



FCA CONSTITUTION

Discussion Paper – Revised

May 2024

For the information of FCA Members
Feedback Open until 5pm 27th May 2024

FRANCHISE COUNCIL OF AUSTRALIA LIMITED NEW CONSTITUTION DISCUSSION PAPER - REVISED

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The FCA is pleased to have engaged Governology to work on a review of the FCA's Constitution.



Governology is a law and governance firm which assist in legal and governance matters. Governology give quality association tailored advice and excellent client service.

A. INTRODUCTION AND REASONS FOR CHANGE

Based on the feedback provided by members on the Discussion Paper issued in February 2024, the Board is issuing a revised version of the Discussion Paper.

Thank you to all members who provided feedback in the first round of consultation. The Board has considered the comments received and is issuing this revised version of the Discussion Paper for a further round of consultation.

This Discussion Paper outlines the Franchise Council of Australia Limited (FCA) Constitution review project including the reasons for the review, the process, timeline and a summary of the proposed changes for the new Constitution.

The Board is working with Governology (a law firm specialising in associations and charities) to develop the new Constitution.

Members are invited to submit any comments or questions on the proposed changes outlined in this document by close of business **27th May 2024** to Annette Vukoje, Executive Assistant to the Chief Executive Officer at membership@franchise.org.au.

It is a normal part of the evolution of an Association to review its Constitution and governance arrangements.

The new Constitution will be a fresh document based on a contemporary template fit for a public company limited by guarantee. It will not be an amendment of the existing Constitution.

The purpose of the project is to update the Constitution to:

- ensure compliance with current legal requirements,
- align with accepted good governance practice,
- ensure it reflects current FCA practice,
- remove any ambiguities and address any omissions in the existing Constitution.

B. KEY DATES

It was previously planned for a Special General Meeting in May 2024 to vote on the new Constitution. After valuable feedback from members, the Board has decided to postpone the meeting to August 2024. This allows us more time to address member questions and feedback. Please see the revised proposed schedule below.

Revised Discussion Paper available to members	13 th May 2024
Deadline for feedback on Revised Discussion Paper	27 th May 2024
Members forum to be held at National Franchise Convention, Cairns	21 st May 2024
Draft Constitution available to members	July 2024
Deadline for submission of comments on draft Constitution	July 2024
Final version of Constitution endorsed by Board	Aug 2024

C. SUMMARY OF REVISED PROPOSALS

Section in paper	Proposed change	Rationale
4	<p>Revised proposed Board composition</p> <p>The Board will comprise up to 11 Directors:</p> <p>5x Franchisor Directors – elected by the Franchisor Members</p> <p>Up to 3x appointed Directors appointed by the Board</p> <p>3 x Member Elected Directors – elected by the whole voting membership, at least one of whom must be a Franchisee Member and at least one must be a Service Provider Member</p> <p>1x Director from the newly established National Advisory Council - appointed by the NAC (not by the Board)</p> <p>Previous proposed Board composition</p> <p>The Board will comprise up to 11x Directors:</p> <p>5x Franchisor Directors – elected by the Franchisor Members</p> <p>Up to 3x appointed Directors appointed by the Board</p> <p>2x Franchisee Directors – appointed by the Board</p> <p>1x Director from the newly established National Advisory Council - appointed by the Board</p>	<p>Feedback received expressed concerns about the Service Provider Members being disadvantaged under the new board model. Concerns were also expressed about there being no election of Directors by the entire membership and potentially the majority of positions being board appointments.</p> <p>In order to address some of the concerns, the revised board composition now includes 3 Elected Director positions to be elected by the whole voting membership, with at least one position for a Franchisee Member and at least one for a Supplier Member.</p> <p>The National Advisory Council will choose the NAC Director.</p>

