

## **EXPLANATORY STATEMENT**

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

#### *Competition and Consumer Act 2010*

#### *Competition and Consumer (Industry Codes—Franchising) Amendment (Penalties and Other Matters) Regulations 2022*

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

Section 51AE of the Act provides for industry codes to be prescribed by regulation in order to regulate the conduct of participants in an industry towards other participants in that industry. One such Code is the Franchising Code of Conduct, contained in the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code). This instrument amends the existing Code.

The purpose of the *Competition and Consumer (Industry Codes – Franchising) Amendment (Penalties and Other Matters) Regulations 2022* (the Regulations) is to deter misconduct and to improve compliance under the Code. The Regulations further the objective of the Act to enhance the welfare of Australians by promoting competition and fair trading in the franchising sector by introducing new civil penalty provisions and increasing the maximum penalty available for contraventions of the Code. The Regulations also deal with other matters to ensure the smooth operation of the Code.

The Regulations are part of a suite of legislative reforms to strengthen compliance with the Code. In March 2019, the Parliamentary Joint Committee on Corporations and Financial Services (the Committee) tabled a report titled *Fairness in Franchising*. The report found penalties in the Code insufficient to deter large and profitable businesses from breaching the Code, as franchisors can incorporate potential penalties into the cost of doing business. The Committee recommended increasing the penalties available under the Code to correlate with the size of the offence as well as the size of the franchisor, and to reflect the penalties available under the Act, to incentivise compliance.

In response, the Government established the Franchising Taskforce to consider and implement the Committee's recommendations. Following consultation with a range of stakeholders, Schedule 2 to the *Treasury Laws Amendment (2021 Measures No.6) Act 2021* amended section 51AE of the Act to increase the maximum penalties available for the contravention of an industry code's civil penalty provisions.

All industry codes prescribed under section 51AE of the Act (including the Franchising Code) may now prescribe a penalty not exceeding 600 penalty units for contravention of a civil penalty provision in that code. In addition, the Franchising Code may prescribe higher penalties as follows:

- for a contravention by a body corporate – the greatest of the following:
  - \$10 million;
  - three times the value of the benefit obtained from the contravention (if the court can determine the value); or
  - if the court cannot determine the value of the benefit obtained from the contravention, 10 per cent of the annual turnover of the body corporate during the 12-month period in which the act or omission occurred or started to occur.
- for a contravention by a person who is not a body corporate – \$500,000.

In line with these new penalties available under the Act, the Regulations amend the Code to increase the maximum civil penalties available for certain contraventions of the Code and to introduce new penalty provisions for some existing obligations. Certain civil penalty provisions are identified as giving rise to particularly serious adverse consequences for the parties involved as well as the franchising sector more broadly. The stronger penalties attach to those provisions.

Targeted industry consultation was undertaken on the exposure draft Regulations between 13 August and 25 August 2021. Seven submissions were received from stakeholders. The Regulations address the Committee's recommendations to significantly increase penalties to ensure they are a meaningful deterrent, and incorporate the feedback received from industry stakeholders during consultation.

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

A Statement of Compatibility with Human Rights is at [Attachment B](#).

This proposal was granted an exemption from completing a Regulatory Impact Statement ahead of a decision being made due to urgent and unforeseen circumstances. A Post Implementation Review will be completed by 17 March 2023. OBPR Ref 44210.

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

The Regulations commence 28 days after the instrument is registered.

**Details of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Penalties and Other Matters) Regulations 2022***

Section 1 – Name

This section provides that the name of the Regulations is the *Competition and Consumer (Industry Codes—Franchising) Amendment (Penalties and Other Matters) Regulations 2022* (the Regulations).

Section 2 – Commencement

The Regulations commence 28 days after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Schedule

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

Schedule 1 – Amendments

Part 1- Main amendments *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*

This part amends the maximum pecuniary penalties applicable for breaches of certain civil penalty provisions under the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code). The amended provisions have potentially serious adverse consequences for the parties involved and the franchising sector, as such they require significant enough penalties to serve as a meaningful deterrent for breaches of these provisions.

This part also repeals and substitutes certain provisions in the Code to clarify the existing obligations contained in those provisions to reflect the new penalties to attached to those obligations.

