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 (Fairness in Franchising) Regulations 2021

Purpose and Operation

The purpose of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Fairness in Franchising) Regulations 2021* (the Regulations) is to improve the fairness and transparency of the franchising sector. It furthers the overarching goal of the *Competition and Consumer Act 2010* (the Act) to enhance the welfare of Australians by promoting competition and fair trading in the franchising sector and providing for the protection of parties who wish to enter into franchise agreements.

These regulations amend the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code) to address:

- Dispute resolution and complaints handling: franchising dispute resolution provisions are strengthened through:
    - The introduction of conciliation and voluntary arbitration code dispute resolution mechanisms
    - Conferring the functions previously undertaken by the Franchising Code Mediation Adviser upon the Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) and expanding the role to encompass arbitration and conciliation
    - The express recognition of the availability of multi-franchisee dispute resolution processes, and an obligation for a franchisor to attend such a process conducted by the dispute resolution provider.
- Pre-entry disclosure: targeted improvements have been made to pre-entry disclosure requirements, which includes:
    - The introduction of a new mandatory key facts sheet
    - Improvements to the scope of financial disclosure, including requiring additional information relating to goodwill
    - An improved information statement
    - Providing more specific disclosure relating to the supplier rebates received by a franchisor and their methods of distributing any benefits of those rebates.
- Exit arrangements and termination provisions: the provisions relating to the termination of franchise agreements are amended to:
    - Provide franchisees with an explicit avenue to request the early termination of their franchise agreement

- Extend cooling off periods to 14 calendar days and allow franchisees who purchase an existing franchise from a vendor franchisee to rely on cooling off provisions
    - Providing that cooling off periods only begin upon the provision to the prospective franchisee of necessary documentation, including, where relevant, retail leases.
- Significant capital expenditure: the prohibition on requiring undisclosed significant capital expenditure is strengthened by extending recent changes to capital expenditure for automotive franchises to the broader franchising sector.
- Marketing funds: amendments are made to clauses addressing marketing funds to ensure consistency in terminology when referring to such funds and related obligations, and civil penalties are imposed upon franchisors who maintain a marketing fund but fail to comply with reporting obligations.
- Passing on of a franchisor's legal costs: the amendments prevent a franchisor from contractually passing on future legal costs associated with the agreement where those costs are indeterminate at the time the agreement is signed.
- Retrospective unilateral variation of franchise agreements: a franchisor is prohibited from unilaterally varying an agreement with retrospective effect unless the written consent of the franchisee is obtained.
- Leasing of premises: disclosure related to lease arrangements and any interests that the franchisor has in leases has been improved to alleviate risks of conflicts of interest relating to the business premises arising.
- Restraints of trade: the Code has been updated to ensure that only a serious breach of an agreement by a franchisee is relevant to the enforceability of a restraint of trade provision.
- New vehicle dealership agreements: new provisions inserted into the Code apply principles relating to the fair compensation of franchisee automotive dealers and clarify the operation of the Code to explicitly apply to agents who sell new vehicles on behalf of a manufacturer.

Background

In March 2019, the Parliamentary Joint Committee on Corporations and Financial Services released its *Fairness in Franchising* report (the Report), which found that Government action is needed to improve the fairness and transparency of the sector and prevent systemic exploitation of franchisees. These amendments implement the Government's commitments in its response to the Report abd related commitments regarding automotive franchising.

Authority

Section 172 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 51AE of the Act allows the Government to prescribe an industry code to regulate the conduct of participants in an industry towards other participants in the industry. This instrument amends the existing *Competition and Consumer (Industry Codes—Franchising) Regulation 2014,* made under section 51AE, Schedule 1 of which is the Code.

Consultation

The Franchising Taskforce was established to consider a number of 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.

There was broad consensus amongst stakeholders that reforms to the regulation of franchising are needed to restore confidence in the industry. The measures outlined in the Government response are informed by the Report and extensive consultation. Feedback to the release of the exposure draft of these regulations has informed the final instrument. Targeted consultation with automotive representatives on the automotive amendments in Schedule 11 has also occurred.

Regulatory Impact

A Regulation Impact Statement (RIS) has been completed, and is included at Attachment A.

The Office of Best Practice Regulation (OBPR) has assessed that the RIS is adequate against the Government's impact analysis requirements (OBPR Reference: 25083).

Details of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Fairness in Franchising) Regulations 2021*

Section 1 – Name of Instrument

This section specifies the name of the amending regulations as the *Competition and Consumer (Industry Codes—Franchising) Amendment (Fairness in Franchising) Regulations 2021* (the Amending Regulations).

Section 2 – Commencement

This section provides that sections 1 to 4, Schedule 1 (which introduces changes to dispute resolution provisions) and Schedule 12 item 1 (which deals with application, saving and transitional provisions) of the Amending Regulations commence the day after the instrument is registered on the Federal Register of Legislation.

Schedules 2 to 11, which contain the remaining substantive amendments to the Franchising Code, and Schedule 12 item 2 commence on 1 July 2021.

Section 3 – Authority

This section states that these Amending Regulations are made under the Act.

Section 4 – Schedules

This section is a machinery clause that enables the Schedules to the Amending Regulations to operate according to their terms and conditions.

SCHEDULE 1 – DISPUTE RESOLUTION

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Key issues underlying dispute resolution in the franchising sector are a lack of access to cost-effective and determinative dispute resolution, and the presence of imbalances in bargaining power and resources between the parties. This Schedule expands the dispute resolution avenues available to parties, defines processes and standards which must be adhered to, and improves mechanisms that provide assistance with resolving disputes.

Item 1 – After section 4

This item inserts section 4A, which confers dispute resolution assistance functions upon the Australian Small Business and Family Enterprise Ombudsman (the Ombudsman) (consistent with subsection 13(c) of the *Australian Small Business and Family Enterprise Ombudsman Act 2015*).

Subsections 4A(a) and (b) give the Ombudsman the functions of keeping lists of dispute resolution practitioners for the purposes of resolving disputes according to the Code, and appointing practitioners on the request of one or more of the parties. In addition, subsections 4A(c) and (d) give the Ombudsman the role of receiving information about franchising disputes, and regularly reporting to the Minister about the handling of disputes arising under Code or franchise agreements. These data collection and reporting functions help monitor the effectiveness of the Ombudsman's dispute resolution services and ensure that they can be targeted to current issues and trends in the sector.

The conferral of these functions is necessary for giving effect to the Act, in that they ensure that dispute resolution processes, including arbitrations, can still operate even where parties cannot agree on a dispute resolution practitioner. It provides a convenient mechanism by which an independent party can efficiently facilitate the resolution of disputes between industry participants.

Item 2 – Subclause 4(1) of Schedule 1

This item inserts definitions for ***ADR practitioner***, ***ADR process***, ***complainant***, ***Ombudsman***, ***respondent***, and ***virtual attendance technology*** into the list of definitions at subclause 4(1) of the Code.

Items 3 and 4 – Paragraphs 21(1)(b) and 21(2)(b) of Schedule 1

Item 3 replaces references to 'mediation' in paragraph 21(1)(b) of the Code with references to 'an ADR process'. This allows a franchise agreement to contain a clause that requires conciliation and mediation processes to be conducted in the jurisdiction in which the franchised business is based.

Similarly, item 4 updates the language of paragraph 21(2)(b), preventing franchise agreements from containing clauses that require mediations and conciliations to be conducted in jurisdictions outside of the one in which the franchised business is based, or outside Australia.

Item 5 – Clause 21(3) of Schedule 1

This item repeals the subclause.

Item 6 – Clause 22 of Schedule 1

This item removes the words ", and if it does, the clause is of no effect" from the Clause.

Item 7 – Clause 34 of Schedule 1

This item updates references to the process to be observed in an internal complaint handling procedure to reflect changes to the structure of this Division of the Code.

Item 8 – Clause 35 of Schedule 1

This item updates the terminology in clause 35. The party with whom a complainant has a dispute is to be referred to as 'the respondent'.

Items 9, 10 and 11 – Clause 36 of Schedule 1

These items replace references to 'mediation' with references to 'ADR'. This expands the operation of clause 36 to include provision for conciliation as well as mediation.

Item 12 – Divisions 2, 3 and 4 of Part 4 of Schedule 1

This item repeals Division 2 (Internal complaint handling procedure), Division 3 (Code complaint handling procedure) and 4 (Mediation appointments) of Part 4 of the Code and substitutes with new Division 3 only. Further detail and explanation of the amended dispute resolution scheme is provided below.

Subdivision A – Notification of Dispute

Clause 40A replaces the previous clause 38. For the avoidance of doubt in the calculation of dates, timeframes in this subdivision are reworded in terms of days, rather than weeks. References to 'mediation' and the 'mediator' are to be changed to 'ADR process' and 'ADR practitioner' respectively to reflect the intent for conciliation to be available as an adjunct to mediation.

Subclause 40A(5) requires appointments of an ADR practitioner by the Ombudsman to occur within 14 days of a request. This subclause reflects the substantive requirements and intent of existing clause 45. This is intended to avoid delay in the initiation of dispute resolution proceedings.

Clause 40B provides a procedural framework for the initiation and conduct of dispute resolution processes involving multiple franchisees that have a corresponding dispute with a franchisor. This clause clarifies that the Code allows for multi-party dispute resolution processes to be undertaken by agreement, by referral to an ADR practitioner, or by request to the Ombudsman.

Subclause 40B(3) qualifies confidentiality requirements which may otherwise prevent a franchisee from engaging in discussions with other franchisees about a current dispute, expressly allowing discussions on their possible common dispute. This subclause ensures that clause 40B is consistent with the overarching policy of protecting franchisees' abilities to freely associate with other franchisees for lawful purposes, such as to discuss the resolution of potential common disputes.

Subclause 40B(5) clarifies that parties can request that the Ombudsman appoint an ADR practitioner for multi-party disputes where the parties cannot agree on a practitioner themselves.

Subclause 40B(6) provides that the ADR practitioner may undertake a multi-party dispute resolution process notwithstanding the disagreement of the franchisor. This provision has been inserted to prevent a franchisor from obstructing the efficient resolution of common disputes by arguing that they each be dealt with separately. Where an ADR practitioner chooses to continue with the process, the franchisor is required to attend and attempt to resolve the dispute.

Subdivision B – ADR process

This subdivision is intended to define common procedural standards for the undertaking of ADR processes. Clauses 41A, 41B and 41C extend the operation of the existing clauses relating to mediation processes, termination, and costs to both mediation and conciliation processes.

The requirement for each party to the dispute to attend the ADR process in subclause 41A(3) is now a civil penalty provision. Attendance at an organised ADR process is a minimal requirement for a genuine attempt at resolving the dispute. The application of this penalty is intended to prevent dispute resolution from being undermined by non-attendance of a party and ensure ADR processes are not abused by one party seeking to waste the other party's time and effort at ADR. Subclause 41A(2) has the effect that an ADR process can be held wholly online by way of virtual attendance technology and does not require a party to be physically present.

Subdivision C – Arbitration

Clause 43A allows for a complainant and respondent to agree in writing to resolve disputes by arbitration. In some instances, the parties might agree that the most appropriate and cost efficient mechanism to resolve a dispute may be to engage in a determinative process outside of the court system. This subclause expands the Code's dispute handling process to allow parties to engage in binding arbitration.

Clause 43B specifies a process for arbitration. The object of this provision is to ensure that certain minimum standards of conduct are observed throughout the process. The clause is based on the arbitration process set out in the Dairy Code of Conduct. The clause requires all parties to attend an arbitration and the arbitrator to give notice of the commencement and successful completion of an arbitration (if applicable). This is to ensure transparency and certainty for parties to a dispute who agree to have the dispute resolved by arbitration.

Clause 43C states that the arbitrator must terminate the arbitration in accordance with this section if the parties mutually request the arbitrator to do so. The arbitrator is then to issue a certificate relating to the termination of the process, and provide it to the parties and the Ombudsman as a record of the attempt to resolve the dispute.

Clause 43D gives parties a greater degree of certainty regarding the allocation of the costs of arbitration. Unless the parties agree otherwise, each party is to pay half of all reasonable costs associated with the conduct of the arbitration, and each is to bear their own costs of attending. For example, if there are 5 franchisees in a corresponding dispute with the franchisor (see clause 40B), the franchisor must pay 50 per cent of the common costs (representing its share of each of the individual disputes) and the franchisees must pay 10 per cent each of the common costs.

<u>Subdivision D - Confidentiality</u>

Clause 44A requires parties to a dispute arising under the Code to observe confidentiality requirements relating to resolving the dispute. This clause reflects best practice by reinforcing the enforcement of 'without prejudice' clauses, and recognises that a substantial benefit of commercial arbitration is its confidential nature.

SCHEDULE 2 – DISCLOSURE BEFORE ENTRY INTO FRANCHISING AGREEMENTS

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

For disclosure to be effective, useful information must be disclosed in a format which is neither unduly burdensome to prepare nor read. The measures improve the quality and scope of disclosure requirements, while making it more accessible and bringing the most pertinent business information to the attention of prospective franchisees.

Item 1 – Subclause 4(1) of Schedule 1

This item inserts a definition for ***key facts sheet*** into the list of definitions at subclause 4(1) of the Code.

Item 2 – Subclause 9(1) of Schedule 1

This item amends subclause 9(1), which imposes obligations upon the franchisor to give certain documents to prospective franchisees.

As well as the documents required by the current subclause 9(1), the subclause requires the franchisor to provide:

1. a copy of the new key facts sheet and
2. if premises are leased to the franchisor or an associate of the franchisor, and they propose to sublease the premises to the prospective franchisee, a copy of the lease (or summary of the commercial terms if the lease is unavailable) and, where relevant, any written information required by State or Territory law in relation to that lease.

The requirement to provide these documents at least 14 days before the parties enter the agreement or make a non-refundable payment under the agreement is a civil penalty provision. The pecuniary penalty is designed to deter franchisors from delaying or neglecting to provide these documents. The early provision of the disclosure documentation is vital to assist franchisees in assessing a franchise opportunity before they become bound by an agreement in law.

Item 3 – Subclause 9(2) of Schedule 1

This item updates the reference to a prior subclause to reflect the numbering as amended.

Item 4 – After subclause 9(2) of Schedule 1

This item expands disclosure requirements in cases where the franchisor consents to the transfer of an existing franchise agreement to another person. The object of this amendment is to ensure that those who choose to take over an existing franchise can benefit from the same pre-entry disclosure as prospective franchisees who sign new agreements. The franchisor is required to give the prospective new franchisee the same documents as required by the new subclause 9(1) at least 14 days before giving consent to the transfer of the agreement. In other words, the franchisor cannot give their consent to the transfer until at least 14 days after giving the prospective new franchisee the required documents, to ensure that a prospective franchisee is not rushed into accepting obligations. A civil pecuniary penalty applies to a failure to meet these requirements in order to ensure that a new franchisee has proper time to read and consider the terms of an agreement without being pressured to accept immediately.

Subclause 9(2B) avoids the duplication of obligations by providing that the disclosure requirements specific to a transfer of an existing franchise agreement do not apply where parties enter into a new agreement.

Subclause 9(2C) allows the recipient of documents disclosed under clause 9 to request those documents in printed and/or electronic form. The franchisor must comply with such a request. If, however, the documents have already been provided in one form, providing them in a different form does not restart the 14 day disclosure period.