4	<p>The Chair</p> <p>Revised proposals include:</p> <p>Set term limit of 6 consecutive years for all Directors and no extension for the Chair.</p> <p>Chair may be any Director (including the Appointed Directors) if the Board so chooses.</p>	<p>A set term limit of 6 consecutive years for all Directors with no extension for the Chair ensures a more equitable and simple system for board tenure.</p> <p>The previous proposal was for the Chair to come from Franchisor Members. The revised proposal provides more flexibility to the Board to choose the most meritorious person as Chair.</p>
3	<p>Franchisor Members and Disclosure Document</p> <p>To maintain their membership, Franchisor Members must provide at renewal time a letter from their legal advisors verifying they have a current Disclosure Document, rather than providing the document itself.</p>	<p>There were queries raised regarding how the Disclosure Documents would be verified and stored, and who would have access. To address these queries, the revised requirement will be for Franchisor Members to provide a letter from their legal advisors verifying that they have a current Disclosure Document (rather than having to provide the Disclosure Document itself).</p>
3	<p>Revised proposed criteria for Service Provider Member: Individuals and organisations providing services to those operating in franchising and small business, and who are not Direct Competitors to FCA.</p> <p>Previous proposed criteria for Service Provider Member: Individuals and organisations providing services to those operating in franchising and small business, and whose business does not compete with any of FCA's products and services.</p>	<p>Some members flagged the risk of unintended consequences of the proposed criteria with regards to advisors who also provided technical or legal updates to members. Such advisors may be disqualified from membership based on the non-compete requirement.</p> <p>The revised proposed criteria clarifies that the Service Provider must not be a direct competitor to FCA defined as an individual or organisation whose primary business activity is providing products or services that are the same or substantially similar to those provided by FCA, particularly in relation to membership services or similar business models.</p>

D. COMPOSITION OF NEW CONSTITUTION

1. Introductory Comments

Before the drafting of the new Constitution commences, the key elements need to be presented to the members for their feedback and comments. These elements are included in this Discussion Paper.

2. Objects

The proposed Objects clause is set out below:

The Objects of the Company are to support and connect the Australian franchising community by helping them grow through education and advocacy and to foster a vital, strong and financially viable Franchising Sector.

The Company pursues the Objects through a range of activities and services that may include:

- (a) Providing education and information to those involved in or looking to enter franchising;*
- (b) Advocating on behalf of the franchising community to government, regulators and other stakeholders;*
- (c) Promoting best practice in franchising;*
- (d) Promoting franchising and the contribution and success of the franchising community; and*
- (e) doing anything ancillary or incidental to the Objects.*

The Objects clause states why the organisation exists and influences taxation status. The proposed objects clause better reflects the vision, mission and activities of FCA.

A contemporary format for the Objects clause is to have one overall objective that encompasses the broad purpose for the entity. This overall objective can be supported by sub-goals that would give an indication of the types of work or actions that the organisation may take in pursuing the overall objective. The advantage to this approach is that if any particular activity is not pursued it does not raise questions about whether the organisation is acting in pursuit of its purpose.

Franchising Sector definition (current clause 1.1(23)) – no change.

3. Membership

Membership Classes and Voting Rights

The proposed membership structure (outlined below) is a simplification and consolidation of the 16 categories currently listed in the Constitution.

Class	Rights	Including current member categories
Franchisor Member	Voting rights at a general meeting Board will have 5 Franchisor Directors elected by the	Franchisor Members

Class	Rights	Including current member categories
	Franchisor Members (see point 4 below)	
Franchisee Member	Voting rights at a general meeting At least one Member Elected Director will be a Franchisee Member	Master Franchisee Members Franchisee Members (Corporate and Individual)
Service Provider Members	Voting rights at a general meeting At least one Member Elected Director will be a Service Provider Member	Adviser Members (Corporate and Individual) Supplier Members (Corporate and Individual)
Non-voting Member	No voting rights, but may attend a general meeting	Honorary Members

Simplifying membership categories into four classes

The current Constitution lists 16 categories of membership, some of which are no longer used/required.

