

# Franchising Code of Conduct

## Industry consultation franchising reforms – Joint Committee on Corporations and Financial Services’ report on franchising

### Request for Comments

This paper has been released by the Government to seek input on possible amendments to the Franchising Code of Conduct (Franchising Code) as discussed in the report of the Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee), *Opportunity not opportunism: improving conduct in Australian Franchising* (Report). The Joint Committee’s inquiry into the Franchising Code was the most recent of the three inquiries into franchising conducted in 2008. The Joint Committee’s report drew on the findings of the inquiries in Western Australia and South Australia.

This consultation paper will continue the consultation process undertaken as part of the Joint Committee’s inquiry process, which will further inform the Government’s response to the Report. As such, the Government is seeking additional information to that already expressed and in response to the questions outlined in this paper. The questions are aimed at clarifying the business compliance activities and costs in relation to the regulatory options identified in the Report. This paper does not reflect a settled position on the issues by the Government.

The Committee report was tabled in Parliament on 1 December 2008 and can be accessed at [http://www.aph.gov.au/senate/committee/corporations\\_ctte/franchising/index.htm](http://www.aph.gov.au/senate/committee/corporations_ctte/franchising/index.htm)

This paper is available through the Business Consultation Portal at [www.consultation.business.gov.au/consultation/](http://www.consultation.business.gov.au/consultation/). Any written comments may be emailed to the Department at [Franchising@innovation.gov.au](mailto:Franchising@innovation.gov.au) or may be marked to the attention of:

The General Manager  
Business Conditions Branch  
Industry and Small Business Policy Division  
Department of Innovation, Industry, Science and Research  
GPO Box 9839  
CANBERRA ACT 2601

The closing date for written comments is **10 July 2009**.

Recommendations 9 – 11 by the Joint Committee deal with penalties for breaches of industry Codes and other provisions of the *Trade Practices Act 1974* (Trade Practices Act) and additional investigative powers for the Australian Competition and Consumer Commission (ACCC). The enforcement regime for the Franchising Code is an issue that extends to other industry codes under the Trade Practices Act, such as the Oilcode and the Horticulture Code of Conduct. Enforcement arrangements for industry codes are being considered by the Government in the context of the ACCC's 'Inquiry into the competitiveness of retail prices for standard groceries' and any outcome of those deliberations would apply to all industry codes, including the Franchising Code. Thus, these issues are not canvassed in this paper.

It should be noted that while the Department will treat submissions in-confidence, requests may be made for release of information relating to franchising under the *Freedom of*

*Information Act 1982* (Cth). A request made under the *Freedom of Information Act 1982* (Cth) for a submission to be made available will be determined in accordance with that Act.

### **The Joint Committee's findings**

In June 2006 the disclosure provisions of the Franchising Code were reviewed in the Matthews Review and amendments to the Franchising Code came into effect on 1 March 2008. Subsequently the Western Australian Government undertook an inquiry into the fairness of franchise agreements in April 2008 and in May 2008 the South Australian Parliamentary Economics and Finance Committee tabled a report on the efficacy of the laws regulating the franchisee-franchisor relationship. The Joint Committee's inquiry into the Franchising Code is the most recent inquiry. The terms of reference for the Joint Committee are at [Attachment A](#).

### **Main areas of suggested regulatory reforms**

The Joint Committee considered that the existing regulatory framework is developing into the most appropriate mechanism for fostering franchising in Australia and that many of the concerns in the submissions to the review could be addressed through the 1 March 2008 amendments. However, it made 11 recommendations to improve the operation of the Franchising Code (see [Attachment B](#)). The four broad areas for regulatory reforms as identified in the Joint Committee's report on franchising were:

- Issues impacting on franchisees in the event of franchisor failure (Recommendations 1 and 4).
- Establishment of a registration system for franchise businesses and collection of data on the franchising sector (Recommendation 2 and Recommendation 7).
- End of term arrangements (Recommendation 5).
- Insertion of a good faith clause into the Franchising Code (Recommendation 8).