Item 5 – At the end of clause 9 of Schedule 1

This item inserts the new subclause 9(4). Where earnings information is provided separately to the other disclosure documents, the Code deems that the disclosure required by clause 9 had not occurred when those other disclosure documents were provided. As a consequence of subclause 9(4), the 14 day disclosure period begins from the time that all information, including earnings information, is provided. This is intended to address circumstances in which earnings information is provided outside of the formal disclosure process, with the statements in item 20.3 being inappropriately relied on by franchisors.

Item 6 – After clause 9 of Schedule 1

This item inserts new clause 9A, which sets out the requirements for the new key facts sheet. The key facts sheet is intended to draw particular attention to the most crucial information contained in the disclosure document.

The specific layout and contents of the key facts sheet is to be published on the Australian Competition and Consumer Commission's (ACCC) website, as it exists from time to time. This form is intended to ensure that certain information is presented in a standard, accessible, and useful format for prospective franchisees, but will not itself create new substantive disclosure obligations for the franchisor.

Paragraph 9A(1)(c) provides that the key facts sheet will only include information on matters that franchisors must already include in the disclosure document or otherwise under the Code. This is intended to address concerns that the key facts sheet could create new substantive disclosure requirements without being subject to Parliamentary scrutiny. While the form on the ACCC website may be changed from time to time, these changes are expected to be infrequent, communicated through appropriate franchising networks, and cannot go beyond what is already substantively required to be disclosed by the Code itself.

The obligations on the franchisor to update the key facts sheet within 4 months of the end of the financial year and upon the request of the franchisee are civil penalty provisions. The penalties attached are designed to deter franchisors from neglecting to update their key facts sheet and encourage the regular provision of up-to-date information on the health of the franchise system to franchisees. The penalty provision in subclause 9A(2) is subject to the circumstances in subclause 9A(3) in which a franchisor need not update the key facts sheet.

Subclause 9A(4) ensures that where a request is made for a disclosure document under clause 16(1), the franchisor must also update the key facts sheet to reflect the updated disclosure document. This provision ensures that the disclosure document and key facts sheet are consistent. This is a civil penalty provision to reflect the importance of keeping the documents consistent and up to date.

Item 7 – Subclauses 11(1) and (2) of Schedule 1

This item removes the subclauses and create new subclause (1), providing that a franchisor must give a copy of the Information Statement relating to franchising that is published on the Commission's website to a prospective franchisee.

Item 8 – At the end of subclause 11(3) of Schedule 1

This addition to subclause 11(3) is intended to ensure that the Information Statement is provided to a prospective franchisee before the franchisor gives them the documents described in clause 9. This emphasises that the Information Statement cannot simply be provided as an annexure to the Code, since the policy intent of the Information Statement is that it should be provided prior to formal disclosure.

Item 9 – Clause 16 of Schedule 1 (heading)

This item changes the heading of clause 16 from 'Disclosure Document' to 'Franchisee may request copy of disclosure document'. This change is made to better describe the substance of the provision.

Item 10 – Subclause 16(1) of Schedule 1

This item clarifies that a franchisee may give the franchisor a request in writing for both an updated the disclosure document and the key facts sheet. The franchisor is required to comply with this request in the time set out by clause 16.

Item 11 – At the end of clause 16 of Schedule 1

This item inserts subclause 16(3) which requires that, if a franchisee were to make a request under subclause 16(1) for the documents in a particular format, the franchisor is obligated to provide it in printed or electronic form, or both, depending on the format requested. This is intended to improve the accessibility of updated disclosure documentation for franchisees.

Items 12, 13 and 14 – Paragraph 1.1(e) of Annexure 1 of Schedule 1

Item 12 updates the introductory guidance contained on the first page of the disclosure document to draw explicit attention to the new key facts sheet.

Item 13 clarifies that references to the waiting period of 14 days between disclosure and the entrance into a franchise agreement is measured in calendar days, rather than business days.

Item 14 lets franchisees or prospective franchisees know that the franchisor is required to give the disclosure document, including attachments, the key facts sheet, the proposed franchise agreement and the Code in printed and/or electronic form if requested.

Item 15 – At the end of item 4 of Annexure 1 of Schedule 1

This item adds a new paragraph 4.4, which requires that franchisors provide in their disclosure documents the percentage of franchisees in a franchise system that were a party to some form of alternative dispute resolution process. Much like the information concerning litigation that is already required to be provided, this information on ADR proceedings serves as a useful indication of the degree of cohesion and satisfaction of franchisees across the system. It may prompt a prospective franchisee to undertake further investigations before entering the agreement if there is a high level of disputation in the system.

Item 16 – Paragraphs 10.1(j) and (k) of Annexure 1 of Schedule 1

This item replaces the existing paragraphs 10.1(j) and (k) and expand the disclosure requirements relating to the receipt and distribution of supplier rebates. The disclosure document must specify whether the franchisor, master franchisor or an associate of the franchisor receives a benefit from a supplier, and if so, some details of the benefit. The rebates or financial benefits are to be expressed as a percentage of total purchases within the franchise system from that supplier. It should be noted that this calculation does not include purchases made for a franchisor-run unit of the franchise. In addition, the disclosure document must specify whether the benefit will be distributed to franchisees, and if so, how the benefit is to be shared.

Supplier rebates, commissions, and other payments to franchisors may mean franchisors' interests with respect to the supply of goods and services conflict with the interests of franchisees. This item improves disclosure of supplier rebates, giving franchisees an enhanced ability to raise potential conflicts of interest with the franchisor and factor this into their decision whether to sign the franchise agreement.

Item 17 – At the end of item 10 of Annexure 1 of Schedule 1

New item 10.2 clarifies that the disclosure requirements in 10.1(j) to (m) do not apply in relation to payments made by the franchisee to the franchisor for supply of goods or services ("wholesale supply"). It also clarifies that lease incentives are not required to be disclosed under these provisions (to avoid double disclosure given enhanced leasing disclosure requirements in Clause 9 and 13 of Schedule 1).

New item 10.3 provides an exemption from providing the details in 10.1(k)(iii) where the franchisee is permitted to acquire goods or services from sources other than the franchisor without the franchisor's approval, or where the whole of the rebate or financial benefit is to returned to the franchisee directly as a payment into a cooperative fund.

Item 18 – Item 13.3 of Annexure 1 of Schedule 1

This item introduces a new requirement for a franchisor to disclose any interests that they have in a particular lease arrangement for the franchised business, for example as landlord, head lessee or another interest disclosed under clause 13 of the Code. Like clause 13, this requirement is intended to put franchisees on notice of any incentives or financial benefits that the franchisor is entitled to receive by virtue of the lease or agreement to lease.

Item 19 – After item 17 of Annexure 1 of Schedule 1

This item introduces two new content requirements for the disclosure document. The franchisor must disclose whether the franchise agreement provides for the resolution of disputes through arbitration (item 17A) and summarise the parties' rights to end the franchisee agreement early, as set out in the franchise agreement (item 17B).

Item 20 – Item 18 of Annexure 1 of Schedule 1 (heading)

The heading of item 18 has been changed to reflect the fact that the initial term of the franchise agreement is now required to be included in the disclosure document.

Item 21 - Item 18.1 of Annexure 1 of Schedule 1

This item removes the reference to 'the process that will apply in determining arrangements' that apply at the end of the franchise agreement. This change places the focus of disclosure upon the substantive end of term arrangements rather than the procedure that applies.

Item 22 – Before paragraph 18.1(a) of Annexure 1 of Schedule 1

This item ensures that the initial period of the franchise agreement is specifically highlighted in disclosure related to end-of-term arrangements.

Item 23 – After paragraph 18.1(f) of Annexure 1 of Schedule 1

This item requires that disclosure documents detail whether or not a franchisee has any rights to goodwill generated by the franchise. Franchisees can then take this into account when deciding whether to sign the franchisee agreement. This information can also be highlighted in the key facts sheet.

Item 24 – At the end of item 18.1 of Annexure 1 of Schedule 1

This item requires that franchisors disclose whether the franchise agreement contains a restraint of trade clause, or a similar clause that purports to restrict the franchisee's business activities after the conclusion of the franchise agreement. If relied upon, such terms can significantly impact the future rights of a franchisee. This provision is intended to draw particular attention to their existence within a contract.

Item 25 – Subitems 18.3, 18.4 and 18.5 of Annexure 1 of Schedule 1

This item clarifies the requirements about the font and type used for warnings in the disclosure document about a franchisee's rights to renew or extend the franchise agreement, in the interests of ensuring both the legibility of disclosure documents and that warnings are sufficiently prominent.

Item 26 – Subclause 20.1 of Annexure 1 of Schedule 1

The previous subclause 20.1 has been replaced to clarify that if a franchisor provides earnings information, the franchisor must provide earnings information in either the disclosure document or a document attached to the disclosure document. The new subclause 20.1A requires that, where a franchisor has provided earnings information before providing the disclosure document, the earnings information must also be given in the disclosure document. Note that, by operation of subclause 9(4), any provision of earnings information after the disclosure document is provided restarts the mandatory 14 day disclosure period.

Item 27 – After item 20.2 of Annexure 1 of Schedule 1

This item requires the franchisor to include a statement that to the best of the franchisor's knowledge the earnings information in the disclosure document is accurate, except where the disclosure document contains pieces of information the franchisor knows is not accurate.

The intended effect is to dissuade a franchisor from including earnings information in the disclosure document it cannot vouch for as being accurate. This alleviates uncertainty from the use of disclaimers, which may cast doubt on whether the prospective franchisee can rely on the accuracy of the disclosed financial information.

Item 28 – Annexure 2 of Schedule 1

This item repeals the existing information statement and directs franchisors to provide the copy of the information statement available on the ACCC's website.

An improved and updated version of the information statement will be made available on the ACCC's website.

SCHEDULE 3 – TERMINATION OF FRANCHISE AGREEMENTS

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Clause 26 of Schedule 1 (heading)

This item changes the heading of clause 26 to clarify that it applies to cooling off periods that apply after a person has entered a new franchise agreement. This is distinguished from the new clause 26A, which applies to cooling off periods that apply upon the transfer of an existing agreement.

Item 2 – Subclause 26(1) of Schedule 1

This item has the effect of expanding the duration of the cooling off period that applies to new franchise agreements, and amends the conditions which trigger the commencement of the cooling off period.

It replaces the existing subclause 26(1) and provide for a cooling off period of 14 days to give prospective franchisees more time to reassess entering a franchise agreement after all necessary information has been received.

New subclauses 26(1B) and (1C) apply where the franchisee is to lease the business premises from the franchisor or an associate of the franchisor, or the franchisee is to occupy the premises without a lease, and that lease is not yet in force. Subclause 26(1B) lets the franchisee terminate the franchise agreement 14 days after receiving the terms of the proposed lease or right. There is a further 14 day cooling off period that applies if the final terms of the lease or right are not substantially identical to the proposed terms. These provisions only allow for the termination of the franchise agreement, and do not enable the early termination of a lease or contracts with other parties, even if they are related to the franchising endeavour.

> Example: On 2 August, Emily enters into a franchise agreement, and makes her first payment to the franchisor. The franchisor is responsible for leasing the premises that will be used for the business to Emily.
>
> On 5 August, the franchisor gives Emily a document which details a proposed location for her business, and outlines proposed terms of the lease to Emily. At this stage, if Emily changes her mind, she has until 19 August to terminate her franchise agreement under subclause 26(1B).
>
> Emily does not terminate the franchise agreement.
>
> On 23 August, the franchisor provides the final lease agreement to Emily, but its terms are substantially different from the proposal which was given on 5 August. This restarts the cooling off period in the Franchising Code. Emily does not sign the lease and terminates

the franchise agreement with the franchisor.

Items 3, 4 and 5 – Subclause 26(2) of Schedule 1

These items ensure that the newly-inserted subclauses 26(1B) and (1C), as well as the amended subclause (1), do not apply to

3. the renewal of existing franchise agreements,
4. the extension of the term or scope of an existing agreement, or
5. transfers of an existing franchise agreement where the new franchisee does not have to enter a new franchise agreement (which are dealt with by clause 26A).

Items 6 and 7 – Subclause 26(3) of Schedule 1

These items expand the scope of the requirement for the franchisor to repay payments connected with the franchise agreement, in cases where the franchisee exercises their termination rights under the new subclauses 26(1B) and (1C).

Item 8 – After clause 26 of Schedule 1

Previously, a cooling off period did not apply to a transfer of an existing agreement from an outgoing franchisee to an incoming one. This is despite the incoming franchisee (the 'new franchisee') having the same informational asymmetry as prospective franchisees entering an entirely new agreement. This item inserts clause 26A, which extends cooling off rights to incoming franchisees who are transferred existing franchise agreements. The cooling off period expires at the earlier of

- 14 days from the day after becoming the franchisee for the purposes of the franchise agreement, or
- once the incoming franchisee takes possession and control of the franchised business.

If this cooling off right is exercised in time, the agreement will revert to the old franchisee, who is reinstated as the franchisee.

This clause also provides for refunds to be made to the new franchisee in the event that they exercise their cooling off rights, with any reasonable expenses deducted. Refunds must be provided within 14 days of the provision of the notice that the new franchisee is exercising their cooling off right.

Failure to refund payments made under the contract, less any reasonable expenses, within the 14 day period, may result in the application of civil pecuniary penalties. The penalty is applied to deter unreasonable delays or the withholding of payments by the franchisor or old franchisee. Payments made under a franchise agreement often represent very significant expenditure for the incoming franchisee, and it may be imperative that they be repaid this expenditure quickly.

Example: Simon wishes to purchase a bakery franchise. Luckily, Sarah is looking to sell her Bread Factory franchise store located in central Canberra, which she has been operating for 3 years.

On 5 October, The Bread Factory approves the transfer, and Simon finalises his purchase of the business. At this point, he becomes the new franchisee of the store.

By agreement with The Bread Factory, Simon decides that he will not take control of the business right away, and instead will actually begin operating the business on 1 November. Under subclause 26A(3)(a), Simon will be able to give written notice to The Bread Factory and Sarah to terminate his transfer agreement until 19 October. If he did provide such a notice, the transfer of the franchise from Sarah to Simon would be terminated, and Sarah would continue to be the franchisee as before.

The Bread Factory is then required to pay back to Simon any payments that he might have paid to them pursuant to the franchise agreement. In addition, Sarah is obligated to repay to Simon the payments made for the transfer. Both the Bread Factory and Sarah can lawfully deduct from the amount refunded to Simon their reasonable expenses. They might include the administrative and legal expenses that they undertook in effecting the transfer, so long as they detailed these costs in the franchise agreement or transfer agreement. If, for example, Simon gave notice on 14 October, the refunds must be made by 28 October.

If, however, Simon decided instead that he wanted to take possession and control of the store before 18 October, he would not be able to terminate his transfer agreement after doing so. For example, if Simon took control of the business from Sarah on 11 October, he would not then be able to give written notice to terminate the transfer agreement at any point from then on.

This item also inserts clause 26B, which allows for franchisees to propose the early termination of the franchise agreement, and the terms on which the proposal will be effected. The franchisor must then provide a response to the franchisee’s proposal, which must include reasons if they refuse the request, within 28 days. The parties are obliged to act in good faith during negotiations for early termination. The response must be substantive in nature. For example, it is likely that a mere statement that the proposal will not be considered will not be adequate to meet this requirement.

