided you with such details, you should obtain further information about their involvement in the matter and its outcome. This will allow you to make an informed decision about purchasing the franchise.

It is important in any case to check whether any government agency or private party has taken legal action against the franchisor or any other persons responsible for the management of the franchise (including directors and majority shareholders) and/or the franchise itself.

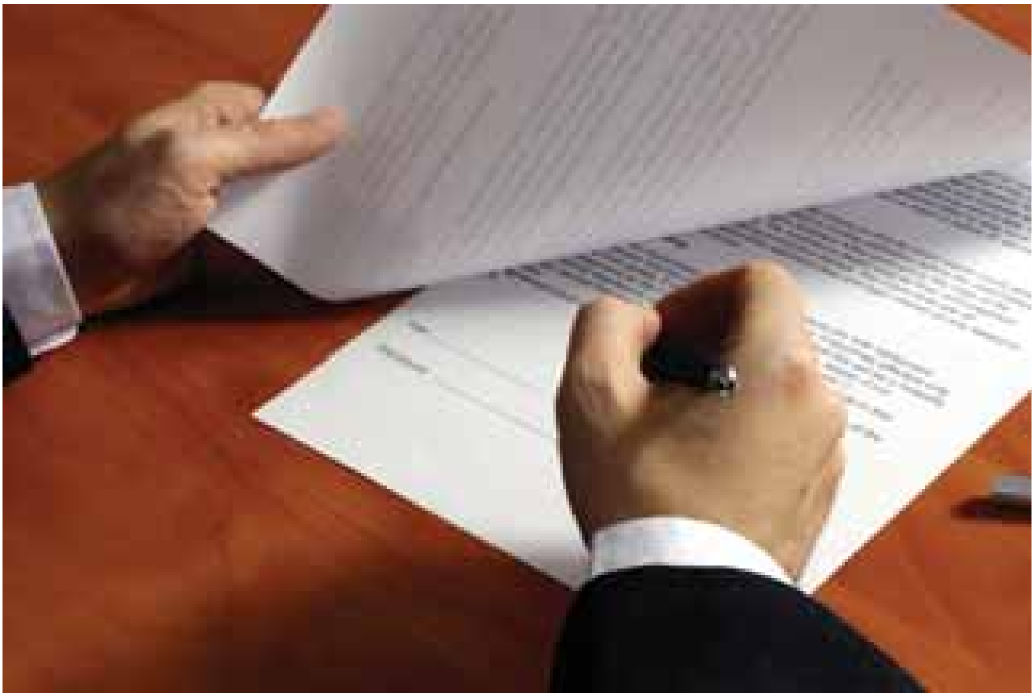
If legal action has been taken, you should find out more information about the matter and decide whether you still want to purchase the franchise.

General search

It is also a good idea to do a general internet search on the franchise for anything that may affect your decision.

You should consider doing background searches for individual and company names on the following websites:

Agency	Website
Australian Government	
Australian Competition and Consumer Commission	www.accc.gov.au
Australian Securities and Investments Commission	www.asic.gov.au
State and territory offices of fair trading	
Australian Capital Territory—Office of Regulatory Services	www.ors.act.gov.au
Northern Territory—Department of Justice	www.nt.gov.au/justice
New South Wales—Fair Trading	www.fairtrading.nsw.gov.au
Queensland—Fair Trading	www.fairtrading.qld.gov.au
South Australia—Office of Consumer and Business Affairs	www.ocba.sa.gov.au
Tasmania—Consumer Affairs and Fair Trading	www.consumer.tas.gov.au
Victoria—Consumer Affairs Victoria	www.consumer.vic.gov.au
Western Australia—Department of Commerce	www.commerce.wa.gov.au



Understanding your agreement

Your franchise agreement is a contract between you and your franchisor. Once you have signed the agreement, you will be legally bound to its terms and conditions.

It is important that you **read** the agreement **carefully** and make sure you understand all the terms and the legal effect of what you are agreeing to.

It is essential that you seek legal advice to explain what you are signing and how the terms will affect you legally.

Every franchise agreement is different, although their general purpose is the same.

All franchise agreements will state the rights and responsibilities of the franchisor and franchisee. They will deal with fees, territory, site selection, lease arrangements, termination, renewal and the length of the franchise agreement.

There are three phases to your franchise agreement. You should be aware of your rights under the code within each of these phases.

1. Before you sign

(or make a non-refundable payment in connection with the franchise)

Fourteen days

You are entitled to receive a copy of the Franchising Code of Conduct, the disclosure document and the franchise agreement in the form in which it is to be executed from your franchisor at least 14 days before you enter into the franchise agreement (clause 10 of the code).