In addition, the Joint Committee recommended that the name of the Office of the Mediation Adviser be changed to the Office of the Franchising Mediation Adviser (Recommendation 6), and that the Government review the efficacy of the 1 March 2008 amendments to the disclosure provisions of the Franchising Code of Conduct within 2 years of them taking effect (Recommendation 3). The Joint Committee also recommended that the Trade Practices Act be amended to introduce pecuniary penalties (Recommendations 9 and 10) and that the ACCC be given the power to investigate if parties may be engaging in conduct contrary to the Franchising Code (Recommendation 11).

This paper sets out the background to each of these areas and identifies specific questions in relation to options to address the issues raised in the Joint Committee's report. Part 1 deals with issues impacting on franchisees in the event of franchisor failure; Part 2 deals with the establishment of a registration system for franchise businesses and collection of data on the franchising sector; Part 3 deals with pre-contractual disclosure in relation to end of term arrangements; and Part 4 deals with the insertion of a good faith clause into the Franchising Code and dispute resolution.

## Part 1: Issues impacting on franchisees in the event of franchisor failure

### *Recommendation 1*

The committee recommends that the Franchising Code of Conduct be amended to require that disclosure documents include a clear statement by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure.

### *Recommendation 4*

The committee recommends that the government explore avenues to better balance the rights and liabilities of franchisees and franchisors in the event of franchisor failure.

## **What was the problem identified in the Joint Committee's report?**

- 1.1 Submissions to the Joint Committee indicate that franchisees may not fully appreciate the risks and the potential consequences they could be exposed to in the event of their franchisor failing. It appeared to the Joint Committee that there is a public perception that franchising guarantees success. As a result, some franchisees could be underestimating the risks of franchisor failure. Submissions to the Committee note that this could also be due to franchisors 'overselling' the business opportunity. Examples of failed franchise businesses include Cut Price Deli (1995), Traveland (2001), Kleins (2008) and Kleenmaid (2009).
- 1.2 Under the Franchising Code, franchisors must provide a disclosure document to prospective franchisees or existing franchisees who are considering whether to renew or extend the term of the franchise agreement. Submissions to the Joint Committee note that while this disclosure assists franchisees, more timely disclosure of the true state of the franchisor's business is necessary where the franchise business encounters difficulties.
- 1.3 Prospective franchisees may be able to negotiate their rights and obligations, in the instance of franchisor failure, under the franchise agreement. The Joint Committee noted that under some franchise agreements, a franchisee may have to continue to pay royalties and/or accept stock already ordered from suppliers if the franchisor goes into administration.
- 1.4 While the Joint Committee noted that it is the franchisee's responsibility to obtain and have regard to competent legal and accounting advice to identify the risks of franchisor failure, it recommended that a clear statement be provided by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure.
- 1.5 In addition, the Joint Committee recommended that the Government explore avenues to better balance the rights and liabilities of involved parties in the event of franchisor failure.
- 1.6 A number of issues and options were raised as part of the Joint Committee's discussion of Recommendations 1 and 4. These are identified below, along with questions for industry consultation.

The Franchising Code requires franchisors, as part of their disclosure document, to provide their financial details to their franchisees (clause 20 (Annexure 1) and clause 11 (Annexure 2)). The financial details include:

- a statement as at the end of the last financial year signed by at least one director of the franchisor whether in its directors' opinion they have reasonable grounds to believe that the franchisor will be able to pay its debts as and when they fall due; and
- financial reports for each of the last two completed financial years prepared by the franchisor.

The Franchising Code was also amended from 1 March 2008 to require franchisors to disclose 'any materially relevant facts' to franchisees in writing within 14 days of becoming aware of such facts. Materially relevant facts include any change in majority ownership or control of the franchisor and if the franchisor becomes bankrupt, insolvent under administration or an externally-administered body corporate.

- Q 1.1** Are these provisions effective in assisting franchisees to gain an understanding of the franchisor's financial position?
- Q 1.2** What would be the effect of requiring franchisors to provide an earlier disclosure of issues relating to the majority ownership or control of the franchisor; for example, the franchisor becoming bankrupt, insolvent under administration or an externally administered body corporate?
- Q 1.3** How useful are the disclosure provisions of the Franchising Code which direct franchisees to make their own enquiries about the franchise business and seek independent legal, accounting and business advice before signing the franchise agreement?

