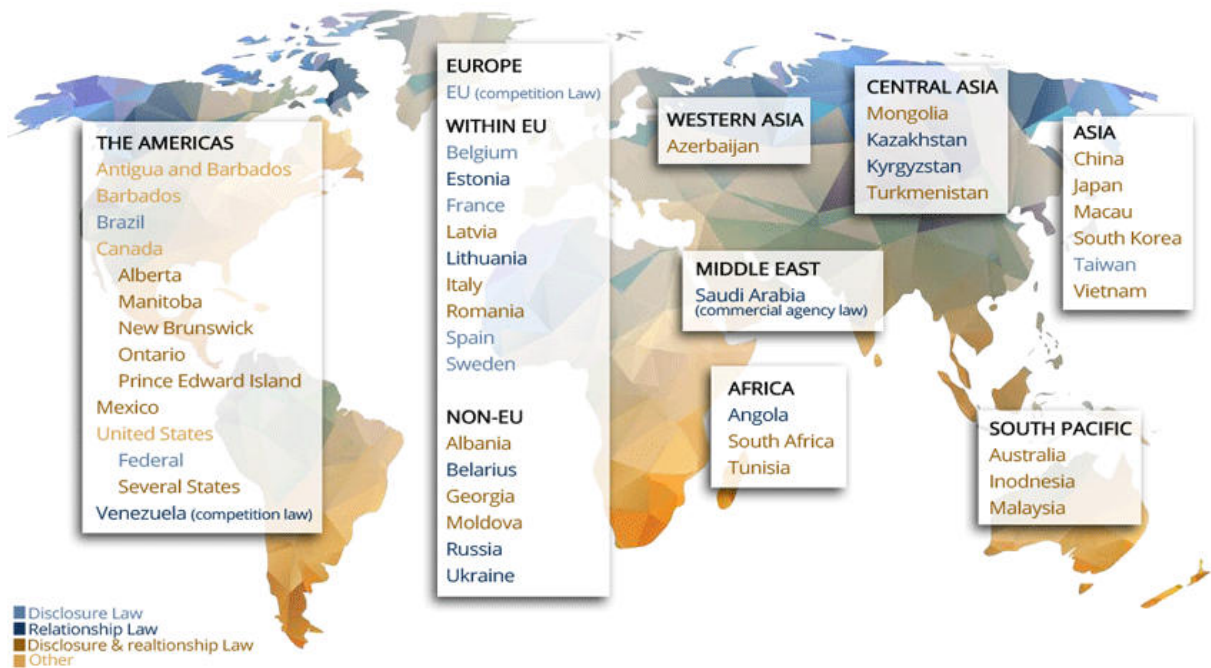




INTERNATIONAL RESOURCES ABSTRACT

Laws and agencies that regulate the offer and sale of franchises



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Which laws and government agencies regulate the offer and sale of franchises?

The offer and sale of franchises is regulated by the Franchising Code of Conduct, which is underpinned by the Competition and Consumer Act. The Australian Competition and Consumer Commission (ACCC) is the government agency that administers and enforces the Competition and Consumer Act and the Franchising Code of Conduct.

What are the exemptions and exclusions from any franchise laws and regulations?

There are two exemptions or exclusions from the operation of the Franchising Code of Conduct:

- ⊗ where another mandatory industry code, prescribed under section 51AE of the Competition and Consumer Act, applies to the franchise agreement; or
- ⊗ if the franchise agreement is for goods or services that are substantially the same as those supplied by the franchisee before entering into the franchise agreement and the franchisee has supplied those goods or services for at least two years immediately before entering into the franchise agreement and the sales under the franchise are likely to provide no more than 20 per cent of the franchisee's gross turnover for goods or services of that kind for the first year of the franchise.

The Franchising Code of Conduct will only apply to franchise agreements that satisfy all elements of the definition of 'franchise agreement' contained therein. Foreign franchisors granting only one franchise or master franchise in Australia were exempt from the Franchising Code of Conduct, but that exemption was removed by amendments that took effect on 1 March 2008.

Does any law or regulation create a requirement that must be met before a franchisor may offer franchises?

The Franchising Code of Conduct does not include any operational requirements that a franchisor must meet before it may begin offering franchises for sale. From a practical viewpoint, franchisors are unlikely to be successful in growing their franchise network unless they have been in the business or industry for some time and have established a proven business system, a marketable product or service, effective marketing and growth strategies and good relationships with suppliers. The Franchising Code of Conduct does, however, prescribe certain requirements that must be met before a franchisor can issue each individual franchise, including the requirement that the franchisor must receive certain written statements from the prospective franchisee or its legal, accounting and business advisers, or both, prior to entering into the franchise agreement.

