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

The Australian Competition and Consumer Commission (ACCC) welcomes the opportunity to make a submission to the Treasury's public consultation on the Franchise Disclosure Register and the issues raised in the Explanatory Statement, Exposure draft and accompanying Guide.

The ACCC is an independent statutory authority responsible for administering and enforcing the *Competition and Consumer Act 2010* (CCA), including the Australian Consumer Law (ACL) and the Franchising Code of Conduct (the Code). Through doing so, we promote fair trading, consumer and small business protection, and competition for the benefit of all Australians.

Franchise Disclosure Register as a starting point for due diligence

The ACCC supports the government's objective of making access to information for prospective franchisees as accessible as possible. In this respect, the Franchise Disclosure Registry can be a useful point of reference for people looking to buy a franchise to compare like for like information provided by franchisors. It is crucial, however, that people looking to buy a franchise take the time to understand the nature of franchising itself and the inherent risks that are unique to franchising. The Register should clearly refer people to franchise guidance on business.gov.au and provide a clear, prominent link to the [Information Statement](#) which contains key information about the potential risks in franchising.

It will be critical in the creation of the Register that all prospective franchisees understand the context and limited oversight of the information and documents on the Register. We support prominent, clear warnings stating the limited oversight or assessment of the published documents, including that the ACCC's enforcement role in relation to the Code does not mean that the ACCC has vetted any of the information before it is put on the Register. There is a considerable risk that, in the absence of such warnings, prospective franchisees will assume documents on the Register are assessed, vetted or approved by a relevant authority. This warning should be reinforced wherever possible both on the Register and in communications referring people to the Register. It is equally important that the Register highlights to prospective franchisees the importance of thoroughly researching a franchise system and franchise business and obtaining independent legal, accounting and business advice before buying a franchise.

Integrity of the Franchise Disclosure Register

To ensure the integrity of the Register, it should capture all franchisors who are offering franchises and franchisor disclosure documents and materially relevant facts disclosure information that is current, accurate and as complete as possible, excluding only necessary commercially sensitive, site specific and personal information.

Although the draft regulations include an initial and an annual ongoing obligation for franchisors to lodge disclosure documents (in their redacted form) on the Register, the current drafting does not capture new franchisors who have not given a disclosure document on or before 30 June 2022 until their obligation to provide an updated disclosure document under the Code is triggered. As a result, a franchisor could be circulating a disclosure document for a year before being required to place that disclosure document on the Register.

Further, as currently drafted the ongoing obligation for franchisors to lodge updated disclosure documents only relates to disclosure documents that must be updated within 4 months of their financial year if clause 8(6) of the Code applies or within 2 months of receiving a franchisee's request if clause 8(8) of the Code applies. This means disclosure documents that are updated at other times by franchisors for whatever reason (e.g. a change to the franchisor's system which risks information provided in an existing disclosure document being misleading) don't have to be made available on the Register. In this respect, we recommend requiring franchisors to lodge their current disclosure documents on the Register, including as updated from time to time.

For these reasons, the Code amendments should make it clear that disclosure documents that are provided by franchisors to prospective franchisees and franchisees must also be available (albeit in redacted form) on the Register.

It is equally as important that as little information as possible is redacted from franchisors' disclosure documents lodged on the Register. We do not consider it to be appropriate that items 9, 13.1 or 14¹ of the disclosure document in Annexure 1 to the Code should be information that franchisors are required to redact. These items require information that goes to fundamental aspects of disclosure, and there does not appear to be any strong privacy or commercial reasons to require the redaction of this information. In our experience, the information required to be disclosed under these items would ordinarily be provided by a franchisor to any prospective franchisee and is not franchisee/site specific information.

Further, to avoid any confusion and inconsistency that may arise from information that is redacted, we recommend that there be prescribed wording that franchisors are required to use alongside any redactions in the disclosure document lodged on the Register. For example, if former franchisee contact details are required to be redacted at item 6.5 of the disclosure document lodged on the Register, then the franchisor should be required to replace this information with prescribed wording similar to:

'This information is redacted to meet the requirements of the Register but is important information that can be obtained from the franchisor as it would ordinarily be disclosed in the franchisor's disclosure document that is provided to prospective franchisees and franchisees. Prospective franchisees are strongly encouraged to read and understand the franchisor's

¹ Item 9: disclosure of whether franchise is for an exclusive or non-exclusive territory or limited to a particular site and related details; Item 13.1 disclosure of franchisor's leasing policy; Item 14: disclosure of payments / fees relating to the franchise

unredacted disclosure document and to contact former franchisees as part of their research on a franchise system’.

We support franchisors being required to lodge on the Register materially relevant facts they are required to disclose under the Code, such as a change in majority ownership or control

of a franchise system, or the franchisor or an associate of the franchisor becoming a Chapter 5 body corporate (e.g. the franchisor company is under administration). We think it is appropriate prospective franchisees have access to this information as current franchisees of any system already do. For this reason, if a statement as to the franchisor’s solvency is made or a financial report comes into existence, and at the same time, that solvency statement or financial report is not already reflected in the disclosure document available on the Register, we believe that solvency statement or financial report should also be uploaded by the franchisor onto the Register as soon as reasonably practicable. This would be consistent with the franchisor’s obligations under clause 17(1) of the Code.

Lastly, disclosure requirements should be balanced with the need to protect the Register as an objective source of information. We see considerable risks from the Register being used by franchisors as a method of marketing for their franchise, so supporting information that can be lodged on the Register should be limited only to what is required.

ACCC’s role

As noted in the materials published, the Register will be hosted and administered by the Treasury with the ACCC being responsible for enforcement of the relevant obligations to publish on the register, as it is responsible for enforcement of the Code.

As an economy-wide regulator, the ACCC takes a strategic approach to compliance and enforcement and we are careful in selecting matters we prioritise for investigation. The ACCC cannot pursue all matters that come to our attention. In particular, we focus on conduct that will, or has the potential to, harm the competitive process or result in widespread consumer or small business detriment. The ACCC exercises discretion to direct resources to matters that have the greatest overall benefit to the public, in line with our [Compliance and Enforcement Policy](#).

The ACCC will assess any reports about alleged non-compliance with the new obligations relating to the Register by reference to the factors set out in our Compliance and Enforcement policy; in particular, considering the nature and extent of the potential harm from any non-compliance. The ACCC expects that Treasury will provide education and guidance to ensure that franchisors are aware of their obligation to lodge the required information on the Register. In line with its responsibility for the integrity and administration of the Register Treasury should also be prepared to follow up with franchisors that do not lodge some or all of the required documents. Enforcement action by the ACCC for noncompliance would be reserved for serious breaches that may result in significant harm.

Franchisors should also remain conscious of their existing obligations under the ACL not to mislead or deceive prospective franchisees or make any false or misleading representations in any material put on the Register. If you wish to discuss any aspect of this submission,