The proposed membership structure groups members based on rights i.e., those members with the same rights are grouped into the same class.

With the above membership structure, the Constitution will state that the Board has the power to create categories within each class of membership, without those categories having to be named in the Constitution. This provides flexibility regarding the composition of membership as circumstances change.

Membership definitions and criteria

Franchisor Members – a Franchisor will be as defined in the Franchising Code of Conduct (Code).

Applicants for Franchisor Membership must declare that:

- they comply with the Code and are not knowingly either directly or indirectly involved in a breach of the Code; and
- they have a current Disclosure Document in accordance with the Code.

To maintain their membership, Franchisor Members must provide at renewal time a letter from their legal advisors verifying they have a current Disclosure Document.

Franchisee Members

"Franchisee" means a company, person or firm which has been granted a Franchise by a Franchisor.

Service Provider Members: individuals and organisations providing services to those operating in franchising and small business, and whose business is not a direct competitor to FCA. A direct competitor being an individual or organisation whose primary business activity is providing products or services that are the same or substantially similar to those provided by FCA, particularly in relation to membership services or similar business models.

Non-voting Members: Individuals and organisations that support the Objects and do not otherwise qualify for the other classes of membership.

Members must agree to comply with the FCA Constitution and the FCA Member Standards.

Disciplinary Process

The process to suspend or expel member as outlined in clause 2.12 of the current Constitution will be reviewed and simplified. Currently, the Board may resolve to suspend or expel a member and that member may appeal the decision by referring the decision to an "arbitration panel".

It is proposed that the Board should be the final decision maker with regards to the suspension or expulsion of a member, however, the Board may only make such a decision subject to the outcomes of a formal disciplinary process that will be set out in the by-laws.

The disciplinary process that will be set out in the by-laws may cover:

- a) the investigation and handling of any allegations against Members with regards to breaches of the Constitution or Member Standards, and
- b) the Board establishing a body or panel that is responsible for administering the disciplinary procedures and making a recommendation to the Board about any disciplinary action to be imposed against the Member.

4. Board of Directors

Composition

The current Board composition has been in place since establishment of FCA. In order to ensure governance structures are fit-for-purpose and aligned to the mission and current culture and practices, not-for-profit Boards should review their composition at regular intervals. Reviewing Board composition involves looking at the process by which Directors are elected or appointed on to the Board, including:

- a) industry representation requirements
- b) size of the Board
- c) terms of office and the balance of continuity vs refreshing of the Board
- d) mix of required skills, experience and perspectives and how to recruit Directors accordingly.

The proposed Board composition compared to the current Board composition:

Current Board composition as per clause 7.7 of constitution	Proposed Board composition
<p>Up to 15 Directors</p> <ul style="list-style-type: none"> • Five Chapter Representatives (each of a different State Chapter); • Three from Franchisor Members; • Two from any category of membership; • Five External Directors. 	<p>Up to 11 Directors:</p> <p>5x Franchisor Directors – elected by the Franchisor Members</p> <p>3 x Member Elected Directors – elected by the whole voting membership, at least one of whom must be a Franchisee Member and at least one must be a Service Provider Member.</p> <p>1x Director from the newly established National Advisory Council (NAC) - appointed by the NAC</p> <p>Up to 3x Appointed Directors appointed by the Board.</p>

Generally, Board sizes have been reducing over the years. The AICD notes that the typical Board size for large charities/NFP Boards is 8 to 12 and for small charities/NFP Boards 5 to 8. Based on Associations Forum’s Annual Board Survey, the average Board size of associations is 9.

The FCA Board size of up to 15 Directors is therefore significantly higher than the typical not-for-profit Board. The question arises as to whether 15 people is necessary to govern an organisation like FCA. The potential disadvantages of a larger Board include:

- easier to be less engaged in a large Board, for example, apologies at Board meetings are common;
- may be harder for each Director to make a meaningful contribution in discussions and to develop a close working relationship with other Directors;
- administrative burden on a small Secretariat in managing the logistics involved with a large Board;
- the costs of holding Board meetings and associate time and travel.