As found by the *Fairness in Franchising* report, the current penalty provisions and maximum penalties under the Code have been insufficient to deter non-compliance, as franchisors could include potential penalties or other consequences into the cost of doing business. The increased and new penalties are designed to encourage proactive compliance and to deter breaches, while remaining proportionate to the seriousness of the contravention.

The new maximum civil penalties are consistent with penalties outlined in section 51AE of the Act.

## **Item 1 (Clause 5A)**

Item 1 inserts a new clause into Division 2A of Part 1 of Schedule 1 to the Act. Clause 5A applies a new, strong penalty scheme for breaches of specified civil penalty provisions by bodies corporate in line with the penalty authority in section 51AE(2A) of the Act.

Clause 5A(1) lists the civil penalty provisions of the Code which are subject to the new penalty scheme and includes:

- Subclauses 17(1) and (2) the obligation for franchisors to disclose certain materially relevant facts;
- Clause 33 the requirement for franchisors not to restrict or impair the freedom of franchisees or prospective franchisees form an association or associate for a lawful purpose;
- Subclauses 46A(1), (2), and (3) the requirements for new vehicle dealership agreements to contain clauses providing for the compensation of the franchisee if certain circumstances arise; and
- Clause 46B the requirement for franchisors not to enter into a new vehicle dealership agreement unless the agreement provides the franchisee with a reasonable opportunity to make a return on investment during the period of the agreement.

These provisions merit strong penalties as breaches of the obligations in those provisions are likely to cause significant personal and financial harm to franchisees, and damage confidence in the franchising system more broadly. The increased penalties are designed to deter contravention of these core obligations.

Clause 5A(2) contains the new penalty scheme for bodies corporate. The maximum penalty, depending on the benefit derived by the body corporate and its annual turnover, may be the greatest of:

- \$10 million;
- if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, has obtained directly or indirectly and that is reasonably attributed to the contraventions – three times the value of that benefit; or
- if the Court cannot determine the value of that benefit – 10 per cent of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the contravention occurred.

This formula gives the Court discretion to apply a penalty up to the maximum amount, proportionate to the circumstances of the case.

## **Item 2 (Amendment to subclause 6(1))**

This item amends the maximum penalties available for a contravention of subclause 6(1) from 300 penalty units to 600 penalty units.

Clause 6(1) requires parties to a franchising agreement to act in good faith towards each other and is an integral obligation of the Code. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

## **Item 3 (Amendments to subclauses 6(4) and (5))**

This item amends subclauses 6(4) and 6(5) to provide civil penalties to ensure that franchisors do not enter into a franchise agreement that limits the obligation to act in good faith set out in subclause 6(1).

The obligation to act in good faith is considered a fundamental requirement for trust to be built between parties in the sector. Franchise agreements require ongoing cooperation, partnership, and honesty between parties to operate fairly and effectively. As a normative standard of commercial behaviour, the good faith obligation captures a wide range of dishonest practices which could undermine these fundamental requirements of a working franchise relationship. By ensuring franchising agreements do not impede this obligation, the Code ensures that a wide range of unfair and predatory practices are prohibited.

A breach of the obligation can cause a destruction of trust between parties, but can also cause franchising, as a business model more broadly, to be viewed with apprehension. The financial consequences that result from such practices, and the need to deter such conduct, are considered serious enough to justify penalties. This item aligns with subclause 6(1) which is a civil penalty provision.

## **Items 4-11 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 8(1), 8(6), 8(8), 9(1), 9(2), 9(2A), 9A(2) and 9A(4) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the franchisor's obligations surrounding disclosure documentation, which must be provided before entry into a franchise agreement. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

## **Item 12 (Repeal and Substitution of clause 11)**

This item amends clause 11 to repeal subclauses (1) and (3) and substitute a new subclause (1) that has been redrafted for greater clarity and to include a civil penalty.

Subclause 11(1) requires the franchisor to provide a copy of the Information Statement to a prospective franchisee within a reasonable time, before formal disclosure of more detailed documents. The new subclause is clearer as it applies directly to franchisors and clarifies the timeframe for compliance. It is also framed to

ensure the information statement is provided to prospective franchisees separately to a copy of the Code, allowing more time for consideration prior to receiving further documentation.