Subclause 26B(3) provides that where a franchisee has previously submitted a proposal for early termination and has received a written response, the franchisor is not obligated to provide another response. This provision is intended to prevent the early termination mechanism from being used as a source of uncertainty and cost to franchisors. This provision is qualified by subclause 26B(4) which requires a franchisor to provide a written response where a franchisee submits a proposal on the basis of a different reason from that given in a prior request.

These changes provide franchisees with an explicit avenue to commence negotiations for the early termination of their franchise agreement. It does not give a franchisee a right to exit on demand. Any such rights must be set out already in the agreement. The franchisee is able to request early termination even if the agreement denies or is silent about early termination.

Previously, franchisees had no ability under the Code to signal their desire to commence negotiations to terminate the agreement early. However, in practice, the early termination of a franchise agreement is a common outcome of dispute resolution. An early termination of an agreement is not always be because one party alleges wrong-doing on the part of the other, and instead may be because of personal hardship or changes in the market outside the control of either party that makes the business unviable.

Item 9 – After subclause 27(4) of Schedule 1

This item clarifies that a franchisor and a franchisee can consensually terminate their agreement, even if the franchisor has given the franchisee a notice of termination as a result of the breach of the agreement.

Item 10 – Clause 29 of Schedule 1

There have been concerns with the ability of franchisors to immediately terminate franchise agreements where certain special circumstances, which must be provided for in the franchise agreement, (as per subclause 29(1)) are relied upon. This item introduces an additional 7 day notice provision where the franchisor purports to terminate an agreement in special circumstances.

To give franchisees an opportunity to contest the purported termination, they may notify the franchisor that they dispute the grounds of the proposed termination, and commence dispute resolution proceedings. If there is a dispute raised, the proposed termination cannot be effected until after the end of 28 days from the giving of termination notice, to allow the parties to complete the ADR process or to allow the franchisee to commence urgent proceedings to stay or prevent the termination. In addition, this clause provides for an expedited process for appointing an ADR practitioner or arbitrator to resolve disputes related to the purported termination.

However, recognising that allowing a franchisee to continue operating a business in some circumstances could pose substantial risks for third parties, the franchisor may be justified in taking immediate and decisive action in order to protect their brand. Accordingly, if the franchise agreement allows the franchisor to take such action if a special circumstance in subclause 29(1) arises, the franchisor is able to stop the franchisee operating the business while dispute resolution proceedings are underway by providing written notice.

Example: Hank operates a Coffee Addicts franchise. During the term of his franchise agreement, Hank is accused of endangering public health in the way he runs the store. Hank's franchise agreement gives the franchisor, Coffee Addicts, the power to terminate

the agreement if the franchisee does endanger public health.

On 1 July, Coffee Addicts serves Hank with written notice that in 7 days it proposes to terminate his franchise agreement, on the basis of his failure to comply with health standards.

Hank disputes the factual basis for the termination, and on 3 July he provides Coffee Addicts with notice of his dispute. Coffee Addicts is unable to agree with Hank on a suitable ADR practitioner, so a request is made to the Ombudsman, who is then obligated to promptly appoint someone to hear the dispute.

On 9 July, Coffee Addicts serves Hank with a notice purporting to terminate his franchise agreement.

Although more than 7 days have passed since Coffee Addicts served Hank with notice that it proposed to terminate the agreement, the notice purporting to terminate the agreement is ineffective. This is because the Code provides that once the dispute is referred for an ADR process, the agreement cannot be terminated for 28 days from the date on which the ADR process was requested.

Notwithstanding the ongoing ADR process, Coffee Addicts remains deeply concerned about Hank's capacity to operate the store in accordance with public health standards. As a precautionary measure, Coffee Addicts provides Hank with written notice that he is not to operate the store, effective immediately, pending the outcome of the ADR process.

Items 11, 12 and 13 – Paragraph 1.1(e) of Annexure 1 of Schedule 1

These items update the introductory statement of the disclosure document to ensure it accurately reflects the operation of clauses which have been amended or introduced.

SCHEDULE 4 – CAPITAL EXPENDITURE

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Subclause 4(1) of Schedule 1

This item inserts a definition of ***significant capital expenditure*** into the list of definitions at subclause 4(1) of the Code. The definition refers to subclause 30(2), which sets out exclusions from the definition of significant capital expenditure.

Item 2 – Clause 30 of Schedule 1

This item replaces the existing provisions relating to significant capital expenditure. It tightens the prohibition on significant capital expenditure being required of franchisees by extending recent changes to capital expenditure for automotive franchising to the broader franchising sector.

Previously, expenditure that the franchisor considered necessary and justified with a written statement was excluded from the general prohibition on requiring significant capital expenditure.

The updated clause 30 removes this exception. For a franchisor to require the undertaking of significant capital expenditure during the term of an agreement, the franchisor must either:

1. disclose the expenditure in the disclosure document at the time the agreement is entered into, renewed or expanded
2. get approval from a majority of franchisees if the expenditure affects all or a majority of franchisees in the system
3. require it in order to comply with legislative obligations; or
4. get the approval of the individual franchisee affected.

In addition, the new clause 30A requires the franchisor to provide a prospective franchisee with ‘as much information as practicable about the expenditure’, prior to entry into the franchise agreement. It includes some examples of what should be disclosed. Subclauses 30A(3) and (4) create an obligation to discuss expenditure before the prospective franchisee enters the agreement, including discussing the circumstances under which the franchisee is likely to recoup the expenditure.

Item 3 – Division 3 of Part 5 of Schedule 1

In order to avoid duplication and confusion, the automotive sector-specific capital expenditure provisions have been removed. The capital expenditure provisions as amended in these Regulations uniformly applies to all franchise systems, including automotive franchises.

SCHEDULE 5 – MARKETING FUNDS AND OTHER COOPERATIVE FUNDS

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Paragraph 5(1)(c) of Schedule 1

Previously, there was inconsistency within the Code between references to marketing funds and advertising fees. References to marketing funds now apply to all forms of cooperative funds where payments are collected to cover marketing activities for the franchise system or a segment of it. Advertising is considered a subset of marketing activities for which cooperative funds are held.

Items 2 and 3 – Clause 12 of Schedule 1

Master franchisors may collect and manage marketing and other cooperative funds. They are to be subject to the same requirements in their management of these funds as other franchisors, to the extent that they are responsible for a marketing or other cooperative fund.

Item 4 – Clause 15 of Schedule 1

Concerns were raised about the clarity of the previous clause 15. This item applies the new clause 15 to a fund administrator, whether that is a franchisor or a master franchisor, or a third party authorised to administer the fund for the franchisor or master franchisor.

To improve accountability over the use of the marketing or cooperative funds, the fund administrator is required to prepare an audited annual financial statement for the last financial year, ensuring it contains sufficient detail so as to be meaningful to the franchisees, within four months of the end of the financial year to which it relates. Making this provision a civil penalty provision reflects the seriousness of the impact that a breakdown of trust in relation to the use of marketing funds can have on a franchise system, and to further deter the inappropriate use of funds.

Recognising the potential costs to the fund that the auditing requirement may impose, subclause 15(3) provides that where 75% of Australian franchisees who contribute to the fund agree by vote, the fund administrator does not need to have the statement audited for that financial year. The vote must be passed within three months of the end of the relevant financial year, reflecting that a much later ratification of a failure to audit may not be sufficient to remedy the breakdown of trust between the parties in the short-term.

The item also requires that the statement and auditor's reports must be provided to franchisees within 30 days of their preparation. Finally, reasonable costs associated with the administration and audit of the fund are to be paid from the fund itself.

Item 5 – Clause 31 of Schedule 1

Concerns were noted in relation to compliance with marketing fund reporting requirements and how funds are used under the existing clause 31. This item applies civil pecuniary penalties to breaches of subclauses 31(2), (3) and (4). This is intended to deter the misuse of marketing funds and ensure greater franchisor accountability in relation to the fund.

The clause has been updated to reflect its application to both franchisors and master franchisors who administer a fund. The language of subclause 31(2) (previously subclause 31(1)) clarifies that the fund is to be kept in a separate account from the general operating account, whether it is kept in a bank or other deposit-taking financial institution. Under subclause 31(3), where a franchisor or master franchisor operates units of the franchise business themselves, they are obligated to contribute to the marketing fund on behalf of each unit they operate on the same terms as they require of franchisees.

Subclause 31(4) reflects the content of the existing subclause 31(3), except that it is now a civil penalty provision.

Items 6, 7, 8, 9, 10 and 11 – Item 15 of Annexure 1 of Schedule 1

These items updates the language of the Code’s disclosure document requirements so that they remain consistent with changes which are being made to clauses 15 and 31 of Schedule 1.

SCHEDULE 6 – FRANCHISOR’S LEGAL COSTS RELATING TO FRANCHISE AGREEMENT

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Before clause 20 of Schedule 1

This item responds to the concern that franchise agreements expose franchisees not only to the legal costs of preparing that agreement, but also to future legal costs which may arise and which, at the time of entrance into the franchise agreement, are unquantifiable. For example, at the moment clauses could be included in an agreement that pass on the legal costs associated with the execution of breach notices or renewal notices, even though at the time the franchisee signed the agreement, they could not have known they would be liable for this future cost.

Clause 19A prohibits the franchisor from entering into an agreement which requires the franchisee to pay for legal costs associated with the agreements or documents related to the agreement. To ensure compliance and to deter such contract terms from being applied, a civil penalty is associated with the breach of this prohibition. Subclause 19A(2) ensures that the prohibition does not prevent the franchisee and franchisor from agreeing to the passing on of legal costs of preparing the franchise agreement if a particular amount is specifically quantified in the agreement.

<u>Example:</u> Stephen enters a franchise agreement with the franchisor, Sydney Sandwiches, which contains the following terms:

> (1) The costs of legal services associated with the preparation of this franchise agreement are to be shared between the incoming franchisee and Sydney Sandwiches Pty Ltd according to Table 1. This relates only to costs incurred with respect to this agreement, and not for the costs of legal services that may be provided, after this agreement is entered into, in relation to preparing, negotiating or executing other documents.
>
> (2) The franchisee will be separately liable for costs which may or may not arise associated with the drafting and execution of notices of a breach of this agreement and a notice for the termination of this agreement.

Table 1 specifies that Stephen is to pay $8,500 to cover the legal costs of the agreement. During the term of the agreement, Sydney Sandwiches issues Stephen with a breach notice. Stephen remedies the breach but is charged $200 in legal fees for the breach notice.

Subclause 19A(1) will prohibit Sydney Sandwiches from including term (2) of the above contract, as it requires Stephen to pay all or part of Sydney Sandwiches’ legal costs related to the preparation and execution of other documents related to the agreement.

Subclause 19A(2), however, would allow a term like (1) in the above contract to be included. This is because it requires Stephen to make a payment of an amount which is specified as a number of dollars, it relates to the preparation of the agreement, and is stated not to include any amount for the franchisor's future costs of legal services related to the preparation, negotiation, or execution of other documents.

SCHEDULE 7 – TERMS OF FRANCHISE AGREEMENT

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Subclause 20(3) of Schedule 1

This item repeals subclause 20(3) of Schedule 1.

Item 2 – Before clause 32 of Schedule 1

Retrospective variation occurs when a franchisor alters a term of the franchise agreement or includes a new term in the agreement, after the agreement is entered into which applies to actions that occurred before the change. Such variations could have profound consequences for franchisees, who may, for example, be liable to back-pay a franchisor from the period between the signing of the agreement and the date of variation for a fee which has been retrospectively increased.

This item inserts a new clause 31A. This clause prevents the franchisor from varying an agreement with retrospective effect unless the affected franchisee consents, in writing, to the making of the variation. This provision echoes clause 10 of the Food and Grocery Code of Conduct.

SCHEDULE 8 – LEASING OF PREMISES

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

These amendments, alongside the amendments to clause 9 and clause 26, address the concern that franchisees may be put in positions where they enter franchise agreements with insufficient information about the lease of their business premises. Rent, and the terms of a lease, are significant factors affecting the success of a business.

Franchisees are also often unaware of potential conflicts of interest that the franchisor may have as a result of their association with the landlord of the premises. The measures in this Schedule assist franchisees in understanding the implications of any head lessor and sub-letting arrangements, as well as arrangements relating to occupation of a premises without a lease.

Item 1 – After subclause 13(2) of Schedule 1

This item enhances the disclosure of information to a franchisee or prospective franchisee who subleases their business premises from a franchisor who in turn leases it from another party. In addition to existing obligations to disclose lease information, any written information which is required under State or Territory law which was given to the franchisor from the lessor, is required to be provided to a franchisee if requested. One example is lease disclosure statements, which may be required by the relevant State or Territory retail leasing legislation. Under subparagraph 9(1)(e)(iv), such information is to be provided to a prospective franchisee at least 14 days before the franchise agreement is entered into.

Civil pecuniary penalties applies to breaches of these new provisions.

Item 2 – Subparagraph 13(3)(a)(ii) of Schedule 1

Where the franchisee occupies a premises without a lease, this item ensures that franchisees are given both a copy of the lease agreement between the landlord and the franchisor and documents giving the franchisee the right to occupy the premises. This item also provides franchisees with information about a wider range of information about any incentives or benefits a franchisor derives from the lease and the franchisee’s occupation of the premises.

Item 3 – After subclause 13(4) of Schedule 1

This item addresses the same policy issue as item 1. The new subclause 13(4A) improves disclosure to franchisees who do not have a formal lease, and it is the franchisor who leases the premises. Where the information requested is not provided within seven days of the request, a civil penalty may apply to deter non-compliance given the importance of leasing information.

SCHEDULE 9 – RESTRAINT OF TRADE

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Paragraph 23(1)(b) of Schedule 1

A restraint of trade clause purports to restrict the commercial activities an ex-franchisee can undertake after the end of their franchise agreement. Clause 23 sets out circumstances in which a restraint of trade clause does not have an effect. This provision further narrows the circumstances under which a restraint of trade clause will be enforceable.

The concern with the wording of paragraph 23(1)(b) is that it might have allowed a restraint of trade to have effect even if the franchisee breached the agreement in a minor, technical, or procedural manner. After amendment, it applies only when the franchisee has committed a serious breach of the agreement. This protects ex-franchisees against being restrained in their business activities after the expiry of the agreement purely because they had breached their franchise agreement in an insubstantial manner.

The Code does not define the term 'serious'. The franchising sector is diverse, and what amounts to a serious breach may differ between franchise systems, and will often depend on the circumstances.

SCHEDULE 10 - COOPERATIVES

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – At the end of Division 1 of Part 1 of Schedule 1

This item inserts a new clause 3A to clarify the operation of the Code in relation to cooperatives. This provision explicitly excludes co-operatives registered under a State or Territory co-operatives law from being subject to the Code. This exclusion reflects the understanding that true co-operatives, which, unlike franchises, are owned and controlled by their members and which have voting rights based on membership rather than shareholding, do not exhibit the same inherent power imbalances and potential conflicts of interest which exist in many traditional franchising models.

Item 2 – Subclause 4(1) of Schedule 1

This item inserts a definition of ***Co-operatives National Law.*** This defines the Co-operatives National Law as the appendix to the *Co-operatives (Adoption of National Law) Act 2012* (NSW) as applied by the listed pieces of State and Territory legislation.

Item 3 – Subclause 5(3) of Schedule 1

Feedback from the sector has indicated that there has been a degree of confusion about the operation of the subclause 5(3) exclusions from the definition of a franchise agreement. To address this, this item alters the wording of the provision to clarify that none of the listed types of arrangements constitute a franchise agreement, without more.

