



FRANCHISE *Watch*

INTERNATIONAL FRANCHISE DEVELOPMENT SERIES

April 10, 2019

This is the 24th article in Wiley Rein's International Franchise Development Series. The International Franchise Development Series offers a broad overview of franchise regulation and the legal issues confronting franchisors seeking to expand into certain countries from the combined legal perspective of U.S. and local counsel.

Release of New Parliamentary Report Suggests More Regulatory Compliance Challenges Ahead for Franchisors in Australia

By Maureen A. O'Brien and Nick Rimington

In the wake of more than a year of written submissions, public hearings, and intense media coverage, Australia's Parliamentary Joint Committee on Corporations and Financial Services released its report regarding the Australian franchise sector on March 14, 2019. The report contends that major substantive reform to Australia's current regulatory regime is needed to correct systemic, pervasive failures and to curtail unscrupulous activity by some franchisors. The comprehensive 369-page report, which includes more than 70 recommendations, foreshadows numerous additional compliance challenges for franchisors in Australia.

The key recommendations of the report include the following:

- **Franchising Taskforce:** The report calls on the Australian government to establish an inter-agency "Franchising Taskforce" to examine the feasibility and implementation of many of the Committee's recommendations. The taskforce would include representatives from Australia's Department of the

Treasury, the Department of Jobs and Small Business and, where appropriate, the Australian Competition and Consumer Commission (ACCC). Given the Committee's deference to the Franchising Taskforce to develop solutions to the issues identified in the report, the franchise sector will have to wait some time before a clear picture of the likely legislative reforms emerges.

- **Franchisee association:** The Committee suggests that Australian franchisees bind together to develop a strong national association to counter the alleged influence of franchisors and their representatives. Because the Australian franchise sector encompasses hundreds of different industries and 80,000 franchisees, of varying nature, size, sophistication, and interests, this recommendation has several inherent challenges.
- **Marketing funds:** The Committee recommends expanding the current annual reporting requirement for marketing funds to quarterly reporting

continued on page 2

and imposing civil penalties for failure to comply - a significant increase in the administrative burden of operating a marketing fund.

■ **Disclosure of financial information:**

The report recommends extensive additional financial disclosures in the context of sales of existing franchised businesses, including two years of Business Activity Statements (forms submitted to the Australian Taxation Office by registered business entities to report their tax obligations). For greenfield sites, such information must be provided for a comparable franchise. Specific assurances are required that earnings information is accurate, and such information must be provided as part of the disclosure document. This requirement would increase the risk to franchisors in granting franchises and overseeing transfers, as the franchisor would be held directly liable for representing the likely profitability of the franchise opportunity, and, necessarily, the number of claims filed against franchisors.

- **Registration:** The report calls on the Franchising Taskforce to explore options for compulsory registration of franchise systems, including an annual requirement to file key documents, with the ACCC as the possible custodian of the registry. The taskforce may consider as a model the existing Australian Franchise Registry operated by FRANdata and used by franchisors on a voluntary basis. The Franchise Council of Australia (FCA) (a non-profit body representing franchisees, franchisors,

and service providers to the franchise sector, which, among other things, has established best practice standards for franchising in Australia) intends to make registration on the Australian Franchise Registry a mandatory requirement of FCA membership.

- **Rebates:** The report recommends greater transparency regarding supply arrangements under which franchisors receive rebates, commissions, and/or other payments on the basis of franchisee purchases.
- **Supply chain:** The report proposes that the Franchising Taskforce explore requiring franchisors to disclose deep, complex data and analysis regarding current and historical supply arrangements. The Committee's core concern is to prevent price-gouging by franchisors, given that many franchisors before the inquiry were accused of forcing franchisees to purchase goods at prices higher than were otherwise available on the open market.
- **Whistleblower protections:** The Committee recommends extending existing whistleblower protections to protect franchisees reporting breaches of Australia's Franchising Code of Conduct (Franchising Code).
- **Unfair contract terms laws:** The report echoes the current proposal by the ACCC to extend the Unfair Contract Terms regime to make unfair terms illegal and subject to civil penalties. The Committee further suggest that all franchise agreements should be deemed standard form small business contracts for the purpose of the legislation.

