

EXPOSURE DRAFT EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment, Workforce, Skills, Small and Family Business

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2021

Section 172 of *Competition and Consumer Act 2010* (the Act) provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 51AE of the Act provides that the regulations may prescribe an industry code to regulate the conduct of participants in an industry towards other participants in the industry. This instrument amends the existing the Franchising Code of Conduct (the Code) contained in Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

The purpose of the *Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2021* (the Regulations) is to increase transparency of the operation and structure of franchise systems before prospective franchisees enter into franchise agreements. This furthers the objective of the Act to enhance the welfare of Australians by promoting competition and fair trading in the franchising sector.

The introduction of a public Franchise Disclosure Register (the Register) will facilitate free and easy access by prospective franchisees to pertinent information about franchised businesses. This will enhance the ability of prospective franchisees to make informed decisions about franchise systems that they are considering purchasing, by enabling them to easily compare information about different franchise systems. The Register will provide easy access to appropriate, useful information, without compromising the individual or commercial privacy of the parties involved or imposing undue burden upon the sector.

The Register will operate as a self-service portal through which information and documents are uploaded by franchisors and accessible by prospective franchisees without the direct intervention of the Government. Departmental staff are responsible for maintaining the register, providing technical assistance, and conducting post-implementation policy reviews. Compliance with the obligation to meet registration requirements will be within the enforcement responsibilities of the regulator, as with the remainder of the obligations set out in the Code.

In March 2019 the Parliamentary Joint Committee on Corporations and Financial Services tabled a report titled *Fairness in Franchising*, making a number of recommendations for regulatory

reform in the franchising sector. The Government established a Franchising Taskforce (the Taskforce) to consider the recommendations made in the *Fairness in Franchising* Report. The Taskforce consulted with a range of stakeholders, and received submissions to both an Issues Paper and a Consultation Paper and feedback across multiple roundtable discussions and targeted sector consultation.

The Regulations implement the Government's commitment to improve franchisee information and awareness through the introduction of a Franchise Disclosure Register, as outlined in its response to the *Fairness in Franchising* report. These Regulations complement the changes made in the *Competition and Consumer (Industry Codes – Franchising) Amendment (Fairness in Franchising) Regulations 2021*, which address other commitments made in response to that report.

Details of the Regulations are set out in [Attachment A](#).

The Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Regulations commence on 31 March 2022.

Details of the *Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2021*

Section 1 – Name

This section provides that the name of the regulations is the *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2021* (the Regulations).

Section 2 – Commencement

This section provides that the Regulations commence on 31 March 2022.

Section 3 – Authority

This section provides that the Regulations are made under section 51AE of the *Competition and Consumer Act 2010* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Schedule 1 to the Regulations amends the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* to insert Part 5A to establish the Franchise Disclosure Register (the Register).

All legislative references in this attachment are to the Franchising Code of Conduct (the Code) contained in Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* unless otherwise stated.

Item 1 – Subclause 4(1) of the Code

This item inserts definitions for *ANZSIC division and subdivision codes*, *Register* and *Secretary* into the list of definitions at subclause 4(1) of the Code.

ANZSIC is the Australian and New Zealand Standard Industrial Classification 2006, published by the Australian Bureau of Statistics. The Regulations incorporate the ANZSIC division and subdivision level industry codes, by reference to the version of ANZSIC in force at the time the Regulations commence (31 March 2022).

The Register is described at clause 53 of the Code (see below).

The Secretary refers to the Secretary of the Department that is administered by the Minister with policy responsibility for the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.

Item 2 – Part 5A of the Code

This item inserts a new Part 5A into the Code. This Part establishes the Register, sets out rules for the governance and maintenance of the Register, and imposes obligations on franchisors to provide relevant information on the Register.

Division 1 – Establishment and Content of the Register

Clause 53 establishes the Register. The Secretary is responsible for establishing and keeping the Register, which will be an online electronic register available to the public without charge to maximise transparency. Giving the Secretary this responsibility ensures a public officer is accountable for the Register, although in practice it is expected franchisors will play an active role in managing their own information on the Register. The Register is not a legislative instrument.