Item 4 – Paragraph 5(3)(e) of Schedule 1

This item reformats the provision to take account of subclause 5(3)(e) now being the final subclause.

Item 5 – Paragraph 5(3)(f) of Schedule 1

This item repeals the paragraph of subclause 5(3) excluding co-operative relationships from being considered a franchise agreement. This exclusion is contained in clause 3A.

SCHEDULE 11 – NEW VEHICLE DEALERSHIP AGREEMENTS

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Item 1 – Subclause 4(1) of Schedule 1 (definition of *motor vehicle dealership*)

This item replaces the previous definition of ***motor vehicle dealership.*** It expands the definition to expressly incorporate agency models of vehicle sales. The definition captures Australian-based dealers who act as an agent to sell vehicles on behalf of the manufacturer, where the consumer may be directly purchasing the vehicle from the manufacturer. The dealer will no longer need to purchase the stock, and may not be able to control pricing. This is contrasted with a traditional automotive franchising model, where new stock is purchased by the franchisee who then on-sells to customers. For the purposes of the Code, references to a franchisee and franchisor also refer to an agent and principal, respectively.

Item 2 – After subclause 6(3) of Schedule 1

This item introduces an additional factor that courts must consider in determining whether a party to a new vehicle dealership agreement has acted in good faith. In addition to the existing considerations that apply to all franchise agreements, courts are to have regard to whether the terms of the agreement are fair and reasonable.

This enshrines the principle that manufacturers should act in good faith in negotiating and offering the substantive terms of an agreement, including terms relating to the duration of the agreement and the proposed calculation of compensation for dealers in the event of early termination.

Item 3 – Subclause 6(4) of Schedule 1

This item removes the words “and if it does, the clause is of no effect” from subclause 6(4) of Schedule 1.

Item 4 – At the end of clause 46 of Schedule 1

This item adds a note confirming that, in this Part, a reference to a franchise agreement is a reference to a new vehicle dealership agreement.

Item 5 – After Division 1 of Part 5 of Schedule 1

This item inserts a new Division into Part 5 of Schedule 1.

The new subclause 46A(1) provides that new vehicle dealership agreements are to include terms setting out the compensation of the dealer in the event that the manufacturer withdraws or rationalises its Australian market presence, or changes its distribution models in Australia. The compensation term must also specifically address how this compensation is to be determined with respect to lost profit from direct and indirect revenue, unamortised capital expenditure requested by the franchisor, loss of opportunity in selling established goodwill and wind-up costs.

The manufacturer must specify how the franchisor will buy back or provide compensation in relation to new vehicle inventory, party and special tools in the event of early termination or non-renewal of the agreement where a new agreement is not executed. The manufacturer is precluded from including a contractual provision which attempts to deny the dealer compensation if the agreement is terminated early for reasons other than breach by the dealer. If such a term is included, a civil penalty applies.

Clause 46B expands upon the other capital expenditure requirements applicable to new vehicle dealership agreements by providing that the dealer must have a reasonable opportunity to recoup any capital investment required by the franchisor upon entering into or under the agreement. This addresses situations where the provisions and specified term of the agreement do not give the dealer a reasonable opportunity to make any return on their investments. Clause 46B does not require a franchisor to guarantee a profit or the success of the franchisee's business. It is not intended to remove the inherent risks of running a business, but is intended to ensure that the term of a franchise agreement is consistent with the level of capital investment required.

Each of the above provisions of clauses 46A and 46B is a civil penalty provisions. As a result of the substantial imbalance in bargaining power between vehicle manufacturers and dealers, it is necessary for regulation to provide an effective deterrent to manufacturers from abusing their position by including terms which are substantially unfavourable and uncommercial in their agreements. The risks of considerable harm being done to small business dealers is particularly pronounced in situations where a manufacturer withdraws from Australia or reduces their market presence. It is these risks that justify the penalties applicable to imbalanced contractual arrangements, particularly as they pertain to compensation and capital investment.

Item 6 – Subclauses 49(2) and (3) of Schedule 1

This item updates references in 49(2) and (3) to 'new vehicle' to 'new road vehicle'. These are consequential amendments consistent with the commencement of Schedule 2 to the *Competition and Consumer (Industry Codes – Franchising) Amendments (New Vehicle Dealership Agreements) Regulations 2020*.

SCHEDULE 12 – APPLICATION, SAVING AND TRANSITIONAL PROVISIONS

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Schedule 12 sets out when the amendments in this regulation apply and the transition from the pre-amendment provisions to the revised Code.

The amendments regarding dispute resolution apply to any dispute which arises after the clause commences, even if the franchise agreement was entered into before the commencement of the amending Regulations. The amendments to clause 34, the repeal of Division 2 of Part 4, and subclause 40B(3) relating to dispute resolution processes, applies to agreements entered into, extended, or renewed on or after 1 July 2021.

The remaining provisions only affect agreements entered into, renewed, or extended on or after 1 July 2021.

Amendments which require a franchisor to change the disclosure document apply to disclosure documents to be given on or after 1 November 2021. The Code requires franchisors to update the disclosure document within 4 months of the end of financial year. This transitional provision minimises the regulatory impact and compliance burden associated with the transition to the amended Code.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Competition and Consumer (Industry Codes—Franchising) Amendment (Fairness in Franchising) Regulations 2021

This regulation is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The regulation amends the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* to improve the fairness of franchising regulation, enhance the transparency of franchise arrangements for franchisees, and prevent the systemic exploitation of franchisees. The regulations address problems identified in the Parliamentary Joint Committee on Corporations and Financial Services' report, *Fairness in Franchising*, which include unfair practices in the sector, insufficient disclosure, conflicts of interest, and issues relating to dispute resolution and enforcement of the Code. They also address particular concerns emanating from the automotive franchising sector.

In particular, the regulations address the following topics in a fair and effective manner, without placing unnecessary regulation on the sector:

- Dispute resolution and complaints handling
- Disclosure before entry into franchise agreements
- Exit arrangements and termination provisions
- Capital expenditure
- Marketing funds and other cooperative funds
- Franchisor's legal costs relating to a franchise agreement
- Retrospective unilateral variation of franchise agreements by franchisors
- Disclosure of leasing arrangements
- Restraints of trade
- Provisions specific to new vehicle dealership agreements

Human rights implications

This regulation does not engage any of the applicable rights or freedoms.

Conclusion

This regulation is compatible with human rights as it does not raise any human rights issues.

The Hon Stuart Robert MP

Minister for Employment, Workforce, Skills, Small and Family Business

Attachment A

Regulation Impact Statement

Changes to the Regulatory Framework Applying to the Franchise Sector

August 2020

Contents

1 Executive Summary

The franchising sector is an important contributor to the Australian economy. Franchising is underpinned by the relationship between franchisor and franchisee. This relationship is directly regulated by the Franchising Code and the broad protections available in the Australian Consumer Law.

Despite existing interventions, there is widespread evidence that problems in the relationship between franchisees and franchisors continue. The PJC heard evidence that franchisees are not always sufficiently informed prior to entering into a franchise agreement, franchisors continue to engage in poor conduct, and existing mechanisms to support enforcement, exit and dispute resolution do not go far enough to address power imbalance and problematic conduct of franchisors.

A range of options for regulatory improvements is identified in this Regulation Impact Statement (RIS) to inform the future direction of the regulation of franchising. This RIS concludes that a package of regulatory and non-regulatory reforms, while imposing low to moderate additional regulatory burden on franchisors, would result in an overall net benefit.

2 Background

2.3 The franchising sector

Franchising is a popular business model, and makes a significant contribution to the Australian economy. There are approximately 1,240 franchise brands in Australia with 95,600 franchise establishments, providing employment for approximately 580,000 people. The sector's estimated revenue is $170.5 billion in 2019-2020.[1]

The franchising business structure is used in a diverse range of industries – ranging from large accommodation providers to garden maintenance businesses and everything in between. There is also a diversity in the approach to the franchisor-franchisee relationship in individual systems. In addition, the changing economic environment – such as the generally tough retail environment, the emergence of the gig economy and the growth of alternative models for self-employment, and more recently the COVID-19 pandemic – have created challenges for the sector.

In Australia, around 90 per cent of franchisors, and almost all franchisees are small businesses.[2] Franchise systems involve a franchisor with experience in operating the brand, an understanding of the market and access to resources. Franchisees by comparison are likely to be smaller operators, without the same business knowledge or experience, and are often from a culturally and linguistically diverse background. Sources suggest many franchisees enter into franchising from wage-dependent employment.[3]

2.4 Current regulatory framework

In Australia, the relationship between franchisor and franchisee is regulated primarily by the Franchising Code. The Franchising Code is a mandatory industry code prescribed by regulation under Part IVB of the *Competition and Consumer Act 2010* (CCA).

[1] IBISWorld, Franchising in Australia, Industry Report X0002 (July 2020).
[2] Franchise Council of Australia's submission to the PJC, page 5.
[3] Franchise Law Review, page 101, 2018 *Law Business Research Ltd.*

The mandatory Franchising Code was first introduced in 1998 to promote positive relationships in the franchising sector. Since 1998 the Franchising Code has undergone a number of policy reviews and legislative changes.[4] The Franchising Code was most recently revised with effect from 2015. Key changes include a requirement for franchisees and franchisors to act in good faith and the introduction of financial penalties for breaches of key provisions of the Franchising Code.

In addition to the Franchising Code, participants in the sector are also subject to the general laws governing business relationships and fair trading in Australia. These laws include prohibitions on unconscionable conduct, false or misleading representations, and the regulation of unfair contract terms in standard form contracts under the Australian Consumer Law. Some of the issues faced by the franchising sector are unique to the sector while others are faced by small businesses in general.

Changes to broader economic policy settings and laws are relevant to the franchising sector. For example, since the Franchising Code was amended in 2015:

- There have been amendments to the *Fair Work Act 2009* (**FWA**) to extend liability to franchisors, in certain circumstances, for franchisee breaches of the FWA.
- The Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) was established in 2016 to advocate for, and provide assistance to, small business including franchisees and franchisors.

Industry compliance with the Franchising Code is overseen by the ACCC, which has a range of enforcement options. These options include issuing infringement notices and taking court action seeking pecuniary penalties.

The ACCC's enforcement activity focuses on the most systemic and egregious breaches of the Franchising Code, the CCA or the ACL. Many stakeholders have identified that this can lead to a gap in enforcement for cases that may not be systemic or egregious, but are nonetheless clear breaches. Stakeholders submitted that private action in the courts to remedy breaches is expensive and time consuming for franchisees and franchisors.

Parties to a dispute are able to approach ASBFEO for assistance with the Franchising Code mediation process. The parties to a franchise agreement are also able to take action through the courts to resolve disputes or pursue breaches of the Franchising Code.

2.5 The Parliamentary Joint Committee on Corporations and Financial Services' inquiry into the franchising sector, and the *Fairness in Franchising* report

On 14 March 2019, the Parliamentary Joint Committee on Corporations and Financial Services (PJC) handed down its *Fairness in Franchising* report, making 71 recommendations to improve the operation and effectiveness of the franchising sector. This included a recommendation that the Government form a Franchising Taskforce to consider a number of the recommendations made in the report.

On 21 June 2019, the Government announced it had agreed to establish the Franchising Taskforce.[5] The Franchising Taskforce was comprised of senior officials within the Department of the Treasury,

[4] *Fairness in Franchising* report, Appendix 3, pages 319-320.
[5] See Media Release, *Building a fair, effective and accountable franchising network,* 21 June 2019, https://ministers.employment.gov.au/cash/building-fair-effective-and-accountable-franchising-network.

the Department of Industry, Science, Energy and Resources, and the Department of the Prime Minister and Cabinet and was tasked with providing advice to Government on the recommendations in the PJC's *Fairness in Franchising* report.

The Franchising Taskforce consulted on the PJC's recommendations, and principles underpinning franchising regulation and that consultation is reflected in this RIS.

3 What is the problem?

There are widespread problems in the franchising sector. These have been documented in the PJC's comprehensive *Fairness in Franchising* report, which was informed by a 12-month inquiry and over 400 submissions. Consultation undertaken by the Franchising Taskforce built on the work of the PJC.

The ACCC oversees enforcement of the Franchising Code and the Australian Consumer Law, and confirms that there are widespread problems in the sector, warranting robust regulatory reform. ASBFEO has a role in helping franchising parties in dispute and also supports regulatory reform.

The social impacts of problems in this sector include significant mental health impacts and relationship breakdowns. The economic impacts include significant direct financial losses incurred by franchisees[6], and secondary impacts in relation to employee entitlements and competition.

Underlying these problems are franchisees entering into franchise agreements without adequate information, evidence of poor franchisor conduct, and insufficient enforcement and dispute resolution mechanisms. These issues are discussed below.

Prospective franchisees are not always well informed before buying a franchise

Evidence shows many franchisees are not well informed before making the decision to buy a franchise. Disclosure documents are difficult to comprehend, and do not contain all critical information relevant to entering into a franchise agreement. The reliability of information provided may also be difficult for a potential franchisee to assess and they might be unaware what is crucial for their decision making. Reliable information, particularly financial information (capital expenditure, supplier rebates, financial performance and leasing), assists prospective franchisees to conduct due diligence and compare different franchise offerings.[7] A lack of transparency in the use of marketing funds has also been highlighted as a problem, which has been shown to lead to reduced trust and disputes.

Franchisees can also be affected by 'optimism bias', where they are reluctant to face the downside of an investment to which they have become emotionally attached. For poorly informed or overly optimistic franchisees, the cooling off period available to exit the franchise agreement is important. The current seven-day cooling off period is insufficient, and in some cases (for example transfers, extensions and renewals) franchisees receive no cooling off period at all.

Issues relating to inadequate disclosure, transparency and reliability of information are further compounded when franchisees do not seek professional advice. The ACCC found that 40 per cent of prospective franchisees did not seek any independent professional advice before entering a franchise agreement.[8] Concerns have also been raised about the adequacy of educational material to inform and assist prospective franchisees.

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[6] See discussion on the limitations of franchising data below

[7] See example cited at page 65 of the PJC *Fairness in Franchising* report, provided by 7-Eleven stores.

[8] See, for example, ACCC's *Disclosure practices in food franchising* report. This report found that 40 per cent of prospective franchisees did not seek any independent professional advice before entering a franchise agreement.

Some franchisors behave poorly

The franchising sector is very diverse. Across the estimated 1,240 franchise systems operating in Australia, the ACCC receives more than 450 reports a year.[9] Particular concerns have been raised in relation to retail food franchising, with evidence of systemic poor disclosure practices.[10] However problems are widespread, with the ACCC taking action against franchisors in a range of other sectors alleging beaches of the Franchising Code and the Australian Consumer Law.[11] This confirms evidence provided to the PJC and the Franchising Taskforce highlighting instances of egregious conduct by franchisors. It also confirms the outcomes of reviews into automotive franchising which highlighted problematic conduct by automotive franchisors in relation to dispute resolution, capital expenditure and end of term arrangements.[12]

Current regulation and penalties have not deterred poor conduct

The current penalties for breaches of the Franchising Code have not prevented poor conduct from franchisors. This is despite the ACCC making small business, and compliance with the Franchising Code of Conduct, a Compliance and Enforcement Policy and Priority in recent years.[13]

Evidence has been submitted that the scope and quantum of current penalties is insufficient to encourage compliance and some franchisors may factor the cost of penalties into their cost of doing business.[14] There have also been allegations of franchisors not mediating in good faith, which would be considered a breach of the Franchising Code. This evidence around non-compliance supports the ACCC's findings of systemic poor disclosure practices in food franchising.[15]

Non-compliance undermines the intent of industry codes to raise standards of business conduct by guarding against misconduct and opportunistic behaviour. In order for broader improvements in disclosure and the Franchising Code to be effective, there needs to be a culture of compliance across the sector.