continued on page 3

- **Unilateral variation of existing agreements:** The report proposes various restrictions on franchisors' unilateral variation of existing agreements (where permitted by the agreement), including prohibiting such agreements from being amended without consent of a majority of franchisees. The Taskforce is also to consider extending this to amendments to Operations Manuals. A final landing point is likely to be some form of agreement that such unilateral variations are only possible in defined circumstances, in relation to subsidiary matters as opposed to fees or commercial terms or with majority franchisee approval.
- **Termination:** The Committee recommends providing franchisees a statutory right to terminate their franchise agreements in certain circumstances. The report also recommends curtailing franchisors' statutory right of immediate termination in special circumstances, such as fraud and danger to public health and safety, and substituting a seven-day period before the effectiveness of the termination, during which a dispute notice can be served by a franchisee and termination thereby suspended.
- **Arbitration:** The report recommends mandatory arbitration if Australia's mandatory mediation procedure is unsuccessful.
- **Collective disputes:** The report suggests empowering groups of franchisees to initiate collective mediation and arbitration.
- **Civil Penalties:** Presently, civil penalties only apply to certain key provisions of the

Franchising Code. The report suggests applying civil penalties to every clause of the Code.

- **Education and advice:** The report recommends that the ACCC develop a website with resources for franchisees and recommends that franchisors be required to provide a copy of the ACCC's Franchisee Manual to all prospective franchisees as part of disclosure.
- **Retail lease arrangements:** The Committee recommends that the Franchising Taskforce consider various matters, particularly in relation to the clarity, transparency, and timeliness of the disclosure of retail lease agreements to the franchisee.

In light of the looming federal election in Australia, there may not be any definitive action on these policy recommendations for some time. In addition, as with previous changes to the Franchising Code, any legislative changes may be grandfathered in, preserving existing agreements. While the recommendations in the report are extensive, history suggests many of the proposals will not ultimately find their way into law. It is nonetheless vital that franchisors review the report and consider implementing certain sensible recommendations voluntarily in the pursuit of best practices and in anticipation of the likely reforms. Despite the present uncertainty regarding the future regulatory environment, Australia continues to be fertile ground for U.S. brands looking to expand into a robust, developed economy. ■

continued on page 4

Franchising in Australia continued from page 3

For more information, please contact:

Maureen A. O'Brien

+ 1 202.719.3563

mobrien@wileyrein.com

Nick Rimington

+ 61 3 8686 6353

nick.rimington@nortonrosefulbright.com

Nick Rimington is an attorney at Norton Rose Fulbright in Melbourne, Australia. Nick has assisted many U.S. and Canadian franchise systems with entry into the Australian market, by direct entry, master franchising and area development arrangements. Nick's international practice includes consulting on market entry strategy, revision of franchise documentation for compliance with Australian laws, corporate structuring advice

and company incorporation, mergers and acquisitions, terminations and disputes, and Franchising Code of Conduct compliance.

Maureen A. O'Brien is Of Counsel at Wiley Rein LLP. Maureen counsels startup, middle-market, and mature franchisors in achieving domestic and international system growth objectives, acquiring and disposing of franchise systems, and complying with franchise registration, disclosure, and relationship laws. Maureen specializes in structuring and negotiating international franchise deals and in providing legal guidance to non-U.S. franchisors seeking to enter the United States market.

To view other articles in Wiley Rein's International Franchise Development Series, [click here](#).

To update your contact information or to cancel your subscription to this newsletter, visit:

www.wileyrein.com/newsroom-signup.html.

This is a publication of Wiley Rein LLP, intended to provide general news about recent legal developments and should not be construed as providing legal advice or legal opinions. You should consult an attorney for any specific legal questions.

Some of the content in this publication may be considered attorney advertising under applicable state laws. Prior results do not guarantee a similar outcome.