Written statement

You will need to sign a written statement stating that you have received, read and had a reasonable opportunity to understand the code and the disclosure document. It is very important that you do this before signing (clause 11(1)).

Independent advice

You will need to sign a statement that you have sought independent legal, business or accounting advice, or that you have been told that this advice should be sought and have decided not to seek it. It is important that you do seek advice so that you understand your contractual and financial obligations (clause 11(2)).

2. When you are considering the agreement

No release of liability

A franchise agreement entered into on or after 1 July 1998 must not contain a general release of the franchisor from liability towards you (clause 16(1)).

In addition, a franchise agreement entered into on or after 1 March 2008 must not contain or require you to sign a waiver of any verbal or written representations made by the franchisor (clause 16(1A)).

You should look closely at the agreement and note particularly:

- **Fees payable**, which may include advertising fees, royalties, commissions, marketing and cooperative funds, transfer fees and early termination fees.
- **Termination conditions** with which you will have to comply if you want to terminate the franchise early, and whether the franchisor has the right to buy back the business when the franchise agreement is terminated.
- **Transfer conditions** that you will need to comply with if you wish to transfer (sell) your franchise during the term of your franchise agreement. You may find that a new franchisee will require the approval of your franchisor and that a transfer fee may be payable.
- Whether **oral representations** that have been previously made to you have been put in writing and form part of the contract. It will be difficult for you to enforce at a later date oral representations made to you prior to entering the franchise if they have not been put in writing.
- Whether **quality and other standards** for products and/or services are imposed on franchisees and enforced.
- Whether there is **territory exclusivity**.
- Whether you will be required to contribute to a **marketing or cooperative fund**, how the franchisor intends to use these funds and how this will benefit your franchise.
- The **length of your franchise agreement** and any renewal options and end of term arrangements.
- The **length of your lease agreement** and whether the term coincides with the term of your franchise agreement. You should also be aware of any fit-out obligations and associated costs.

3. After you have signed—your ongoing rights and obligations

Cooling-off period

You are entitled to terminate a new franchise agreement within seven days of entering into the agreement or making a payment under the agreement. If you do terminate the agreement, the franchisor must refund all payments you have made, less reasonable expenses, within 14 days. This seven-day cooling-off period does not apply to the renewal, extension or transfer of an existing franchise (clause 13).

Lease documentation

You are entitled to receive lease documentation from your franchisor where you lease the premises from your franchisor or occupy premises leased by your franchisor.

Your franchisor must provide you with these documents within one month of you signing them (clause 14).

Current disclosure document

You can request (in writing) a current disclosure document once every 12 months.

Your franchisor must provide you the document within 14 days (clause 19).

Continuous disclosure

Your franchisor must provide you with updated and continuous disclosure of matters that may be materially relevant facts. If any of these matters occur and are not mentioned in your disclosure document, the franchisor is required to tell you about it within 14 days (clause 18).

Materially relevant facts include changes in majority ownership or control, and court proceedings or judgments alleging a contravention of trade practices law (see the list in clause 18(2)).

Marketing fund statement

If you provide money to a marketing or cooperative fund, the franchisor must prepare an annual financial statement of all the fund's receipts and expenses for the last financial year within four months of the end of the financial year. A registered company auditor (or, if the franchisor is a foreign franchisor, a foreign equivalent) must audit this statement. Where 75 per cent of franchisees agree, the requirement to audit the statement may be waived. However, this decision must be revisited every three years.

The franchisor must provide you with the financial statement and auditor's report (if required) within 30 days after their preparation (clause 17).

Termination

Termination conditions

If your franchisor wishes to terminate the franchise because you have breached the agreement, they must give you reasonable notice of the breach, tell you what needs to be done to fix it and allow you reasonable time (but not more than 30 days) to do this. If you fix the breach within this time, the franchisor will be unable to terminate the franchise on this ground (clause 21).

If your franchisor wishes to terminate the franchise and you have not breached the agreement, your franchisor must give you reasonable written notice of the termination and reasons for it (clause 22).

Termination conditions exceptions

The franchisor does not have to comply with these termination conditions if you:

- no longer hold a licence needed to carry on your business
- become bankrupt or insolvent
- abandon the franchise
- are convicted of a serious offence
- operate the business so that it endangers public health or safety
- are fraudulent in operating the business
- agree to terminate the franchise agreement.

Good faith

Nothing in the code limits any common law obligation of good faith that applies to the parties to a franchise agreement (clause 23A).

Transfer conditions

You must request your franchisor's consent in writing for a transfer or novation of the franchise.

Your franchisor may not unreasonably withhold consent. If your franchisor does not respond within 42 days, consent is taken as given.