It has been suggested that some franchisors and franchisees negotiate termination rights such that they can terminate their franchise agreement upon a triggering event, including franchisor administration.

- Q 1.4** Is it common for franchise agreements to anticipate and expressly articulate the rights and obligations of franchisees and franchisors where they are placed into administration or face other financial difficulties?
- Q 1.5** If so, are such provisions usually initiated by the franchisor or franchisees?
- Q 1.6** What resources are commonly used by franchisees in relation to negotiating such provisions; for example, legal advice or former franchisees? What publicly available information is most commonly used by franchisees; for example, particular websites or industry association information?
- Q 1.7** What types of arrangements commonly pose the most difficulties for franchisees when their franchisor is placed into administration; for example, lease arrangements, intellectual property or need to take delivery of ordered stock?

Recommendation 1 of the Joint Committee's Report that the Franchising Code of Conduct be amended to require that disclosure documents include a clear statement by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure.

**Q 1.8** What types of liabilities and consequences could franchisors refer to in such a statement?

**Q 1.9** How would franchisors assess the liabilities and consequences?

**Q 1.10** What costs would you expect to face under this possible option? (Please provide a breakdown and estimate of costs if possible).

**Q 1.11** How would franchisees benefit from such a statement?

**Q 1.12** Would franchisees or franchisors change their business practices if such an option were introduced? If yes, please specify how.

## **Part 2: Establishment of a registration system for franchise businesses and collection of data on the franchising sector**

### *Recommendation 2*

The committee recommends that the government investigate the benefits of developing a simple online registration system for Australian franchisors, requiring them on an annual basis to lodge a statement confirming the nature and extent of their franchising network and providing a guarantee that they are meeting their obligations under the Franchising Code of Conduct and the *Trade Practices Act 1974*.

### *Recommendation 7*

The committee recommends that the government require the Australian Bureau of Statistics to develop mechanisms for collecting and publishing relevant statistics on the franchising sector.

### **What was the problem identified in the Joint Committee's report?**

- 2.1 The Joint Committee received evidence suggesting that centrally registering disclosure documents and/or standard form contracts may improve compliance with the Franchising Code and would also provide a useful research tool for those considering entering a franchise agreement and for those monitoring the sector. The Joint Committee's view was that a system of this nature would generate an annual guarantee from franchisors that they are meeting their obligations under the Franchising Code. It would also mean that, for the first time, a central government agency would have useful data on how many franchises are operating in Australia.
- 2.2 The Joint Committee considered that there is a lack of data on the franchising sector, particularly on disputation within the sector. The Joint Committee considered that this lack of data has meant that it is difficult to assess the stability of the sector and the effectiveness of the mediation provisions under the Code. The Committee therefore recommended that the government require the Australian Bureau of Statistics (ABS) to develop mechanisms for collecting and publishing statistics relating to the franchising sector, with a focus on franchise disputation and dispute-related franchisee turnover, using information collected from both franchisees and franchisors. The Committee suggested this may be appropriately undertaken as part of existing business surveys, or as a new survey directed at the sector only.
- 2.3 There are a number of elements to the Joint Committee's Recommendations 2 and 7. These are listed below along with specific questions about the compliance costs and activities involved for businesses in relation to these options.

A survey of the franchising sector would require identification of franchise businesses within the sector. This could be through establishing mandatory registration of franchise businesses.

The Joint Committee recommended that an online system of registration would require franchisors to register their name; identify the nature of their business (for example, motor vehicle retailer) and the size of their franchising system.

- Q 2.1** Who would benefit from an online system of registration that would provide names of franchise systems; identify the nature of their business (for example, motor vehicle retailer) and the size of the franchising system?