Exit and dispute resolution processes for franchisees are insufficient

Small business franchisees, unlike independent small businesses, are entirely dependent on a functional relationship with their franchisor to continue in business. Accessible, affordable and effective dispute resolution processes are important to resolve disagreements between franchisors and franchisees.

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[9] The ACCC report *Small Business in Focus,* showed that for the 12 months to 31 December 2019, the ACCC received 465 reports relating to franchising. This was an increase from the previous 12 month period in which 405 reports were received. More detailed information on these complaints, such as the breakdown of issues by industry sector, is not reported. See discussion on limitations to franchising data below.

[10] ACCC *Disclosure practices in food franchising,* August 2019 report. Compliance in this sector was targeted because '[t]he ACCC receives more franchising code related reports from café, restaurant and take-away food franchisees than any other sector' (Media Release, *ACCC to focus on franchisors; disclosure in the food services* sector, 7 February 2019).

[11] Recent ACCC action has been taken against Bob Jane Corporation Pty Ltd, Geowash, Ultra Tune and Jump Swim Schools. Details on www.accc.gov.au.

[12] Department of Industry, Science, Energy and Resources, *Regulation Impact Statement: Franchise relationships between car manufacturers and new car dealers,* February 2020.

[13] https://www.accc.gov.au/about-us/australian-competition-consumer-commission/compliance-enforcement-policy-priorities#2020-priorities

[14] The maximum penalty for breach of an industry code provision is 300 penalty units (currently $66,600). These amendments also allowed for the ACCC to issue infringement notices where it has reasonable grounds to believe a person (or body corporate) has contravened a civil penalty provision of an industry code. Infringement notice amounts are 50 penalty units (currently $11,100) for a body corporate and 10 penalty units (currently $2,220) in any other case.

[15] ACCC *Disclosure practices in food franchising,* August 2019 report.

Many franchisees are not aware of available dispute resolution processes and the PJC noted that the Franchising Code does not provide for conciliation or arbitration to facilitate dispute resolution outside of court in cases where mediation fails.

It is also unclear whether existing provisions in the Franchising Code enable multi-party mediations, particularly where the franchisor seeks to avoid multi-franchisee mediation.

Franchisees wishing to exit the system due to hardship or faced with poor conduct from the franchisor are not well supported by the current Franchising Code which only supports a process for franchisor-initiated exits. The treatment of goodwill at the point of exiting a franchise agreement and the restraint of trade clauses prohibiting franchisees pursuing legitimate business ventures after exiting a franchise have also been identified as concerns for franchisees.

Limitations to franchising data

The availability of statistics on the franchising sector is limited. For example, aggregate data on the financial losses incurred by franchisees and complaints data by industry within the franchising sector are not available. However, consistent evidence in submissions to the PJC and the Franchising Taskforce, and the problems illustrated in the *Fairness in Franchising* report, provide insight into the level of financial loss and the spread of issues in the sector.

For example, the PJC heard from a franchisee whose family lost in excess of $800,000 due to their involvement with their franchisor. The Franchising Taskforce heard similar stories, including from a former franchisee who stated that her and her husband 'lost everything [they] ever worked for' due to their franchisor and were left with a $500,000 debt.

Although the ACCC does not report on the industry breakdowns of franchising complaints, problems in the franchising sector appear to be widespread. Submissions to the PJC and Franchising Taskforce indicate evidence of poor behaviour from a variety of sectors including food and non-food retailing, transportation, automotive and fuel retailing.

4 Why is government intervention necessary?

The Government introduced the mandatory Franchising Code in 1998. Since then it has been revised a number of times to address issues in the sector. The fair trading provisions of the Australian Consumer Law are also relevant to franchisees and franchisors. The PJC report and work of the Franchising Taskforce have confirmed that further reform is needed to deter systemic non-compliance, improve transparency and prevent poor franchisor conduct.

The impact of poor behaviour can be severe

While the most egregious behaviour is not widespread, the consequences of poor franchisor conduct have been devastating for some franchisees and undermined confidence in the franchising business model.

The PJC and Franchising Taskforce heard directly from current and former franchisees about the significant personal and financial impacts arising from poor practices in the sector. This included bankruptcies, mental health issues and marriage breakdowns, noting that many franchisees businesses are run as family businesses.

> At the end … my life no longer resembled anything I had previously known before my involvement with franchising. I am separated from my husband and have lost in excess of $280 000. It is almost impossible to recover from this amount of financial loss with the time I have left before I retire. I will then become a burden on the tax paying public.[16]

[16] Submission 184 to the PJC inquiry.

The impact of poor franchisor behaviour has also extended beyond franchisees. One example is the underpayment of employees. Since 2016-17, the Fair Work Ombudsman (FWO) has received more than 4,500 anonymous reports of underpayment of staff that relate to franchises (or just over 11 per cent of all anonymous reports received during that period), with more than half of these reports related to the hospitality industry. In March 2019 the Migrant Workers Taskforce found that some franchising models lead to the underpayment of wages by franchisees.[17]

Problems in the franchising sector can also undermine fair competition with other businesses. Independent businesses may be unable to compete with lower wages, or unviable prices set by the franchisor. In the case of the latter, franchisees may continue to trade because they are unable to exit their franchise agreements. This may in turn have broader economic and consumer impacts.

Franchisees face unique challenges

In addition to the general issues faced by small businesses, franchisees face unique challenges.

In addition to usual business overheads, franchisees pay fees to the franchisor. The COVID-19 economic downturn has further exacerbated cost pressures, with some franchisors continuing to charge franchise fees despite their businesses being forced to close, such as gym operators, or suffering significant losses in trade, such as in the food and personal services sectors.

Other financial controls include the franchisor having control over the prices that the franchisee charges customers, mandating capital investments, mandating suppliers used and the cost of supplies.

Franchisees can be limited in responding to market conditions, when compared to independent small businesses. COVID 19 has seen many examples of small businesses pivoting to take up new opportunities, but franchisees are often constrained in this regard.

Franchisors can often make unilateral changes to the franchise agreement and business model. While there are may be legitimate reasons to do this, it can change the basis on which the franchisee made their investment decision. For example, some franchisees described how their franchisor changed food products being sold from 'fresh' to 'frozen' products.

Compared to independent small businesses, franchisees often face additional challenges winding down or exiting an unsuccessful business venture. They are more likely to continue as an unprofitable business than independent businesses. Allocative efficiency in the economy is harmed when a franchisee is unable to operate a viable business but also unable to exit. Resources that could operate more productively elsewhere are 'tied up' in an unviable operation. One franchisee in submitted to the PJC Inquiry on her experiences exiting the franchise system:

> "I was nearly five years locked into a business I couldn't sell, couldn't walk away from and that no one wanted. Three years later I had seven failed attempts at selling my business".[18]

Another submission commented on the difficulties in selling their food retail business.

> …we wanted to sell the business but there were no buyers due the high exit and entry costs… In the end, we had to make the hard decision of walking away from the business and losing everything. Worked extra-long hours and felt trapped in the system, impacting our health and family life… We

[17] *Report of the Migrant Workers' Taskforce*, https://www.ag.gov.au/sites/default/files/2020-03/mwt_final_report.pdf, p. 37

[18] Submission 32 to the PJC inquiry.

> personally have never encountered the stress and strain as we felt by joining this franchise. We have lost almost $800,000 plus our health … ".[19]

While the interests of a franchisor and franchisee can be aligned, this is not always the case. An example is where the franchisee may be required to acquire supplies from a third party that provides a rebate or incentive to the franchisor. The franchisee may be incentivised to choose a supplier who offers the best rebate to the franchisor, instead of providing the best value goods. In other cases, the franchisor's business model may be premised on 'churning and burning', where the franchisee's success is irrelevant to (or even opposed to) the franchisor's success.

> "Franchise sellers foment unwarranted franchise churn which can cost franchisees their life's savings, their homes, sometimes their marriages and even their lives through suicide."[20]

Finally, there is often a disparity in resources between franchisor and franchisee which is acutely felt in the context of dispute resolution (including access to legal remedies for franchisees).

Reform is required to level the playing field

The problems observed by the PJC, ACCC and ASBFEO have established that there is a case for reform. Submissions to the PJC Inquiry, as well as consultations by the Franchising Taskforce, indicate that there is broad stakeholder support for further Government action in this sector.

Noting that the Franchising Code has been subject to successive reviews,[21] some stakeholders have argued for fundamental changes to the franchising relationship. The ACCC has argued that the Franchising Code, even in an amended form, will never be adequate to address the systemic issues in the sector, and that serious consideration should be given to an ex-ante regulatory model, such as a licensing regime. In its submission to the Taskforce's consultation process, the Australian Association of Franchisees suggested that franchisees should be considered co-investors, with protections similar to those provided to shareholders.

The following section describes policy options being considered to address problems in franchising.

[19] Submission 185 to the PJC inquiry.
[20] Submission 27 to the PCJ inquiry
[21] See *Fairness in Franchising* report, pages 16-17.

5 What policy options are being considered?

5.3 Option 1: Status Quo

5.3.2 What does this option involve?

Under this option, there would be no changes to the Franchising Code or the enforcement framework in the CCA. No other action would be taken in response to the PJC report recommendations or following the work of the Franchising Taskforce. Franchising participants would continue to be subject to the existing provisions in the Franchising Code as well as the general provisions of the CCA and ACL. The need for change could be re-examined at a future point.

5.1.2 What are the costs and benefits of this option?

The major benefit of this option is that there would be no additional regulatory impact on the franchise sector. Noting that the sector has been adversely affected by the economic downturn caused by COVID-19, franchisors in particular would likely benefit from not incurring transitional and ongoing compliance costs.

This option also provides a longer timeframe to evaluate the effectiveness of the changes to the Franchising Code that took effect in 2015. Noting that the average term of a franchise agreement is around five years, and the PJC inquiry took place across 2018-19, it is possible that the full effect of those changes was not reflected in evidence considered by the PJC.

However, not addressing known problems in the sector is likely to result in continuation of the significant negative social and economic impacts. Ongoing disputes and dissatisfaction will draw resources away from more productive economic pursuits, with continuing low confidence in the franchising business model. Poorly informed franchisees may continue to over value franchise opportunities. Non-compliance is expected to continue. Dispute resolution will continue to be difficult and expensive, with resources devoted to dispute resolution not available for more productive outcomes.

On balance, noting that the regulatory impacts associated with reform are low-moderate, the costs associated with this option outweigh the benefits.

5.4 Option 2: Regulatory reforms to the franchising sector

5.2.1 What does this option involve?

Under this option, the Government would implement the following regulatory measures to address the problems outlined in section 3 of this document.

Reforms to better inform franchisees and improve transparency

A public register of franchisors

Under this option, a public register of franchisors would be established by the Government. All franchisors would be required to provide information to the register. In addition to improving transparency for franchisees, the register would assist the ACCC in its enforcement role, and improve the information available to government about the franchising sector. Consultation will inform the design and implementation of the register.

> *Stakeholder views*
>
> A register may address a range of issues in the franchising sector. For example, a register could increase transparency by allowing prospective franchisees to compare different franchise systems and make a more informed decision before committing to a particular

system or brand. The AAF proposed that franchisors, franchisees and franchisee associations should be registered, and that franchise agreements and disclosure documents should be lodged. The FCA also supported registration with updated documentation being provided as it felt this would assist the ACCC in its enforcement role, build a culture of transparency and improve confidence in the sector.

Industry associations such as MTA Queensland suggested a public register could also lift standards across the sector by incentivising franchisors to ensure their conditions are competitive, as well as increasing the Government, regulators' and academics' knowledge of the franchising sector. A more robust model was also supported, including registration of all franchisors and all individual franchising arrangements.

Some stakeholders raised concerns that a register may require the disclosure of commercial-in-confidence information to the detriment of the franchising business model. Franchisors have highlighted concerns that a public register would impose an additional compliance burden.

Most significantly, some stakeholders (including the ACCC) have raised concerns that a register could lead some prospective franchisees to believe that the franchise system and any documents or statements on the register have been vetted and can be relied upon. This may, in turn, result in reduced due diligence by prospective franchisees.

Submissions in response to the Taskforce's earlier issues paper showed that there was general support for a registry function amongst stakeholders, with a number of options suggested about who should host it, what information should be available on it and in what form. Under this option, the Government would consult further on the final design of the Register.

A Key Disclosure Information Fact Sheet containing information that is taken from disclosure documents

Under this option, the Government would design a new mandatory Key Disclosure Information Fact Sheet in consultation with the franchising sector to improve and simplify upfront disclosure, highlight key information, and assist franchisees to understand obligations and the risks associated with entering a particular franchise agreement. Further consultation would be conducted on the design of the Fact Sheet.

Stakeholder views

Submissions to the consultation paper showed there was a general consensus amongst stakeholders that the provision of *more* information was not necessarily desirable. Rather, the focus should be on appropriate information being provided in a concise form, including relevant leasing information. Many stakeholders stated that current disclosure is too complex and needs to be made simpler and more relevant.

Electronic and hard copy disclosure documents

Under this option franchisors would be required to provide disclosure documentation in electronic form. Having access to an electronic copy would allow prospective franchisees to more easily share disclosure documentation with relevant professional advisors and more easily search for information.

Stakeholder views

Submissions to the consultation paper process showed that there was general support for electronic disclosure.

Separate information statement
Under this option it would be made clear the information statement (Annexure 2 of the Franchising Code) should be provided as a separate document to the rest of the disclosure material. This change is intended to make it more likely the information statement will be read before the prospective franchisee commits to entering the agreement.

Stakeholder views
Stakeholders have not raised any significant objections to this recommendation.

Provision of the ACCC's Franchisee Manual to prospective franchisees
A franchisor would be required to provide a prospective franchisee with the ACCC's Franchisee Manual when it first provides the disclosure document.

Stakeholder views
Concerns were not raised by stakeholders in relation to this recommendation by the PJC and is expected to have only a most minimal regulatory burden on franchisors.

Financial disclosure in disclosure document
Under this option, the Government would amend the Franchising Code so that any financial information must be part of the disclosure document (and not provided separately).

Stakeholder views
No significant concerns were raised about the inclusion of financial information, where provided, in the disclosure document.

Increase transparency around retail leasing
Under this option, the Government would implement technical changes to clause 13 of the Franchising Code, to increase transparency surrounding retail leases, subject to consultation with the sector to ensure there are no unintended consequences. Franchisors will not need to provide documents they do not possess.

Stakeholder views
Franchisors have indicated that site negotiation can take a significant period of time, such that providing franchisees with a right to 'cool off' until a site is formally agreed (including the cost) would see the franchisor faced with an extended period of uncertainty. Further, where a franchisor signs a head lessee and then the franchisee utilises their cooling off right, this may leave the franchisor with a premises, but no franchisee to run the business. However, franchisees raised concerns that they cannot make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise business without knowing the terms of the lease.

Improved disclosure around supplier rebates
Under this option, the Government would amend the Franchising Code to require franchisors to disclose information on supplier rebates, commissions and other payments and to disclose whether a master franchisor controls and/or receives rebates from suppliers.