The reasons for which a franchisor may withhold consent include a proposed transferee being unlikely to be able to meet financial obligations or not meeting the selection criteria (see the list in clause 20(3)).

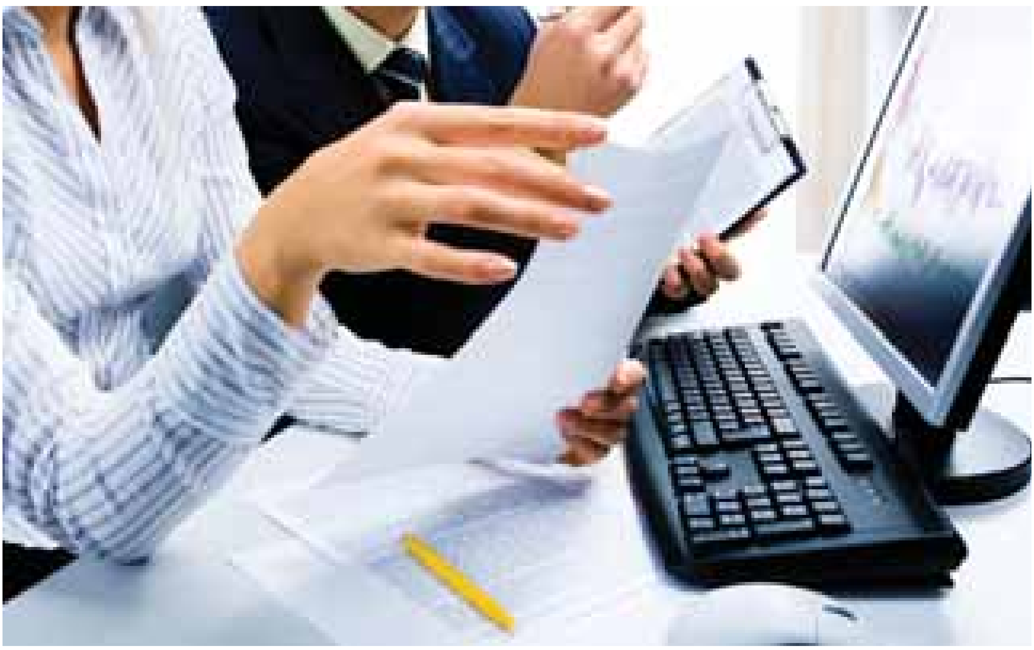
You should also check whether any other conditions are attached to your transfer or novation—e.g. a fee—and ensure that any person to whom the franchise may be transferred evaluates the purchase independently and is aware of their rights and obligations.

Notice of renewal

A franchisor is required to notify a franchisee, at least six months before the end of the term of their franchise agreement, of its decision:

- to renew or not to renew the agreement
- to enter into a new agreement.

If the term of a franchise agreement is less than six months, the franchisor must notify the franchisee of its decision at least one month before the end of the term of the agreement.



Dispute resolution

The code provides a choice of dispute resolution procedures for parties to a franchise agreement. Either party may choose to commence the dispute resolution through the internal complaint-handling procedure (clause 26) or the code's complaint-handling procedure (clause 27).

Internal complaint-handling procedure

This procedure must comply with the code complaint-handling procedure and is often outlined in your franchise agreement.

Code complaint-handling procedure

1. Provide your franchisor with details of the problem, the outcome you are seeking and how you think the outcome can be met.
2. Try to agree with your franchisor about how to resolve the dispute.
3. If you cannot agree, you can refer the matter to a mediator.
4. If you cannot agree on a mediator, you can ask the Office of the Franchising Mediation Adviser to appoint a mediator.
5. Your franchisor must attend mediation and try to resolve the dispute once you have requested this.
6. Remember, your franchisor may also begin this process and choose to refer the matter to the Office of the Franchising Mediation Adviser if you cannot agree on how to resolve the dispute. If your franchisor has requested mediation, you must attend and try to resolve the dispute (clause 29).

You or your franchisor will be taken to be trying to resolve a dispute if either party approaches the resolution of the dispute in a reconciliatory manner, including behaving in the following ways (clause 29(8)):

- attending and participating in meetings at reasonable times
- at the beginning of the mediation process, making your intention clear as to what you are trying to achieve through the mediation process
- observing any obligations relating to confidentiality that apply during or after the mediation process
- not acting—including providing inferior goods, services or support—during the dispute in a way which has the effect of damaging the reputation of the franchise system

- not refusing to act—including not providing goods, services or support—during the dispute if the refusal to act has the effect of damaging the reputation of the franchise system.