- Q 2.2** What types of activities would franchisors need to undertake to comply with an online system of registration? What resources would need to be allocated to undertake these activities? (please provide a breakdown of estimated costs and time if possible).
- Q 2.3** Would franchisors need to gather any extra information from their franchisees to lodge the details identified above in the register? Are there any confidentiality or privacy concerns?
- Q 2.4** Would franchisees and franchisors be prepared to pay for such a registration system?
- Q 2.5** Would franchisors solely be willing to incur the costs? Would the cost to the franchisor in complying with a registration system be passed onto franchisees?
- Q 2.6** Would franchisees or franchisors change their business practices if such an option were introduced? If yes, please specify how.

An online system of registration could incorporate guarantees from franchisors that they are meeting their obligations under the Franchising Code of Conduct and the *Trade Practices Act 1974*.

- Q 2.7** Would you assume that the information in such a register had been vetted for accuracy and compliance? If it was not vetted, would it still be useful?
- Q 2.8** Who would benefit from a register of annual guarantees by franchisors?
- Q 2.9** How would a system of online registration of guarantees by franchisors assist prospective franchisees? How would such a system impact on franchisors?
- Q 2.10** Would franchisees or franchisors change their business practices if such an option were introduced? If yes, please specify how.

The Committee considered that the Australian Bureau of Statistics (ABS) could develop mechanisms for collecting and publishing statistics relating to the franchising sector, with a focus on franchise disputation and dispute related franchisee turnover, using information collected from both franchisees and franchisors.

It would be mandatory for businesses to provide the information requested under any such survey of the franchise sector.

- Q 2.11** What types of resources (statistical or otherwise) are utilised by prospective franchisees before deciding to enter into a franchise agreement, for example, the Asia-Pacific Centre for Franchising Excellence within Griffith University (Griffith University Franchising Survey) or IbisWorld industry reports?
- Q 2.12** What amount of time is spent by franchisees and franchisors in relation to existing private agency surveys of the franchise sector? What other resources are involved in undertaking these activities? (please provide a breakdown of estimated costs and time if possible).
- Q 2.13** Would there be any confidentiality or privacy concerns?
- Q 2.14** What do franchisees and franchisors generally mean by 'a dispute' in the context of a franchising dispute? Is this different to what other small businesses mean by disputes?
- Q 2.15** Who would benefit from more information on disputation within the franchising sector?

### Part 3: Pre-contractual disclosure in relation to end of term arrangements

#### *Recommendation 5*

The committee recommends that the Franchising Code of Conduct be amended to require franchisors to disclose to franchisees, before a franchising agreement is entered into, what process will apply in determining end of term arrangements. That process should give due regard to the potential transferability of equity in the value of the business as a going concern.

#### **What was the problem identified in the Joint Committee's report?**

- 3.1 Some submissions to the Joint Committee indicate that there may be a belief among franchisees, even when their agreements are for a fixed term, that they would be entitled to renew their agreement when it expires.
- 3.2 It is unclear to what extent franchisors 'over-selling' the benefits of entering into a franchise business may have contributed to franchisees' belief that they have bought a 'job for life'. The Joint Committee noted evidence, by way of example, that when franchisees sign up to a five year term contract with the possibility of renewal for two further consecutive five year terms, they can be of the impression that, they have signed a 15 year agreement. It is unclear to what degree franchisees contemplate an alternative scenario. That is, the agreement may not be renewed after 5 years.
- 3.3 Submissions to the Joint Committee indicate that franchise agreements are most often silent as to the rights and obligations of both parties at the end of the term of the agreement.
- 3.4 The Joint Committee's discussion of Recommendation 5 indicates that franchisees' expectations about renewal need to be better managed, and the financial implications of non-renewal better understood initially, before fixed term franchise agreements are signed. Franchisees' expectations could be better managed if franchise agreements clearly stipulate what, if any, renewal options or exit payments exist for franchisees when an agreement expires.

The ACCC's educational material for franchisees refers to the risks and prospects of non-renewal of franchise agreements. The *ACCC Franchisee Manual* notes that the term of the franchise agreement is limited and franchisees may have little input on renewal options. In addition, the *ACCC Franchisee start-up checklist* specifically directs franchisees to consider the following issues in relation to renewal, termination or transfer of franchise agreements:

- Is the franchise granted for a specified period of time? What is your position at the conclusion of the franchise period? Are you able to negotiate an extension? Who will own the goodwill in the business?
- Ensure you have an exit strategy should the franchise agreement not be renewed.
- Check clauses regarding termination, renewal and transfer of the franchise, and make sure you are willing to accept them.
- If the deal is not acceptable, try to negotiate a better offer or find a better deal.