Stakeholder views
Submissions to the consultation paper process showed that stakeholders did not agree about the extent of disclosure of supplier rebates and whether third line forcing could be used to exploit franchisees. There was considerable support however for the amount of rebates

received to be included as a line in franchisors' profit-and-loss statement. A number of franchisors argued that the unintended consequences of regulating rebates could be standardised pricing and reduced incentives to negotiate better deals.

Extend cooling off and parameters to trigger start of cooling off period

Under this option, the Government would amend the Franchising Code to allow a franchisee to terminate any and all arrangements between the franchisor and franchisee at any time up to 14 days after the last of the following have occurred:

1. a franchise agreement has been signed;
2. a payment has been made by the franchisee to the franchisor;
3. the required disclosure documents set out in the recommendations in Chapter 6 of the report have been received by the franchisee, within the required disclosure period; and
4. where the franchisor is the lessor or an associate of the lessor, the franchisee has received a document setting out the terms of the lease provided that the final lease is substantially similar to the terms provided.

Stakeholder views

Stakeholders have stated that the cooling off period is only beneficial if there is adequate and transparent disclosure of the costs involved. Stakeholders did not support mandating the provision of a signed lease as a condition of triggering the cooling off period due to the significant risk and difficulties put on the franchisor in doing so. Instead, there was considerable support to replace that condition with the requirement to provide of the terms of the lease.

Cooling off rights extended to transfers

Under this option, cooling off rights would be extended to the transfer of an agreement to a new franchisee and where the franchisee enters a substantially new agreement with the franchisor (a deemed transfer) but not to renewals or extensions.

Stakeholder views

There was general support for the view that a new franchisee should not be disadvantaged because they are purchasing from another franchisee, as opposed to the franchisor.

Amend the relevant clauses of the Franchising Code to apply recent automotive franchising changes relating to capital expenditure

The Government recently amended the Franchising Code to strengthen the right of franchisees in the automotive sector when a franchisor requires a franchisee to make a significant capital expenditure. Those amendments will be expanded to apply to the broader franchising sector.

This means that before agreements are signed, there will be increased transparency and communication about when capital expenditure will be required, including the circumstances under which the franchisee is likely to recoup the expenditure.

Franchisors and franchisees will be obligated to discuss significant capital expenditure requirements prior to entering an agreement. The franchisor must include as much information as practicable about the expenditure in the disclosure document, including:

1. the rationale for the expenditure;
2. the amount, timing and nature of the expenditure;
3. the anticipated outcomes and benefits of the expenditure;
4. the expected risks associated with the expenditure.

Franchisors will not be able to impose significant capital expenditure just because they unilaterally consider there to be a business case. However, franchisors will still be able to require expenditure when:

1. it is disclosed to the franchisee before they enter the agreement
2. is legally required
3. it applies to all franchisees and has been approved by a majority of them or
4. if it applies to a minority of franchisees, has been agreed to by the franchisee.

Stakeholder views
There was no clear agreement amongst stakeholders although many agreed that capital expenditure associated with leasing arrangements in shopping centres complicated the issue. Some stakeholders suggested that capital expenditure should be commensurate with the timeframe of the franchising agreement so that costs could be recuperated by the franchisee.

Require disclosure of end-of-term arrangements for franchisee goodwill
Under this option, the Government would require franchisors to disclose end-of-term arrangements for franchisee goodwill (if any) in the disclosure document.

Stakeholder views
Stakeholders have indicated this measure would help align franchisees' and franchisors' expectations at disclosure, and assist franchisees in making a more informed decision before entering into the franchise agreement. Stakeholders have further indicated this could help minimise disputes at the end of, or at a later point, in the agreement.

Require master franchisors to meet requirements of marketing funds
Under this option the Government would amend clause 12 of the Franchising Code of Conduct to provide that a master franchisor must comply with clauses 15 and 31 where the sub-franchisee is directly or indirectly required to contribute to a marketing or cooperative fund controlled or administered by the master franchisor.

Stakeholder views
Franchisees and the FCA are generally supportive of this change.

Franchisors would be required to include a statement about the accuracy of financial statements
Under this option the franchisor would be required to make a statement confirming that, 'to the best of the franchisor's knowledge', financial statements provided in the disclosure document are 'accurate, correct and compliant' with the Franchising Code and accounting standards.

Some stakeholders have suggested that this statement is not required, as franchisors are already banned from making false or misleading representations by the ACL. Others suggested it would remind franchisors of their obligations and promote confidence in disclosure amongst prospective franchisees.

Franchisors have indicated that they may not have access to the financial information of their franchisees. Several franchisors raised concerns that they feel they open themselves to liability if they provide franchisees with financial information that may be misleading, even if it is done so inadvertently.

Stakeholder views
Franchisors were concerned about a requirement to actively verify financial information

provided by an exiting franchisee to prospective franchisees unless they are able to state without liability that the information is ‘unverified’.

Many stakeholders, including franchisees, advisers and Small Business Commissioners, were of the view that the provision of accurate financial information at disclosure was important. Accurate financial information is needed for franchisees to make an informed business decision about the franchise.

Additional requirements where the franchisor is terminating in special circumstances
Under this option the Government would amend the Franchising Code to require the franchisor to provide the franchisee with seven days’ notice of a proposed termination in special circumstances (clause 29), so that a mediator or arbitrator can assist the parties to negotiate.

Stakeholder views
Submissions to the consultation paper process showed that a number of stakeholders, including the FCA, thought it important that franchisors maintain the ability to terminate an agreement where there was the possibility of reputational risk, fraud or a health and safety risk.

Franchisees have stated that there should be some ability to challenge termination through the Code, and to ensure that special termination rights are not used opportunistically. For example, the Caltex National Franchise Council submitted to the PJC that many franchisees experienced the termination of their Franchise Agreements for what they considered were non-material breaches or alternatively minor breaches capable of remediation.

- What are the costs and benefits of this option?

Quantitative costs
See Appendix A for the assumptions made in order to complete the costings below.

See Appendix B for the full costings of this option.

Regulatory Burden estimate

	Business costs	Community costs	Individual costs	Total costs
Total Costs	$ 3.92M	$ n/a	$ n/a	$ 3.92M

The regulatory burden estimate (RBE) is calculated as the average annual equivalent cost over the first 10 years of the policy. For a breakdown of this estimate see Appendix B

Qualitative costs and benefits

Public Franchisor Register
The costs and benefits of a public franchisor register is currently not quantifiable due to the need to consult on the final design of the register. An impact analysis of the register will be conducted separately following consultation with the sector. Depending on the design, some possible costs and benefits are identified under ‘stakeholder views’ in the discussion above relating to the register. These will be explored further through consultation.

Key Disclosure Information Fact Sheet
The Fact Sheet would benefit franchisees by providing them with a simple summary of financial and other critical information that is important for making an initial assessment about the franchise offer.

Although it is not intended to be a substitute for the full disclosure document, it will help franchisees, and their professional advisers, prioritize the consideration of critical information.

A summary disclosure document will impose only a minor compliance burden on franchisors because it will be a summary of information already prepared, at least annually, for the disclosure document update. Franchisors would also benefit from franchisees being better informed at the point of disclosure, as this will likely reduce disputation caused by misunderstandings between the n

It is expected that the introduction of the Fact Sheet will provide the sector with a net benefit to the sector over all.

Changes in disclosure practices
Better disclosure practices will benefit both franchisees and franchisors – as discussed above in relation to the Key Disclosure Information Fact Sheet, franchisees being better informed at the point of disclosure will likely reduce disputation caused by misunderstandings between the franchisor and franchisee during the agreement term.

There is a small possibility that overly burdensome disclosure requirements could deter businesses from utilizing the franchising business model, or deterring international franchises from entering the Australian market. On the other hand, a well-regulated sector with a high standard of pre-entry due diligence may be beneficial for attracting international investment.

The regulatory costs associated with improved disclosure are outweighed by the benefits associated with better informed prospective franchisees.

Cooling off measures
Under existing provisions in the Franchising Code, the franchisor can recoup costs associated with a franchisee exercising their right to cool-off. This will have the effect of negating the costs associated with an extended cooling off period for franchisees.

As was discussed in the problem section above, franchisees can be affected by ‘optimism bias’, where they are reluctant to face the downside of an investment to which they have become emotionally attached. The proposed cooling off measures will be beneficial to franchisees who have been motivated to sign on due to an initial emotional impetus – these measures are a chance for poorly informed or overly optimistic franchisees to get out when ‘reality hits’.

Additional benefits to franchisees of these measures would include the ability to examine important documents (including the terms of the lease in certain circumstances) over an additional seven days before being locked into the franchise agreement. Proper due diligence, especially on financial disclosure, is needed in order for the franchisee to make an optimal business decision.

Further, these measures would extend cooling off provisions to the transfer of agreements. This will ensure that all prospective franchisees will have the opportunity to contemplate their decision more thoroughly, not just those signing on to a new franchise agreement.

Given the above, the benefits are expected to outweigh the costs of this measure.

Amending the relevant clauses of the Franchising Code to apply recent automotive franchising changes relating to capital expenditure
While this measure will impose a regulatory burden on franchisors (see discussion in Appendix B), the cost to franchisors would be outweighed by the benefit to franchisees from the increased

transparency and the protections against capital expenditure requirements that they are not able to recoup. Benefits include reduction in disputes and improved financial security for franchisees. The qualitative costs and benefits outlined in *changes in disclosure practices* above would also apply to this measure.

Requiring master franchisors to meet requirements of marketing funds

Improved understanding will likely arise from making the requirements under clauses 15 and 31, relating to disclosure on marketing and other cooperative funds consistent, and ensuring disclosure provisions apply to master franchisors. There is likely to minimal regulatory burden on franchisors arising from these proposals. Indeed, they may reduce the burden of compliance with the current inconsistent provisions.

The qualitative costs and benefits outlined in *changes in disclosure practices* above would also apply to this measure.

Additional requirements where the franchisor is terminating in special circumstances

Currently, franchisors are able to terminate in special circumstances (as defined by the Franchising Code) without notice to the franchisee if the franchise agreement provides for them to do so.

Amending the Franchising Code to require the franchisor to provide the franchisee with seven days' notice of the proposed termination, so that a mediator or arbitrator can assist the parties to negotiate in the context of termination of the franchise agreement, will benefit franchisees by ensuring that franchisees have an opportunity to challenge the termination, or initiate dispute resolution.

In circumstances where immediate termination is warranted, this delay may be costly to the franchisor or even the public – for example, if a franchisee business has somehow endangered public health and safety, further people could be at risk, as well as the reputation of the whole franchise brand. However, it is expected that if conduct of a franchisee has been severe enough to warrant immediate termination, there will be mechanisms to ensure swift termination where necessary.

While this measure will impose a slight regulatory burden on franchisors, it will decrease the franchisor's ability to quickly stem the effects of the likely serious nature of the circumstances in which the franchisee is to be terminated. For example, if a franchisee's business has somehow endangered public health and safety, the wider community could be at risk, as well as the possibility of reputational damage to the franchise brand.

However, it is important terminations arising from breaches are justifiable. This measure will protect the rights of franchisees to have recourse to alternative dispute resolution processes.

5.3 Option 3: Non-regulatory reforms to the franchising sector

5.3.1 What does this option involve?

Under this option, the Government would take non-regulatory action to address problems identified such as initiatives to improve the education levels of franchisees prior to entering into franchising, and other measures which do not have an associated compliance burden.

Improving prospective franchisees' understanding of the importance of due diligence and other key information regarding operating a franchise would assist in avoiding many of the problems identified by PJC and Franchising Taskforce consultation process.

Reforms to better inform franchisees and improve transparency

A new government online educational resource for the franchising sector

The Government would develop a website, consistent with Recommendation 18.2 of the PJC's *Fairness in Franchising* report. The proposed website would contain a range of information relevant to all stages of the franchise relationship such as information on due diligence when entering into a franchise agreement to information on options to exit the franchise system. Further consultation will be conducted to ensure the design of the website promotes the objectives of better informed franchisees

> *Stakeholder views*
> Submissions to the Franchising Taskforce's Issues Paper showed that most stakeholders considered that a franchising website would be helpful.

Amend Information Statement with existing franchisee obligations

Under this option, the Government would amend the Information Statement to advise prospective franchisees that their obligations include obtaining information about employment matters and compliance with relevant laws.

> *Stakeholder views*
> Franchisees and FCA were generally supportive of this measure.

Raise awareness of the use of 'no agent' and 'entire agreement' clauses

Under this option, the Government would amend the Information Statement to address the use of 'no agent' and 'entire agreement' clauses, and ask the ACCC to refer to these terms in its educational material.

> *Stakeholder views*
> The FCA supported these measures, but notes that it is not clear whether 'no agent' and 'entire agreement' clauses protect franchisors. The FCA argues mandating legal and business advice will have a far greater impact.
>
> The ACCC was supportive of include a warning about these terms as part of its general educational material.

Clarification of cooling off period

Clarification would be provided in the Franchising Code that the cooling off and disclosure periods are measured in calendar days and that the 14 day disclosure period must begin at least 14 days before the signing of a franchise agreement.

> *Stakeholder views*
> Submissions to the consultation paper process showed that there was general support for the clarification of franchise cooling off periods.

Improve consistency within the Franchising Code about the treatment of marketing funds, particularly clauses 15 and 31

The Franchising Code would be changed to clarify obligations with respect to marketing funds. This may include clarifying what would be 'meaningful information' for the purposes of clause 15 of the Franchising Code. This could assist parties in understanding their obligations.

> *Stakeholder views*
> Franchisees and the FCA were generally supportive of this option.

Education on best practice financial statements for marketing funds

Under this option, the Government would work with the sector to emphasise the importance of developing best practice financial statements for marketing funds, and additional efforts would be made to educate the franchising sector on the preparation of financial statements.

Stakeholder views
Stakeholders have suggested that improved interpretation of the existing provisions may reduce the incidence of disputes over the use of marketing funds.

Education on distribution of unused marketing funds
Under this option, the Government would amend the Information Statement and use educational materials to improve franchisees' understanding that, if the franchisor becomes insolvent, they may lose the benefit of shared funds such as marketing funds.

Stakeholder views
Some stakeholders advocated for the Code to expressly clarify the distribution of unused marketing funds in the event of the franchisor going into liquidation. Other stakeholders argued that should the costs and risks of administration become too onerous, franchisors may choose not to operate shared marketing funds and instead recoup marketing costs through other means (such as franchise system fees).

Improve awareness of wastage and shrinkage payments
Under this option, the Government would improve awareness of the issue of wastage and shrinkage payments by franchisees. The government will draw on existing channels designed for education and guidance, in addition to the proposed website.

Stakeholder views
There was no significant feedback on the issue of wastage and shrinkage.

Measures to address poor conduct and improve compliance and enforcement

Introduce civil pecuniary penalties for a breach of clause 31
Creating a civil pecuniary penalty for marketing fund provisions in clause 31 will deter breaches of the Franchising Code. Penalties for non-compliance may boost confidence in the operation of marketing funds.

Stakeholder views
Franchisees and the FCA were generally supportive of this measure.

Double the civil pecuniary penalties for breaches of the code
Under this option the Government would double the civil pecuniary penalty for breaches of the Franchising Code from 300 penalty units to 600 penalty units.

There is compelling evidence that existing penalties do not deter poor conduct. This is a significant increase in penalties and will further deter parties from breaching the Franchising Code. The power to seek financial penalties is a fundamental part of the ACCC's enforcement toolkit.