Are there any laws, regulations or government policies that restrict the manner in which a franchisor recruits franchisees or selects its or its franchisees' suppliers?

No such laws exist in Australia.



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In the case of a sub-franchising structure, who must make pre-sale disclosures to sub-franchisees? If the sub-franchisor must provide disclosure, what must be disclosed concerning the franchisor and the contractual or other relationship between the franchisor and the subfranchisor?

If a sub-franchisor proposes to grant a sub-franchise to a prospective sub-franchisee, the head franchisor and the sub-franchisor must either:

- ☞ each give separate disclosure documents to the prospective subfranchisee;
- or
- ☞ give a joint disclosure document.

If the sub-franchisor elects to provide its own separate disclosure, the disclosure document is to be in the form required by the Franchising Code of Conduct and the sub-franchisor must also provide to the franchisee a copy of the head franchisor's disclosure document that must give disclosure of the terms of the franchise agreement between the parties. If the sub-franchisor and head franchisor agree to give a joint disclosure document, it must also address the respective obligations of the head franchisor and sub-franchisor.

Is there any obligation for continuing disclosure?

Under the Franchising Code of Conduct, obligations for continuing disclosure arise if certain 'materially relevant facts' arise, in which case, disclosure of them must be given to all franchisees within 14 days. Materially relevant facts include changes to the majority ownership or control of the franchisor, changes to the intellectual property of the franchise network and certain types of enforcement proceedings by public agencies such as the ACCC, judgments against the franchisor, insolvency events and the giving of enforceable undertakings to the ACCC.

How do the relevant government agencies enforce the disclosure requirements?

The ACCC relies upon receiving complaints from persons who consider that disclosure requirements have not been met. The ACCC's Compliance and Enforcement Policy can be found at www.accc.gov.au. Having investigated and found a breach of the Franchising Code of Conduct, the ACCC may seek administrative resolution, issue an infringement notice (a fine), seek enforceable undertakings or instigate court proceedings.

In addition to any laws or government agencies that specifically regulate offering and selling franchises, what are the general principles of law that affect the offer and sale of franchises? What other regulations or government agencies or industry codes of conduct may affect the offer and sale of franchises?

The offer and sale of franchises is generally affected by the principles of common law and, in particular, contract law. It is also regulated by the Competition and Consumer Act, which contains provisions



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regarding misleading or deceptive conduct. In some states, there are laws that affect the sale of small businesses, including franchised businesses. In the Australian State of Victoria, for example, the Estate Agents Act 1980 (Vic) requires a vendor's disclosure statement to be provided to a prospective purchaser of a small business if the purchase price is less than A\$350,000 (this statement is commonly known as a 'section 52 statement'), failing which a purchaser may void the purchase contract provided they do so within three months of signing the contract and have not already taken possession of the business. Franchised businesses are also often affected by local council regulations in the area in which the business is located, particularly planning regulations.

Other industry codes or laws may also apply, depending upon which industry the franchise business is concerned with. For example, where the franchise is a real estate franchise, motor vehicle dealership or building franchise, further industry regulations will apply on a state-by-state basis.

Do other laws affect the franchise relationship?

The franchise relationship is also affected by laws in relation to corporations, intellectual property and other matters that relate to franchising contracts, business relationships and trade practices in general, such as:

- ⌚ Corporations Act 2001 (Cth);
- ⌚ Competition and Consumer Act 2010 (and regulations under this Act);
- ⌚ Fair Trading Act 1999 (Vic) and applicable counterparts in each state;
- ⌚ Income Tax Assessment Act 1936 (Cth);
- ⌚ Income Tax Assessment Act 1997 (Cth);
- ⌚ A New Tax System (Goods and Services Tax) Act 1999 (Cth);
- ⌚ Occupation Health and Safety Act 2004 (Vic) and applicable counterparts in each state;
- ⌚ Fair Work Act 2009 (Cth);
- ⌚ Property Law Act 1958 (Vic) and applicable counterparts in each state;
- ⌚ Retail Leases Act 2003 (Vic) and applicable counterparts in each state; and
- ⌚ Estate Agents Act 1980 (Vic) and applicable counterparts in each state.

In addition, other acts that generally govern commercial and business matters, such as liquor licensing, may also apply, depending upon the particular franchise system.