**Q 3.1** How useful is pre-contractual education material in explicitly drawing the attention of franchisees and franchisors to franchise agreement renewal issues in pre-contractual

negotiations? What else might encourage franchisees and franchisors to consider the prospect of renewal of their franchise agreements?

**Q 3.2** How often are franchise agreements silent as to the rights and obligations of both parties at the end of the term of the agreement?

There was franchisee support for pre-expiry review of franchise agreements in the 2008 Western Australian Inquiry into the operation of franchise businesses in Western Australia. This pre-expiry review contemplated that the franchisor would have to discuss issues and conditions relating to the renewal of a franchise agreement with the franchisee, at least one year prior to the expiry of the franchise agreement.

**Q 3.3** What activities would you need to undertake and what costs would you expect to incur if the Franchising Code included a provision that required you to provide franchisees with advance notice (at a predetermined time prior to the end of the franchise agreement) of a decision not to renew a franchise agreement? (Please provide a breakdown and estimate of costs if possible).

**Q 3.4** What would be an appropriate timeframe for franchisors to provide this advance notice?

**Q 3.5** How would this notice period assist franchisees? Would this pre-expiry notice period assist in managing expectations, and therefore reduce disputes between franchisees and franchisors, in relation to non-renewal of franchise agreements?

Broadly, the Joint Committee recommended that the Franchising Code could be amended to require franchisors to disclose to franchisees before they enter into a franchising agreement what, if any, renewal options or exit payments exist for franchisees when the agreement expires.

The Joint Committee considered that exit arrangements between franchisors and franchisees, as a starting point, could recognise the market value of a business as a going concern.

**Q 3.6** What percentage of franchise agreements (or does your agreement) explicitly refer to the process that will apply for franchisees in determining end of term arrangements? Does it specify whether there will be any payment to the franchisee at the end of term for Goodwill, Equipment, Stock, Furniture and Fittings, other (please specify).

**Q 3.7** Are there instances where franchise agreements explicitly stipulate that the franchisee will not have an option to renew a franchise agreement when it expires? How has this impacted on franchisor-franchisee business dealings in pre-contractual negotiations?

**Q 3.8** What compliance activities would franchisors need to undertake and what costs would they incur if the Franchising Code was amended to require disclosure of what, if any, renewal options or exit payments exist for franchisees when the agreement expires? (Please provide a breakdown and estimate of costs if possible).

**Q 3.9** Would this amendment reduce disputes at the end of the franchise term in relation to non-renewal of franchise agreements? If no, please specify why not.

## **Part 4: The insertion of a good faith clause into the Franchising Code and dispute resolution**

### *Recommendation 8*

The committee recommends that the following new clause be inserted into the Franchising Code of Conduct:

#### **6 Standard of Conduct**

Franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement.

### *Recommendation 6*

The committee recommends that the name of the Office of the Mediation Adviser be changed to the Office of the Franchising Mediation Adviser and that the Franchising Code of Conduct be amended to reflect this change.

## **What was the problem identified in the Joint Committee's report?**

- 4.1 In its report, the Joint Committee noted that the interdependent nature of the franchise relationship leaves the parties to the agreement vulnerable to opportunistic conduct by either franchisors or franchisees.
- 4.2 The Joint Committee considered that the problem of opportunism in the franchising sector may be addressed through constraining the behaviour of franchisors, and empowering franchisees. The introduction of a statutory obligation of good faith within the Code was recommended as a mechanism for regulating the conduct of franchising parties and, in particular, for preventing franchisor opportunism.
- 4.3 A specific problem identified in the Joint Committee's report was unconstructive or unscrupulous conduct by some parties when they are pursuing dispute resolution under the Code. Evidence to the Joint Committee suggests that some parties may be stalling negotiations and acting to deplete resources of the other party to frustrate the dispute resolution process under the Franchising Code.

