



20 September 2019

Via email: [franchising@employment.gov.au](mailto:franchising@employment.gov.au)

To: Department of Employment, Skills, Small and Family Business

To whom it may concern,

## Franchising Task Force Issues Paper - Response

Thank you for the opportunity to respond to the Franchising Task Force Issues Paper. With the active participation of member banks in Australia, the Australian Banking Association provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.

The financial services industry operates in a highly regulated environment intended to protect consumers. We are concerned that some of the Taskforce's draft recommendations, if implemented as is, could adversely prevent financial services licensees and credit licensees from meeting their regulatory obligations to customers without breaching the Franchising Code of Conduct.

The franchising sector is an important contributor to the Australian economy. There are over 1,300 franchises operating in Australia and around 97,000 franchisees, which are predominantly made up of small and family businesses.

The ABA would like to highlight the following issues as being the most pertinent to supporting an effective and fair regulatory framework franchising in the financial services industry:

Prohibiting unilateral variations would prevent franchisors from making changes to operations manuals that would be required to enforce compliance with new or amended laws or regulations. This will potentially affect a franchisor's ability to meet their financial services licensing obligations. By way of example, mortgage broking franchisors have had to implement substantial changes in quick succession in recent years to comply with new laws and regulations such as ASIC's Responsible Lending obligations<sup>1</sup>, APRA's macro prudential measures for home lending<sup>2</sup> and AFCA determinations<sup>3</sup>. Significant changes were required to be implemented to franchisee sales processes and procedures and franchisors would not have been able to implement these changes without making unilateral variations to their operations manuals. Furthermore, some of these changes would not have been possible if franchisors were required to obtain majority support from franchisees.

The inability to terminate franchisees for fraud until a conviction is reached is problematic in the financial services industry because convictions of this nature can take significant amounts of time. It is critical for franchisors to be able to take action for franchisee misconduct in order to protect customers in line with *National Consumer Credit Protection Act 2009*, the ABA Banking Code of Practice<sup>4</sup>, and also the expectations of our regulators and customers.

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<sup>1</sup> 19-028MR ASIC consults on updating its responsible lending guidance, <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-028mr-asic-consults-on-updating-its-responsible-lending-guidance/>

<sup>2</sup> APRA's Review of APRA's prudential measures for residential mortgage lending risks. [https://www.apra.gov.au/sites/default/files/review\\_of\\_apras\\_prudential\\_measures\\_for\\_residential\\_mortgage\\_lending\\_risks\\_-\\_january\\_2019.pdf](https://www.apra.gov.au/sites/default/files/review_of_apras_prudential_measures_for_residential_mortgage_lending_risks_-_january_2019.pdf)

<sup>3</sup> About AFCA, <https://www.afca.org.au/about-afca/>

<sup>4</sup> Australian Banking Association – 2019 Banking Code of Practice, <https://www.ausbanking.org.au/campaigns/new-banking-code/>



### **ABA recommendations:**

In addition to the legislative and regulatory requirements for financial products mentioned above; APRA's Prudential Standards<sup>5</sup> impose numerous and varied obligations on the management of an ADI to maintain a risk management framework that is appropriate to the size, business mix and complexity of that institution or group. A bank will need to act when it detects conduct that is not consistent with its risk appetite or community expectations; and there may be a case where a franchisee may disagree with this action.

We recommend that franchisors continue to be permitted to make unilateral variations to allow them to meet changing laws and the expectations of regulators and to also enforce and ensure compliance. The ABA therefore recommends that Principle 6 should be altered to read:

*Principle 6: Franchisees and franchisors should be able to exit in a way that is reasonable ~~to both parties~~, taking into account the rights and obligations of both parties.*

This would remove the implication that the franchisee is required to consider the exit reasonable by anchoring an exit to the contractual terms of the franchise agreement.

In regard to fraud, the ABA recommends a carve out for fraud or misconduct for the financial services industry to allow us to immediately terminate for franchisee misconduct, thereby retaining the critical ability to prevent or minimise further consumer detriment.

Recommendation 11.4 is relevant here - *termination in special circumstances*. Currently a franchisor can terminate immediately if the actions of a franchisee are found to be fraudulent in connection with the operation of their business (amongst other things). The taskforce recommendation is suggesting a seven-day notice period where a franchisee can lodge a dispute during that seven days, which would suspend the termination. The ABA would argue that if a franchisee offering financial products has been fraudulent a franchisor must have the ability to take swift and decisive action to protect consumers, and that would require the ability to take immediate action, thus ABA would not be supportive of a seven-day notice period.

### **Franchise Advisory Councils**

The ABA supports the need to have input from franchisees on franchising policy and is open to assisting the Taskforce to understand the benefits of existing governance mechanisms such as Franchise Advisory Councils. Once further thought has been given to this topic, the Taskforce could then consider making franchisee representation through Franchise Advisory Councils mandatory for franchise systems.

### **Conclusion**

The ABA is committed to supporting an effective and fair regulatory framework in the franchising sector.

ABA would welcome the opportunity to facilitate a meeting with the Taskforce alongside ASIC, APRA and Treasury to allow the Taskforce the opportunity to gain a deeper understanding of the obligations and expectations that regulators require of lenders and their agents, In particular to explore lenders obligations under the *National Consumer Credit Protection Act 2009* and the interplay of APRA prudential obligations with an effective and fair regulatory framework for the franchising sector.

Yours faithfully

*Signed by*

Aidan O'Shaughnessy  
Executive Director - Policy

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<sup>5</sup> For examples, please see APRA Prudential Standards - APS 220, CPS 510, CPS 520, CPS 511, APG 230, APS 114, BEAR, etc.