The proposed Board composition of eight elected Directors (five Franchisor Directors and at least one Franchisee Director and at least one Service Provider Director) better aligns to FCA’s objects and core membership.

There is also a trend moving away from geographic representation on Boards, especially for national organisations of federally regulated industries.

The current Board composition with five positions reserved for the Chapter Representatives was designed to facilitate communication between the State

Chapters and the Board. The State Chapters serve a key operational role of organising local events and engaging with the local members. As this is an operational function, the need for having Chapter Representatives on the Board is less relevant than in the past. Further, it is noted that Directors have governance responsibilities for all of FCA. Directors have fiduciary and legal duties to always act in the best interests of the FCA, and not as delegates or representatives of the Chapters that appointed them.

It is proposed that the Chapter Representatives will move to the new National Advisory Council. There will be one Director on the Board from and chosen by the National Advisory Council.

External Directors will be renamed as Appointed Directors as such Directors are not always “external” to the industry. Appointed Directors may come from the membership. The Board may appoint Appointed Directors to complement the existing collective skills and perspectives and ensure balance or diversity on the Board. The Appointed Director positions are an option for the Board and do not have to be filled if the Board so chooses.

Criteria to be a Franchisor Director and Franchisee Director

Franchisor Directors must:

- a) Be a Franchisor Member or an employee or Director of a Franchisor Member; and
- b) Have minimum two years’ experience serving in a C-suite role within a franchise business at the time of their nomination for election as a Director.

Member Elected Directors must be a Franchisee Member, Service Provider Member, Franchisor Member or an employee or director of such Members.

Terms of office of Directors

Franchisor Directors, Member Elected Directors and the NAC Director will serve 3-year terms.

All Directors may only serve up to 6 consecutive years (or 2 x 3-year terms).

Appointed Directors will serve a term as determined by the Board up to a period of 3 years, but they may be re-appointed (subject to the maximum term limit of 6 consecutive years).

Chair and Deputy Chair

The Chair and Deputy Chair to continue to be elected by the Board from amongst the Directors.

Other Board Matters

Elections: If more nominations are received than there are vacant positions for Franchisor Directors or Member Elected Directors, then an online ballot will be held prior to the AGM with results announced at the AGM.

The quorum for a Board meeting will be a majority of Directors in office. For example, if there are 11 Directors then the quorum is 6.

5. State Chapters and National Advisory Council

Details regarding the State Chapters currently in the Constitution will be moved to the by-laws. This provides flexibility on how the State Chapters operate.

The State Chapters will continue and will operate business-as-usual. As stated above, the State Chapters serve a key operational role of organising local events and engaging with the local members. Terms of reference for the State Chapters will be moved to the by-laws.

A National Advisory Council (NAC) will be established which would be a policy and advisory body to the Board.

The NAC will comprise State Chapter Committee members and other representatives as invited. The NAC will provide input on key policy and strategic matters and provide a forum for State Chapter Committee members to share information and best practice.

6. Other Matters

General Meetings

- a) The current quorum for a general meeting will be retained which is 15 Members entitled to vote present in person, by proxy or by their Representative.
- b) Provision will be made for virtual meetings and electronic notices.

Transitional Arrangements

- a) There will be transitional clauses in the new Constitution outlining how the current Board structure will transition to the new Board structure.
- b) As the constitution timeline has been revised, the details of the transitional arrangements are to be confirmed. The aim of the transitional arrangements will be to minimise disruption and ensure a smooth and clear transition to the new Board structure.

E. FEEDBACK ON THIS DISCUSSION PAPER

Please send any comments or questions by close of business, **27th May 2024** to **annette.vukoje@franchise.org.au**