Recommendation 8 of the Joint Committee's report that the following new clause be inserted into the Franchising Code of Conduct:

#### **6 Standard of Conduct**

Franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement.

- Q 4.1** What, if any, changes would franchisees and franchisors make to their business practices and conduct under this option?
- Q 4.2** What would be the costs associated with any changes to business practices? (Please provide a breakdown and estimate of costs if possible).
- Q 4.3** How certain would franchisors and franchisees feel that they were acting in accordance with good faith in their day to day dealings? Would they seek legal advice to ensure

their day to day dealings are in good faith? If this option increases uncertainty in dealings between franchisors and franchisees, please provide specific examples.

The following have been suggested as some behaviours which may be exhibited by parties to a franchise dispute to indicate that they are constructively engaging in mediation under the Franchising Code:

- Attending and participating in meetings at reasonable times.
- Approaching mediation with the intention of resolving the dispute.
- If appropriate, seeking independent advice and preparing a negotiating strategy prior to mediation.
- Disclosing any limitations of authority to attend and settle at mediation including the signing off procedures.
- Making their intentions clear at the outset of the mediation. That is, if the aim is to negotiate an exit arrangement, rather than a resolution to enable continued trading by the franchisee, this should be disclosed.
- Dedicating sufficient resources to the dispute resolution process and not using the process with the intention of depleting the finances of the other party.
- Not exerting undue pressure or influence or engaging in unfair tactics to force the other party to settle or concede.
- Observing confidentiality obligations during and after the mediation process.
- Not damaging the franchise brand, including by providing inferior goods, services, or support or publicising the dispute.

This list is a non-exhaustive list. As such, there may be other behaviours, which both parties to a franchise dispute may exhibit, which indicate they are pursuing mediation in a constructive manner.

Existing provisions under the Franchising Code state that parties must try to agree about how to resolve the dispute and those parties must attend mediation and try to resolve the dispute. Mediation, by its nature, requires parties to observe confidentiality in resolving disputes.

- Q 4.4** Are the activities and behaviours outlined above different to existing activities and behaviours that are expected to be demonstrated by parties when pursuing mediation under the Franchising Code? If so, would there be additional costs for parties in relation to this option?
- Q 4.5** What costs could be incurred by franchisees and franchisors where the other party does not constructively engage in dispute resolution? Please provide examples, a breakdown and estimates of costs.
- Q 4.6** What other constructive behaviours, beyond the list outlined above, could parties specifically demonstrate in relation to mediation under the Franchising Code?

Two options for a name change to the Office of the Mediation Adviser are Office of the Franchising Mediation Adviser and Franchising Code Mediation Adviser.

- Q 4.7** To what extent are franchise sector participants aware of the Government funded Office of the Mediation Adviser which appoints mediators to assist franchisors and franchisees to resolve their problems without going to court?
- Q 4.8** Would the suggested names above aid understanding and recognition within the franchise sector of the role the Office of the Mediation Adviser plays in dispute resolution in franchising? What other names could aid franchise sector recognition of this Office?
- Q 4.9** What sources do franchisees and franchisors commonly refer to in seeking guidance in relation to dispute resolution and mediation under the Franchising Code? Do these resources refer to the Office of the Mediation Adviser?

Joint Committee on Corporations and Financial Services  
Terms of Reference – Franchising Inquiry

On 25 June 2008 the Parliamentary Joint Committee on Corporations and Financial Services (Joint Committee) resolved to inquire into the Franchising Code of Conduct and related matters. Under its terms of reference the Committee was required to inquire and report on the operation of the Franchising Code of Conduct, and identify, where justified, improvements to the Code, with particular reference to:

- (a) the nature of the franchising industry, including the rights of both franchisors and franchisees;
- (b) whether an obligation for franchisors, franchisees and prospective franchisees to act in good faith should be explicitly incorporated into the Code (having regard to its presence as an element in paragraph 51AC(4)(k) of the Trade Practices Act 1974);
- (c) interaction between the Code and Part IVA and Part V Division 1 of the Trade Practices Act 1974, particularly with regard to the obligations in section 51AC of the Act;
- (d) the operation of the dispute resolution provisions under Part 4 of the Code; and
- (e) any other related matters.