Stakeholder views
Submissions to the consultation paper process showed that many stakeholders supported increasing penalties to deter non-compliance and prevent misrepresentations and abuse of the

franchising relationship. FCA thought any increase should be accompanied by greater clarity for franchisors about what was expected of them.

Prohibition of franchisors passing on the legal costs to the franchisee

Under this option, the Government would prohibit (and have pecuniary penalties for) franchisors passing on the legal costs of preparing, negotiating and executing documents to the franchisee (except where it is already incorporated into a joining fee).

Stakeholder views

The FCA made the point that franchisors would probably raise entry fees if a prohibition is introduced, though it would support a prohibition on charging above the standard fixed fee for costs of negotiations.

The AAF did not comment on this recommendation.

Government to develop best practice models for unilateral variations

Under this option, the Government would work with stakeholders to develop best practice models in relation to the process by which a franchisor makes unilateral variations to contracts and subsidiary documents.

The PJC and the Taskforce received evidence that the practice of unilateral variation of franchise agreements (and associated documents such as operations manuals) is widespread in the franchise sector.

Stakeholder views

Stakeholders, including the FCA and franchisors considered that there are good reasons for making unilateral decisions, including for health and safety requirements, to implement new legislation, to innovate or grow the business and maintain market relevance. Franchisees on the other hand felt that franchisors were insulated from the risk of business failure and that they were forced by franchisors at times to opt into deals they did not want.

Improvements to exit and dispute resolution

Incorporate the functions of the Franchising Mediation Adviser into ASBFEO

The FMA role under the Franchising Code would be incorporated into the functions of ASBFEO. This would formalise existing administrative arrangements.

Stakeholder views

Many stakeholders such as 7-Eleven convenience store had no objection to OFMA merging with ASBFEO. Submissions to the consultation paper process showed that stakeholders are generally happy with the mediation process and thought ASBFEO was doing a good job and was well-placed to deliver the mediation adviser services. The rationalisation of OFMA and ASBFEO was broadly supported by franchisors and franchisees, including peak industry associations like FCA, and by ASBFEO.

Introduce conciliation and voluntary arbitration

Under this option, the Government would introduce conciliation to complement existing dispute resolution provisions and implement a voluntary arbitration model by appointing a Franchising Arbitration Adviser, utilising a model similar to that in the Dairy Code of Conduct.

Stakeholder views

Access to justice, including costs and timeliness, was raised by a number of stakeholders in submissions to the consultation paper. Some franchisees considered that mediation outcomes were limited by the power imbalance between the parties entering into mediation. Others considered a fear of retribution meant mediation was underutilised. Advisers thought many disputes were brought to mediation too late to save the relationship between the parties. There was support for a three-stage approach to dispute resolution: mediation, conciliation and arbitration.

Clarify the availability of multi-party mediation

Under this option, the Government would amend the Franchising Code to clarify that, if the person conducting the dispute resolution process determines it is appropriate to conduct a multi-party process, the franchisor cannot refuse to take part in that process.

If implemented, the Government would increase awareness of these measures to ensure the franchising sector is informed of their obligations and rights in relation to multi-party mediation.

Stakeholder views

The Government has heard from the Office of the ASBFEO that under the current Code, franchisors are able to refuse multi-party mediation, and this can lead to franchisees being 'picked-off' by the franchisor through separate mediation processes. ASBFEO has stated that multi-party mediation is not common, despite that it is a process that works well.

Furthermore, many stakeholders indicated that they were unaware of their ability to engage in multi-party mediation.

Submissions to the consultation paper process showed that there was considerable support for clarifying multi-party dispute resolution.

Develop amendments to the Franchising Code to facilitate negotiated early exit

Under this option, the Government would consult with the franchising sector to develop amendments to the Franchising Code to facilitate negotiated early exit that balances the rights and interests of franchisors and franchisees.

Stakeholder views

Some stakeholders, primarily franchisors and professional advisors, claim that introducing franchisee termination rights may affect the franchisor's ability to make long-term investment decisions due to the reduced certainty of the contract, and may also lead to a higher turnover in franchise systems.

Furthermore, some stakeholders claim that not all franchisees exit their franchise in good faith, arguing that franchisees should not be permitted an easy exit from their contract for reasons outside the franchisor's control, such as unfavourable economic conditions.

Submissions to the consultation paper process showed that there was no clear agreement amongst stakeholders on this measure. A number were happy with the current provisions of the Code but thought the terms of the agreement should outline the exit arrangements so the parties are clear about them at the outset. Academics, lawyers and other advisors noted the current existence of legal options to deal with 'unreasonable impositions', such as unconscionable conduct and UCT laws.

Some franchisees considered that franchisors should be obliged to specify their deliverables and only change them with the agreement of the franchisee. If franchisees are not able to meet their deliverables, franchisees should be able to exit the agreement.

Clarify and educate regarding restraint of trade clauses in franchising

Under this option, the Government would increase prospective franchisees' awareness of the effect of restraint of trade clauses, clarify what constitutes a breach of clause 23 of the Franchising Code, and amend the Information Statement to warn prospective franchisees of the need to obtain legal advice on restraint of trade before entering the agreement.

Stakeholder views

Submissions to the consultation paper process showed that stakeholders did not agree on the operation of restraint of trade clauses. Some franchisors noted that dilution of restraint of trade clauses could lead to hardship to small franchisor business. Others supported greater awareness raising amongst franchisees of restraint of trade provisions within franchise agreements.

- What are the costs and benefits of this option?

Quantitative benefits

See Appendix A for the assumptions made in order to complete the cost offsets below.

See Appendix C for the full costings of this option.

Note that the cost offsets in the table below are only associated with the multi-party mediation component of this option.

Cost offset estimate

	Business cost offsets	Community cost offsets	Individual cost offsets	Total cost offsets
Total cost offset	$ 3.12M	$ n/a	$ n/a	$ 3.12M

The cost offset estimate is calculated as the average annual equivalent cost offset over the first 10 years of the policy. For a breakdown of this estimate see Appendix C.

Qualitative costs and benefits

Education and awareness measures[22]

Education and awareness will benefit both franchisees and franchisors. The proposed measures will assist prospective franchisees with conducting proper due-diligence prior to entering a franchise agreement by simplifying and streamlining the process, and filling information gaps that were identified by the PJC.

The online resource would be a central point where prospective franchisees, and industry stakeholders in general, would be able to access crucial, reliable and current information. Although the final design of the website is pending consultation, it would likely bring existing information produced by the

[22] This discussion considers costs and benefits associated with developing an online educational resource for the franchising sector; amending the Information Statement to emphasise the importance of prospective franchisees understanding Franchising Code requirements and to warn prospective franchisees of the need to obtain advice about restraints of trade before entering the agreement; raising awareness of the use of 'no agent' and 'entire agreement' clauses; providing education on best practice financial statements; providing education on distribution of unused marketing funds; improving awareness of wastage and shrinkage payments.

ACCC, ASBFEO, the Fair Work Ombudsman (FWO), business.gov.au, and the Australian Taxation Office (ATO) together, in addition to further guidance material. It would act as a comprehensive online resource for the franchising sector, and save on search costs and create efficiencies in the process of information gathering for franchisees.

Franchisees who have conducted proper due-diligence would be in a better position to make reasonable assessments of the value (including costs, obligations, benefits and risks) of a franchise before entering into a contract with a franchisor. This could also reduce the risk of falling into a dispute with the franchisor due to unforeseen issues arising from a lack of understanding of the franchise agreement, thus reducing the number of incidences of parties entering into dispute resolution.

There will be no cost to industry. As such, the aforementioned measures will result in a net benefit to the sector as a whole.

Improvements to access to justice in the franchising sector

This section considers costs and benefits associated with incorporating the functions of the Franchising Mediation Advisor (FMA) into ASBFEO, and introducing conciliation and voluntary arbitration to the franchising dispute resolution process.

Incorporating the FMA role into ASBFEO would make it clearer to franchisees and franchisors where they should seek assistance from. This is also consistent with the broader dispute resolution assistance that ASBFEO provides to small business.

Arbitration is generally more expensive than mediation, however it can deliver a binding outcome. It is likely to be cheaper and more flexible than pursuing court action. Conciliation is a variation on mediation which gives the party facilitating dispute resolution more flexibility to assist the parties to reach an outcome where needed.

The combination of these two measures would simplify the franchising dispute resolution process and provide multiple avenues for industry parties to accessible, affordable and effective dispute resolution. Exact costs and benefits cannot be estimated as this would depend on the number of instances of dispute and the nature of the disputes themselves, however these reforms would have a beneficial impact on the sector as a whole.

Best practice models and amendments to facilitate negotiated early exit

Under this option, there are a number of measures that the Government would need to consult on with the sector to ensure changes to the Franchising Code are fit for purpose.

Working with the sector on the design of reforms would involve costs for both Government and sector participants, which includes time taken to organize and respond to consultation.

However, involving end-users in the reform process is important – it ensures that the utility of the Code is maximised for sector participants and reduces unintended consequences. The industry codes framework administered by the Department of the Treasury confirms the importance of public consultation as an element of the policy making process, particularly in determining whether a code can provide the right regulatory support without imposing unnecessary red tape on businesses.

Exact costs and benefits of the specific changes cannot be estimated at this time as they are subject to the final design of the measures, which would be settled through consultation.

Extending and increasing penalties

The maximum penalty for a breach of the Code is set by the CCA. Under this option, the Government would amend the CCA to increase the maximum civil pecuniary penalty available for a breach of an industry code from 300 to 600 penalty units, and increase the civil pecuniary penalties for breaches of the Franchising Code accordingly. The Government would also extend penalties to a breach of clause 31 of the Franchising Code which relate to the management of marketing and advertising fees.

The PJC found franchisors do not face sufficient deterrents for non-compliance with the Franchising Code. Penalties are an important part of the ACCC's enforcement toolkit and raising penalties would benefit the franchising sector by deterring breaches of the Franchising Code, lifting standards of behaviour in the sector and restoring confidence in the franchise business model. There would be no additional cost to franchisors who do not breach the Code.

Doubling penalties available under the Code may impose significant costs for small franchisors who breach the Code and do not have the financial means to pay for it. This would have further ramifications for the affected franchisor's franchisees who would be at risk if the franchisor were to wind-up its operations as a result of the imposed penalty. However, the prescribed penalties would be a maximum and a court could impose a lesser amount if in the judgment of the court that is warranted.

The doubling of financial penalties available under the Franchising Code, coupled with existing protections provided by the CCA and ACL, would improve deterrence, enhance compliance and increase standards of franchisor behaviour. This would provide a net benefit to the sector as a whole.

5.4 Option 4: Reform and refine the franchising sector with regulatory and non-regulatory measures (preferred)

5.4.1 What does this option involve?

Under this option, Options 2 and 3 would be implemented as a comprehensive franchising reform package.

5.4.2 What are the costs and benefits of this option?

Quantitative costs and benefits

See Appendix A for the assumptions made in order to complete the costings below.

See Appendix B and C for the full cost benefit analysis of this option.

Regulatory Burden and Cost Offset (RBCO) Estimate Table

	Business costs/offsets	Community costs/offsets	Individual costs/offsets	Total costs/offsets
Total costs	$ 3.92M	$ n/a	$ n/a	$ 3.92M
Total cost offsets	$ 3.12M	$ n/a	$ n/a	$ 3.12M
Net regulatory cost	**$ 800,000**	$ n/a	$ n/a	**$ 800,000**

The RBCO is calculated as the average annual equivalent cost/cost offset over the first 10 years of the policy. For a breakdown of this estimate see Appendix B and C.

Qualitative costs and benefits

This option will have the qualitative costs and benefits of options 2 and 3. See above.

6 Consultation

Extensive consultation across the breadth of the franchising industry has identified a range of views about the degree and direction of regulatory reform needed to address issues in the sector. Additional consultation by the Taskforce has reaffirmed the issues identified by the PJC and further built the evidence base for government intervention.

6.3 Franchising Taskforce

The Franchising Taskforce consulted with relevant stakeholders to ensure that multiple perspectives were considered. A number of consultation channels were established in order to inform the options put forward in this Regulation Impact Statement (RIS), including an Issues paper, a consultation paper and stakeholder meetings and roundtables.

1. Issues paper

The Franchising Taskforce released an Issues Paper on 23 August 2019 to inform the consultation paper options and its advice to Ministers. The Issues Paper invited feedback to the Franchising Taskforce on the PJC's recommendations. The Issues Paper grouped the 71 PJC recommendations report under seven draft policy principles. These seven principles followed the life cycle of a franchise business from a prospective franchisee considering a franchise agreement to their exiting the agreement, with one principle discussing the regulatory framework across all phases. In recognition of the large proportion of culturally and linguistically diverse franchising stakeholders, the Issues Paper was translated into simplified Chinese, Arabic and Korean.

Submissions to the Issues Paper could be made via a number of channels including email, phone, and through an online Issues Paper consultation form which allowed for anonymous responses.

Responses to the Issues Paper were received from 75 stakeholders.

2. Consultation paper

Submissions to the Taskforce's Issues Paper informed the development of a consultation paper. The Taskforce's consultation paper was released on 11 November 2019 and sought feedback on possible problems and options for government action in the franchising sector.

Responses to the consultation paper were received from 73 stakeholders.

3. Stakeholder meetings and roundtables

The Franchising Taskforce and its support officers conducted 74 separate meetings prior to the Taskforce being established. These meetings were with a range of stakeholders from across the franchising sector and in government, including franchisees, franchisors, professional advisors, peak bodies and other government agencies. These meetings were held both face-to-face and via teleconference.

The Franchising Taskforce held two roundtables in Canberra in September 2019, one for franchisees and the other for franchisors.

6.4 Future consultation

It is anticipated that industry to be involved in the final design of key reforms, in order to minimise the likelihood of unintended consequences and build the sector's awareness on the intent and purpose of the proposed measures.

7 Conclusion and recommended option

This thorough review and consultation process resulted in the Franchising Taskforce advising the Government on improvements to the Franchising Code, and relevant provisions of the CCA. These suggestions have been tested against their respective costs and benefits throughout a comprehensive consultation process.

The package of changes put forward in Option 4 of Chapter 5, responds to problems in a manner that ensures the costs of taking action are outweighed by the benefits. The proposal presents an opportunity to ensure the Franchising Code remains fit for purpose, and addresses the problems identified by the PJC while limiting red tape and complexity for the sector.

It is recommended that the Government reform and refine franchising regulation in accordance with Option 4 in Chapter 5.

To summarise, if Option 4 is accepted, the Government would take the following actions to address the identified problems in section 3.

The Government would:

- Increase the information available to prospective franchisees before they enter the franchise agreement
- Improve prospective franchisees' access to financial and non-financial information, including supply arrangements, rebates and marketing and other cooperative funds, supporting their ability to conduct due diligence
- Educate franchisees on the use of 'no agent' and 'entire agreement' clauses, the issues of wastage and shrinkage payments and rights in relation to cooling off and disclosure periods through the Information Statement, ACCC educational material, the franchising website and other avenues
- Strengthen franchisees' rights in relation to significant capital expenditure
- Enhance the management of the dispute resolution services and organisations, including providing for multi-party dispute resolution under the Franchising Code, conciliation and arbitration
- Balance the rights of franchisors and franchisees to facilitate and negotiate an early exit from a franchise agreement, including by increasing disclosure on of end-of-term arrangements for goodwill and improving awareness of restraint of trade clauses
- Establish a more effective enforcement regime to encourage greater compliance with the Franchising Code by doubling pecuniary penalties for a breach, monitoring the effectiveness of regulatory reforms, collaborating across all relevant agencies and with the franchising sector
- Work with stakeholders to develop best practice models in relation to unilateral variation of contracts
- Prohibit franchisors passing on the legal costs of preparing, negotiating and executing documents to the franchisee (except where it is already incorporated into a joining fee)

These proposals are a balanced reform package that maintains the basic regulatory framework of the Franchising Code while introducing new measures to strengthen the industry and protect franchisees.