The Office of the Franchising Mediation Adviser is an independent mediation organisation created by the federal Department of Innovation, Industry, Science and Research. You can contact the Office of the Franchising Mediation Adviser on 1800 150 667 and have a mediator appointed. Franchisors need to state in the disclosure document whether they will attribute their costs, including legal costs, incurred in dispute resolution to you; otherwise the cost of mediation will be equally shared between you and your franchisor.

Costs of mediation

Costs of mediation are outlined in the code (clause 31(4)) as including:

- the cost of the mediator
- the cost of room hire
- the costs of any additional input (including expert reports) agreed by you and your franchisor to be necessary to the conduct of the mediation.

Legal recourse

Your right to take legal action under the franchise agreement is not affected by the dispute resolution provisions under the code.

Where the franchisor has been in serious breach of the code (or your agreement) you may be entitled to damages, court orders to stop breaches of the code and other orders (e.g. changes to the agreement). You need to seek advice from your solicitor if you are considering taking legal action against your franchisor.

Remember: court action can be costly, time consuming and relationship destroying, and there is no guarantee that the court will find in your favour. This is why you should genuinely attempt to resolve the dispute through mediation before considering legal action.

ACCC enforcement action and litigation

The ACCC may consider enforcement action if it is of the view that provisions of the Act have been breached. This includes a breach of the code, which is a mandatory code under s. 51AD of the *Competition and Consumer Act 2010*.

Please note: the ACCC cannot take action for breaches of a franchise agreement, because this is a contractual issue that you, as a party to the contract, must resolve.

Where the ACCC has received a franchising complaint alleging a breach of the code and/or the Act, it will often consider whether you have attempted to resolve the dispute yourself and referred the matter to mediation. If the franchisor has not been diligent in complying with the code, the ACCC will consider the matter, taking into account the following factors:

- overall detriment of the misconduct
- breadth of the detriment
- blatancy of the misconduct
- deterrent educational effect if enforcement action is taken.

If it considers the matter a high priority in relation to these factors, the ACCC can take action and seek remedies on your behalf. It is up to you to approach the ACCC when you believe your franchisor may have breached the code and dispute resolution has failed.

Frequently asked questions

Does the Competition and Consumer Act apply to franchises?

Yes, the Act continues to apply fully to franchisors and franchisees. Full compliance with the code does not exempt you from complying with other provisions of the Act.

Is my licence or distributorship a franchise?

Simply because a business is called a licence or distributorship does not mean it cannot be a franchise. A franchise will exist where the business has the four elements of a franchise agreement under the code:

- an agreement between the parties, which may be written, oral or implied
- a grant by the franchisor to the franchisee of the right to carry on the business
- substantial or material association with a trademark, advertising or commercial symbol
- an agreement by the franchisee to pay the franchisor, or an associate, an amount in return for the grant of these rights and usages.

If your licence or distributorship has all four of these elements, it is most likely a franchise and your franchisor must comply with the code.

My franchisor has asked me to make a non-refundable up-front payment before receiving a disclosure document. Should I make the payment?

No. A franchisor must provide you with a current disclosure document at least 14 days before you make a non-refundable payment or enter into the franchise agreement.

What should I do if I am in a franchise and have not been given a disclosure document?

If you are in a franchise and have not been given a disclosure document, your franchisor has breached the code. You should seek legal advice and consider making a complaint to the ACCC.

Do I have to get professional advice before entering into a franchise agreement?

It is important to get professional advice before you enter into a franchise agreement, because it is a significant decision and financial commitment. You will have to provide your franchisor with a statement saying that you have sought advice on the franchise from a legal adviser, business adviser or accountant.

Alternatively, if you have not sought this advice, you will have to provide your franchisor with a statement saying that you have been told you should seek advice but decided not to do so.

Either of these documents must be provided to your franchisor before you enter into a franchise agreement.

Do I have a cooling-off period after entering into the franchise agreement?

Yes, you have a seven-day cooling-off period after you enter into a franchise agreement, and you are entitled to a refund for payments you have made. Your franchisor has to provide you with a refund within 14 days; however, they are able to deduct reasonable expenses from this amount if the method of calculating such expenses has been set out in the franchise agreement.

Does my franchisor have to attend mediation if I request it?

Yes, your franchisor has to attend mediation and genuinely try to resolve the dispute if you request it.

Additional sources of information

ACCC contacts

Small business helpline: 1300 302 021

Infocentre: 1300 302 502

Website: www.accc.gov.au

Office of the Franchising Mediation Adviser

Telephone: 1800 150 667

Email: office@franchisingmediationadviser.com.au

Website: www.franchisingmediationadviser.com.au

For other business information go to www.business.gov.au

www.accc.gov.au