Recommendations by the Joint Committee on Corporations and Financial Services in its report *Opportunity not opportunism: improving conduct in Australian franchising*

*Recommendation 1*

The committee recommends that the Franchising Code of Conduct be amended to require that disclosure documents include a clear statement by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure.

This amendment would ensure that, before franchisees agree to enter into a franchise agreement, they are aware of their liabilities in the event of franchisor failure.

*Recommendation 2*

The committee recommends that the government investigate the benefits of developing a simple online registration system for Australian franchisors, requiring them on an annual basis to lodge a statement confirming the nature and extent of their franchising network and providing a guarantee that they are meeting their obligations under the Franchising Code of Conduct and the *Trade Practices Act 1974*.

A system of this nature would generate an annual guarantee from franchisors that they are meeting their obligations under the Code. It would also mean that, for the first time, a central government agency would have useful data on how many franchises are operating in Australia.

*Recommendation 3*

The committee recommends that the government review the efficacy of the 1 March 2008 amendments to the disclosure provisions of the Franchising Code of Conduct within two years of them taking effect.

Some of the concerns about the disclosure process raised with the committee during its inquiry should be mitigated by the 1 March 2008 amendments if they function as intended. It is too soon for the committee to judge their efficacy at this stage.

*Recommendation 4*

The committee recommends that the government explore avenues to better balance the rights and liabilities of franchisees and franchisors in the event of franchisor failure.

Although the Code gives franchisors the ability to terminate franchisees, it does not provide reciprocal termination provisions for franchisees. In the event of franchisor failure, this can have serious consequences for franchisees who have no avenue to exit the business.

This recommendation is in line with the ACCC's submission to the Joint Committee.

*Recommendation 5*

The committee recommends that the Franchising Code of Conduct be amended to require franchisors to disclose to franchisees, before a franchising agreement is entered into, what process will apply in determining end of term arrangements. That process should give due regard to the potential transferability of equity in the value of the business as a going concern.

Franchisee expectations about renewal need to be better managed, and the financial implications of non-renewal better understood, before fixed term franchise agreements are initially signed. Franchise agreements should clearly stipulate what the end of term arrangements and processes are, and these arrangements should be fully and transparently disclosed to prospective franchisees.

#### *Recommendation 6*

The committee recommends that the name of the Office of the Mediation Adviser be changed to the Office of the Franchising Mediation Adviser and that the Franchising Code of Conduct be amended to reflect this change.

This name change will aid understanding and recognition within the sector of the role this office plays in dispute resolution in franchising.

#### *Recommendation 7*

The committee recommends that the government require the Australian Bureau of Statistics to develop mechanisms for collecting and publishing relevant statistics on the franchising sector.

Improved collection of statistics on franchising in Australia, with a focus on disputes and dispute-related unit franchise turnover, will help in developing a better understanding of how extensive disputation truly is.

#### *Recommendation 8*

The committee recommends that the following new clause be inserted into the Franchising Code of Conduct:

#### 6 Standard of Conduct

Franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement.

#### *Recommendation 9*

The committee recommends that the *Trade Practices Act 1974* be amended to include pecuniary penalties for breaches of the Franchising Code of Conduct.

The introduction of these penalties would assist the ACCC in its enforcement role by providing a greater deterrent for conduct that contravenes the Code.

#### *Recommendation 10*

The committee recommends that consideration be given to amending the *Trade Practices Act 1974* to provide for pecuniary penalties in relation to breaches of section 51AC, section 52, and the other mandatory industry codes under section 51AD. Similar penalties may be of assistance in improving conduct beyond franchising.

#### *Recommendation 11*

The committee recommends that the ACCC be given the power to investigate when it receives credible information indicating that a party to a franchising agreement, or agreements, may be engaging in conduct contrary to their obligations under the Franchising Code of Conduct.

In its report, the Joint Committee was of the view that, by making the improvements to the Franchising Code recommended in its report and by allowing time for the 1 March 2008 amendments to the Code to have an impact, the existing regulatory framework is developing into the most appropriate mechanism for fostering franchising in Australia.