Clause 53A outlines what must, and what may, be included on the Register with respect to each franchise. All information and disclosure documents which are required to be provided under Division 2 must be contained on the Register (further details about these requirements are provided below). This will allow prospective franchisees to directly access details about the franchise system from the franchisor's profile. In addition, the Register may also contain other information and documents that a franchisor chooses to provide for inclusion. The Register will present this information in an accessible manner, attached to the profile of each franchisor, to support easy identification and understanding of each franchise.

Clause 53B empowers the Secretary to adjust contents of the Register according to the wishes of a franchisor or to correct clerical errors or obvious mistakes in the Register. While in general franchisors are expected to self-manage their profiles on the register by updating information and uploading documents as required, this clause provides a mechanism to ensure the Secretary also has the ability to remove or revise information on the Register under certain circumstances:

- *At the request of the franchisor* – the Secretary must remove or replace the relevant information or documents in the Register. This may occur, for example, if a franchisor is unable to directly update information in their profile or upload documents to the Register due to technical difficulties.
- *Other than at the request of the franchisor* – the Secretary may only remove out-of-date disclosure documents from the Register. That is, where a disclosure document is more than 18 months old (based on the end of the financial year to which the document relates), and the franchisor hasn't updated the document or notified that they are not required to update the document (as prescribed in the Code). The Secretary is not able to amend or remove any other information or documents in relation to a franchisor on the Register (other than at the request of the franchisor).

These limits placed on the Secretary's powers reflect that the Secretary has an administrative role in maintaining the Register. Information and documents uploaded to the Register are not

checked, vetted or otherwise assessed for quality or completeness, and the Secretary does not have a role in monitoring information contained in the Register. The regulator, the Australian Competition and Consumer Commission (ACCC), will continue to have responsibility for enforcement and compliance with the Code, including franchisors' obligations in relation to the Register.

Division 2 – Obligation to provide information and documents relating to franchise for inclusion in the Register

Initial obligations for franchisors upon establishment of the Register

Clause 53C outlines the transitional arrangements for existing franchisors to transition to the new Register effectively and efficiently. Existing franchisors have an initial obligation to provide business information and a disclosure document for their franchise system to be included on the Register. This obligation applies to franchisors who have given a franchise disclosure document to a franchisee or prospective franchisee prior to or on 30 June 2022. The franchisor must update their actual disclosure document up to 30 June 2022 and provide this, or otherwise their most recently updated disclosure document, in the approved manner and form, for inclusion on the Register before 1 November 2022.

This provision ensures that existing franchisors who had publicly offered franchise opportunities must lodge their disclosure document on the Register. Future prospective franchisees considering entering into an agreement with these active franchisors will therefore have access to useful information that can be compared across systems.

In addition to the disclosure document itself, this provision requires franchisors to provide certain identifying business information. Such information is intended to appear alongside published documentation on a profile page for the franchise system. The input of the name of the franchisor and the name under which a franchise system trades in Australia will allow for users to easily search the Register by the names by which a franchise is commonly known. The publication of ANZSIC industry classification information is intended to both assist in the identification of franchises relevant to an industry (ANZSIC division level code) and allow for searches to be sorted by sector (ANZSIC subdivision level code).

Under subclause 53C(5), the Secretary may also require information that is already required to be provided in the disclosure document or given to a franchisee under the Code to be given on the profile page, to allow for searches based on those fields. These provisions enhance the accessibility of important information through the Register. This does not empower the Secretary to impose further obligations on franchisors to provide additional information above and beyond that which is already required under the Code.

Failure to provide the disclosure document and other required information entails a maximum civil pecuniary penalty of 600 penalty units. These requirements to provide initial documentation and information are core obligations of this Division. The effectiveness of the Register framework in achieving its policy goal of improving transparency of franchise systems and providing a means of meaningfully comparing systems depends upon widespread compliance. The civil penalty is necessary to enhance compliance.

The documentation and information lodged on the Register will be publicly accessible and is intended to relate to an entire franchise system. As such, any personal or franchise-specific information is to be redacted from the version of the disclosure document that is publicly available on the Register.