While the Government recognises that some preferred options will impose a regulatory burden across all franchisors, including compliant businesses, the reforms as a whole will result in an overall net benefit to the franchising industry and the Australian economy and society.

Other measures, such as doubling the maximum civil pecuniary penalties for breaches of the Franchising Code that carry a penalty and the introduction of conciliation and arbitration, will encourage greater compliance and deter misconduct in the sector, but have little or no regulatory impact.

8 Implementation and evaluation

8.3 Implementation and transition

Implementation of the recommended reform would require careful planning to keep transition costs low and ensure that compliance remains high.

The proposed form of legislative changes to the Franchising Code would be exposed for a period of public comment ('exposure draft'). This will be intended primarily to capture any unintended consequences arising from implementation and provide the sector with an opportunity to comment in a way that ensures that policy objectives of government are met.

Legislative reform will then follow the usual government process. Consideration will be given to the appropriateness of staging reform.

Following passage of legislative reform and finalisation of non-regulatory measures, awareness-raising activities and guidance material will be developed to assist businesses to understand and comply with the new requirements.

The ACCC would then maintain its educative work and be prepared to undertake enforcement where appropriate to ensure compliance with the Franchising Code.

8.4 Evaluation

The Franchising Code is prescribed by regulation. The regulation is a sunsetting instrument, meaning it will be examined in accordance with the review provisions of the *Legislation Act 2003* (Cth).

Appendix A

General assumptions and parameters

In quantifying the costs and savings associated with changes to the Franchising Code, the following general assumptions have been applied:

1. The cost of legal advice is $500 per hour.[23]
2. The average cost of an owner-manager's time is $39 per hour.[24]
3. The average cost of an employee's time is $32 per hour.[25]
4. The average cost of a manager's time is $64 per hour.[26]
5. Changes to the Franchising Code will only apply prospectively.
6. There are approximately 1,240 franchisors operating under the Franchising Code.
7. There are approximately 95,600 franchisees operating under the Franchising Code.
8. For 2009 – 2019, there was an average of 2,236 new franchisees per year.
9. Franchisor takes on an average of 1.8 new franchisees per year.[27]
10. 32 per cent of systems in Australia use a master/foreign franchisor structure. This equates to 397 franchisors.[28]

Costings have been prepared as the average annual equivalent over a 10 year period from when the changes take effect.

[23] This figure is based on DISER's RIS *Franchise relationships between car manufacturers and new car dealer,* released February 2020.

[24] According to the Australian Bureau of Statistics Publication 6306.0 *Employee Earning and Hours Australia* (May 2018), the average weekly cash earnings of an owner manager of an incorporated enterprise is $1,486. Based on owners working a 38 hour week, this equates to approximately $39 per hour. This publication was released 22 January 2019 and is available from the Australian Bureau of Statistics website.

[25] According to the Australian Bureau of Statistics Publication 6306.0 *Employee Earning and Hours Australia* (May 2018), the average weekly cash earnings of a non-managerial employee is $ 1,227.30. Based on employees working a 38 hour week, this equates to approximately $32 per hour. This publication was released 22 January 2019 and is available from the Australian Bureau of Statistics website.

[26] According to the Australian Bureau of Statistics Publication 6306.0 *Employee Earning and Hours Australia* (May 2018), the average weekly cash earnings of a managerial employee is $2,424.50. Based on employees working a 38 hour week, this equates to approximately $64 per hour. This publication was released 22 January 2019 and is available from the Australian Bureau of Statistics website.

[27] Updated using data from IBISWorld September 2019 report and IBISWorld July 2020 report, based on calculations made in the 2014 franchising RIS which stated that For 2002 – 2012, there was an average of 1,890 new franchisees per year. Each franchisor takes on an average of 1.6 new franchisees per year.

[28] Research by Griffith University, presented in the Franchising Australia 2012 report (page 85). An electronic copy of the report is available from the Griffith University website.

Appendix B

Qualitative costs

Regulatory burden estimate table

Average annual regulatory costs (from business as usual)				
Government action	Business	Community	Individual	Total
Reforms to better inform franchisees and improve transparency				
A public register of franchisors	See qualitative costs in section 5.2.2			
A Key Disclosure Information Fact Sheet containing information that is taken from disclosure documents	$ 96,720[29]	$ n/a	$ n/a	$96,720
Electronic and hard copy disclosure documents	See total costs associated with a minor change in practice			
Separate information statement				
Provision of the ACCC's Franchisee Manual to prospective franchisees				
Financial disclosure in disclosure document				

[29] 2 hours of the franchisors time annually (the fact sheet will be updated once a year, in line with the obligation to update franchise disclosure documents annually) x $39 per hour x 1,240 franchisors x 10 years = $967,200. This equates to an average annual regulatory cost of $96,720. Note this figure is subject to change following stakeholder consultation on the final form of the Key Disclosure Information Fact Sheet, which will decide the final design of the Fact Sheet and therefore the time taken by franchisors to develop this documentation.

Increased transparency around retail leasing	See total costs associated with updating the disclosure document			
Improved disclosure around supplier rebates				
Extend cooling off and parameters to trigger start of cooling off period	See qualitative costs in section 5.2.2			
Cooling off rights extended to transfers				
Amend the relevant clauses of the Franchising Code to apply recent automotive franchising changes relating to capital expenditure	$1,605,520[30]	$ n/a	$ n/a	$1,605,520
Require disclosure of end-of-term arrangements for franchisee goodwill	See total costs associated with updating the disclosure document			
Require master franchisors to meet requirements of	$18,580[31]	$ n/a	$ n/a	$18,580

[30] See full business costs of this measure below.

[31] Note that approximately 60 per cent of franchise systems have a marketing fund. Thus the burden will be 2 hours annually x $39 per hour x (60% x 397 master franchisors) x 10 years = $185,796. This equates to an average annual regulatory cost of $18,580.

marketing funds				
Franchisors would be required to include a statement about the accuracy of financial statements	See total costs associated with a minor change in practice			
Improvements to exit and dispute resolution				
Additional requirements where the franchisor is terminating in special circumstances	See qualitative costs in section 5.2.2			
Other				
Total costs associated with a minor change in practice	$96,720	$ n/a	$ n/a	$96,720
Total costs for updating the disclosure document (see calculation below)	$241,800	$ n/a	$ n/a	$241,800
Total transitional costs associated with obtaining legal advice on regulatory changes	$1,860,000[32]	$ n/a	$ n/a	$1,860,000
TOTAL	$ 3.92M[33]	$ n/a	$ n/a	$ 3.92M

[32] See discussion on transitional legal costs below.
[33] Approximately $3,919,340

The regulatory burden estimate (RBE) is calculated as the average annual equivalent cost over the first 10 years of the policy. For a breakdown of this estimate see Appendix B

Total costs associated with a minor change in practice

It is expected that implementing the following minor changes to franchisor's business practices:

1. Electronic and hard copy disclosure documents
2. Separate information statement
3. Provision of the ACCC's Franchisee Manual to prospective franchisees
4. Financial disclosure in disclosure document
5. Franchisors would be required to include a statement about the accuracy of financial statements.

Will take franchisors 2 additional hours in document preparation time. Franchisors are obliged to update their disclosure documents annually.

Therefore the total RBE over 10 years of these measures will approximately be:

2 hours annually x $39 per hour x 1,240 franchisors x 10 years = $967,200

The annual average cost of these measures equates to $96,720

Total costs associated with updating the disclosure document

It is expected that updating the disclosure document in order to provide:

- Increased transparency around retail leasing
- Improved disclosure around supplier rebates;
- Amend disclosure requirements to ensure end-of-term arrangements for franchisee goodwill
- Additional requirements where the franchisor is terminating in special circumstances

Will take a franchisor approximately 5 hours. Franchisors are obliged to update their disclosure documents annually.

Therefore the total RBE over 10 years of these measures will approximately be:

5 hours annually x $39 per hour x 1,240 franchisors x 10 years = $2,418,000.

The annual average cost of these measures equates to $241,800.

Amend the relevant clauses of the Franchising Code to apply recent automotive franchising changes

The Government introduced significant reforms to automotive franchising regulations which commenced on 1 June 2020. Under the reforms, all new dealership agreements have to take into account additional considerations regarding end of term arrangements, capital expenditure and multi-party dispute resolution. The costings below are in line with costings undertaken in the 2020 *Franchise relationships between car manufacturers and new car dealers* RIS.

This costing assumes that:

1. the average term of franchise agreements in Australia is five years, with an option usually available for a similar term on renewal[34];

2. it would take a lawyer two hours to draft the capital expenditure disclosure part of an agreement which would be updated upon renewal (twice over 10 year period) at a cost of $500 per hour. It is assumed that franchisors would have a standard form contract and that capital expenditure requirements across systems would be consistent in order to maintain brand consistency within the franchise; and

3. the franchisee would attend a one hour meeting with a representative of the franchisor to discuss the capital expenditure requirements (which would occur twice over a 10 year period).

Therefore the total RBE for this measure over 10 years would approximately be:

[($500 x 2) x 2 x 1,240] + [($39 + $32) x 2 x 95,600] = $16,055,200

The annual average cost of these measures equates to $1,605,520

<u>Total transitional costs associated with obtaining legal advice on regulatory changes</u>

There will be transitional costs associated with franchisors obtaining legal advice on changes to the Code that are introduced through these reforms. It is expected that it would take a lawyer 3 hours to review and advise on the additional regulatory requirements discussed in this appendix and section 5.2.2.

Therefore the total RBE for this one-time transitional costs would be:

($500 x 3) x 1,240 = $1,860,000.

[34] FranchiseED, 2018, *Managing Franchise Agreements: Transfers and Renewals*, accessed online at https://www.franchise-ed.org.au/franchisor/managing-franchise-agreements-transfers-and-renewals/

Appendix C

<table>
<tr><th colspan="5">Average annual cost offset (from business as usual)</th></tr>
<tr><th>Government action</th><th>Business</th><th>Community</th><th>Individual</th><th>Total</th></tr>
<tr><td colspan="5">Reforms to better inform franchisees and improve transparency</td></tr>
<tr><td>A new government online educational resource for the franchising sector</td><td colspan="4" rowspan="3">See discussion on education and awareness</td></tr>
<tr><td>Amend Information Statement with existing franchisee obligations</td></tr>
<tr><td>Raise awareness of the use of ‘no agent’ and ‘entire agreement’ clauses</td></tr>
<tr><td>Clarification of cooling off period</td><td colspan="4" rowspan="2">See discussion on clarifying and improving the Franchising Code</td></tr>
<tr><td>Improve consistency within the Franchising Code about the treatment of marketing funds, particularly clauses 15 and 31</td></tr>
<tr><td>Education on distribution of unused marketing funds</td><td colspan="4" rowspan="3">See discussion on education and awareness</td></tr>
<tr><td>Improve awareness of wastage and shrinkage payments</td></tr>
<tr><td>Education on best practice financial statements for marketing funds</td></tr>
<tr><td colspan="5">Measures to address poor conduct and improve compliance and enforcement</td></tr>
<tr><td>Introduce civil pecuniary penalties for a breach of clause 31</td><td colspan="4" rowspan="3">See discussion on costs and benefits of extending and increasing penalties</td></tr>
<tr><td>Double the civil pecuniary penalties for breaches of the code</td></tr>
<tr><td>Prohibition of franchisors passing on the legal costs to the franchisee</td></tr>
</table>

Government to develop best practice models for unilateral variations	See discussion on costs and benefits of Government working with the sector			
Improvements to exit and dispute resolution				
Incorporate FMA into ASBFEO	See discussion on improving access to justice			
Introduce conciliation and voluntary arbitration				
Clarify the availability of multi-party mediation	See discussion on clarifying and improving the Franchising Code			
Develop amendments to the Franchising Code to facilitate negotiated early exit	See discussion on Government working with the sector			
Clarify restraint of trade clause in the Franchising Code	See discussion on clarifying and improving the Franchising Code			
Amend the Information Statement to warn prospective franchisees of the need to obtain advice about restraints of trade before entering the agreement	See discussion on education and awareness			
TOTAL	$3.12M	$ n/a	$ n/a	$3.12M

The cost offset estimate is calculated as the average annual equivalent cost offset over the first 10 years of the policy. For a breakdown of this estimate see Appendix C.

<u>Cost offsets developed from clarifying and improving the Franchising Code</u>

The non-regulatory reforms include the following measures which aim to clarify and improve the Franchising Code:

1. Clarification of cooling off period
2. Improve consistency within the Franchising Code about the treatment of marketing funds, particularly clauses 15 and 31
3. Clarify the availability of multi-party mediation
4. Clarify restraint of trade clause in the Franchising Code

It is difficult to estimate the savings created by a majority of these measures – it is expected that the clarifications and improvements to the Code will save franchisees and franchisors time and money they may have spent researching or seeking legal advice on these clauses.

However, the clarification of multi-party mediation is expected to produce $3,123,250 in savings for the sector per year. Analysis of this saving is provided below.

1. According to the Franchising Australia 2016 report, disputes with franchisees involving an external advisor were reported by 25 percent of franchisors with a median of two of their franchisees over a 12 month period.

2. Typically, commercial lawyers will charge between $5,000 and $7,500 for preparation and attendance at a full day mediation.

3. Mediation offered through the Office of the Franchise Mediation Adviser is charged at a price of $300/hr + GST, which is split by the parties involved. The Office of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO) estimates that due to the complex nature of many franchise disputes, mediation can span 10 and 20 hours. ASBFEO estimates that on average, mediations cost $3000 in total (or $1500 each if split between two parties).

4. Assuming 310[35] franchisors are in dispute with two franchisees per year, this would equate to an average of $6250 in legal fees and $1500 in mediation fees for both the franchisee and franchisor, per dispute.

5. This equates to (310 x 2 x$6250 x 2) + (310 x 2 x $1500 x 2) = $7,750,000 + $1,860,000 = $9,610,000
6. However, with multi-party mediation, if the average two franchisees per system per year resolved dispute through one mediation as opposed to two, this would halve costs and save the sector a total of $4,805,000 per year.
7. Although the exact take up rate of multi-party mediation is difficult to calculate, if at least 50 to 80 per cent of mediations in the sector are progressed as multi-party mediations, there would be a saving of between $2,402,500 and $3,844,000 per year to the sector. The average of these two figures is $3,123,250 per year.
8. A saving of $3,123,250 per year would appear to be a reasonable estimate.
    1. A recent automotive franchising dispute involving approximately 185 franchisees provides an example of the type of mediation that would be well suited to multi party mediation.
    2. Another example of such a dispute occurred in 2016, where 190 Pizza Hut franchisees took class action against franchisor Yum! for the introduction of a ‘value strategy’ that was impacting their businesses’ viability.
    3. If the Franchising Code was amended to explicitly allow multi-party mediation, many more multi-party mediations may occur under the Code.

[35] 25% of 1,240