Annexure 1 of the Code prescribes detailed requirements about the information that must be included in a disclosure document for franchisees and prospective franchisees. Some of this information may pertain to particular franchisees or sites, and would not be relevant to the franchise system as a whole. Since only one disclosure document per franchise system is to be published online, it is appropriate that the following franchise-specific information be redacted from the published document:

- The name, location and contact details of each franchise that was transferred, ceased to operate, terminated, not extended, bought back or acquired (item 6.5)
- Information on franchise site restrictions and territory exclusivity (item 9)
- Policy of the franchisor for selection of the site and operating territory of the franchise, and details of whether the territory or site has been previously subject to a franchised business of the same system (item 13)
- Information on prepayments, establishment costs and other payments payable by the franchisee (item 14)
- Material conditions of financing arrangements offered to the franchisee for the establishment or operation of the franchise (item 16)
- Historical and projected earnings information for the franchised business or a franchise in the franchise system (item 20)

Information on rebates is important for prospective franchisees, as it may help them understand a franchisor's incentives in relation to supply decisions. It is, however, recognised that the public disclosure of such information may, in some cases, risk putting franchise systems at relative competitive disadvantages in relation to supply. As a result, paragraph 53C(4)(b) gives franchisors the option to redact from the provided disclosure document the total amount of rebates or other financial incentives received by the franchisor from suppliers.

Ongoing obligations for franchisors

Following the transitional arrangements relating to establishment of the Register in clause 53C, Clause 53D then outlines the main ongoing obligation for franchisors to update the information and documents provided for publication on the register on an annual basis. This provision applies where the franchisor is required under the Code to update their existing disclosure documents either following the end of a financial year or upon request from the franchisee after 30 June 2022. These franchisors must provide an updated version of their disclosure document for publication on the Register, and information such as the name of the franchisor, name under which the franchisor carries on business relevant to the franchise, and the industry classification of the franchise if that information has not previously been provided.

This provision is intended to ensure that the Register contains up-to-date information on the franchise system, as it is this information which will be of greatest use to prospective franchisees in their decision-making processes. Franchisors subject to this requirement must provide updated documents in the manner and form approved by the Secretary within the time

limit specified in paragraph 53D(3)(b). A maximum civil penalty of 600 penalty units may be applied where a franchisor fails to do so. The civil penalty is necessary to promote timely compliance with this important requirement.

Consistent with the initial obligations outlined in the transitional arrangements:

- the same redaction requirements also apply in relation to any updated disclosure documents on an ongoing basis; and
- the Secretary may also require information that is already required to be provided in the disclosure document or given to a franchisee under the Code to be given on the profile page, to allow for searches based on those fields.

Clause 53E creates another ongoing obligation for a franchisor to provide information on the Register about materially relevant facts which are not included in the disclosure document published on the Register after 30 June 2022. Materially relevant facts are listed in section 17(3) of the Code, and include a change in majority ownership of the franchise and matters relating to proceedings against the franchisor.

This obligation ensures that the online record can be quickly updated to inform prospective franchisees of critical operational changes in a franchise system. The information must be given in the manner and form approved by the Secretary within 14 days of the franchisor becoming aware of the matter, to support the timely correction of the public Register. To encourage compliance, the obligation to provide a copy of the information provided to franchisees or prospective franchisees on the Register is a civil penalty provision, subject to a maximum pecuniary penalty of 600 penalty units for non-compliance.

Clause 53F introduces an ongoing obligation for franchisors who are not otherwise required to update their disclosure document to upload onto the Register a notice explaining why no changes need to be made. This obligation applies in relation to each financial year ending after 30 June 2022. Subclause 8(7) of the Code sets out the circumstances in which franchisors are not required to update their disclosure document. This applies where the franchisor entered into one, or no, franchise agreements during the financial year, and does not intend to enter into another franchise agreement in the following financial year.

To promote compliance and deter intentional or negligent failure to provide such information, a civil pecuniary penalty applies where a franchisor fails to provide a notice in the manner and form approved by the Secretary within 4 months after the end of the relevant financial year. A maximum pecuniary penalty of 600 penalty units may be applied for non-compliance.

Division 3 – Giving of updated disclosure document, information or notice by agents

Clause 53G provides that a franchisor's obligations in relation to the Register are satisfied if those obligations are fulfilled by another person acting on the franchisor's behalf. For example, a franchisor may wish to appoint an agent to manage the franchisor's Register profile on an ongoing basis and assist in the authentication of documentation and information that appears. This provision supports efficiency through delegation to reduce the regulatory burden on franchisors.