This requirement now carries a civil penalty provision. This approach reflects the importance of ensuring that franchisees are not at a disadvantage when entering into a franchise agreement, due to a lack of readily available information. This penalty will ensure that franchisees have access to the information necessary to make an informed decision, within a reasonable timeframe before entering into a franchise agreement.

### **Items 13-22 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 13(1), 13(2), 13(2A), 13(2B), 13(3), 13(4), 13(4A), 13(4B), 14(1) and 15(2) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the franchisor's disclosure obligations when entering into a franchise agreement. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

### **Item 23 (Amendment to subclause 15(4))**

This item reintroduces a civil penalty provision in clause 15 that was inadvertently omitted by a previous amendment to the Code.

Where a franchise agreement requires the franchisee to pay money to a marketing or cooperative fund that is controlled or administered by the franchisor (or master franchisor), clause 15 requires disclosure of financial statements by the fund administrator to improve accountability in use of funds.

The penalty attaches to the clause 15(4) requirement for the fund administrator to provide the franchisee a copy of the financial statement for marketing funds and other cooperative funds administered by or for the franchisor or master franchisor within 30 days. This item also amends the previous penalty of 300 penalty units to 600 penalty units, in line with the Act.

This obligation is a penalty provision in light of 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 deter inappropriate uses of funds.

### **Item 24 (Amendments to subclause 16(1))**

This item amends the maximum penalties available for a contravention of the civil penalty provisions in subclause 16(1) of Schedule 1 from 300 penalty units to 600 penalty units.

This provision relates to the franchisor's obligation to provide a copy of the disclosure document upon request by the franchisee as contained in subclause 16(1). As outlined above, the new maximum penalty aligns with the maximum set in the

Act and provides a meaningful deterrent to non-compliance with core obligations of the Code.

### **Items 25 and 26 (Amendments to subclauses 17(1) and 17(2))**

These items amend the civil penalties for contravention of subclauses 17(1) and 17(2), which contain the obligation for franchisors to disclose certain materially relevant facts before a prospective franchisee enters into a franchise agreement or within a reasonable time after the franchisor becomes aware of them. These items impose the stronger penalty scheme for a body corporate under clause 5A or \$500,000 for a person who is not a body corporate.

The disclosure requirements contained in clause 17 are core obligations of the franchising system which ensure franchisees and prospective franchisees are properly and promptly informed of materially relevant facts, beyond the information contained in a mandatory disclosure document. Such facts include a change in majority ownership of the franchisor, or the existence of civil proceedings against the franchisor, as well as other matters listed in subclause 17(3) which could impact the franchisor or franchisee.

These disclosure obligations are designed to mitigate any imbalance of power or knowledge which may exist between franchisors and franchisees and support a fair and efficient franchise system. Strengthening penalties for contravention of subclauses 17(1) or 17(2) reflects the significance of those obligations and of the potential harm to franchisees resulting from non-compliance and is designed to effectively deter misconduct.

### **Items 27-29 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 18(2), 18(3) and 19A(1) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the franchisor's notification obligations for end of term arrangements and record keeping obligations. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

### **Item 30 (Repeal and substitution of clause 22)**

This item repeals and substitutes clause 22, which provides that a franchisor must not enter into a franchise agreement that requires the franchisee to pay for the costs of settling any disputes. This amendment restructures the provision to provide a civil penalty; the prohibition on entering such agreements has not changed.

If franchise agreements include clauses of this type, the franchisee is at a significant disadvantage if a dispute arises. Franchisees will be less likely to attempt to resolve disputes or further escalate disputes where necessary and may settle for outcomes that are unsuitable due to fear of incurring significant costs. This civil penalty provision will ensure that power imbalances of this kind are not included in franchise

agreements and do not limit the ability of franchisees to access justice and fair dispute resolution processes.

### **Items 31-33 (Amendments to clause 25)**

These items amend clause 25 which imposes obligations on a franchisor regarding the transfer of a franchise agreement. The amendments restructure and clarify several subclauses to improve readability and application of the requirements and add civil penalties for contravention.

Item 31 amends subclause 25(2) to include a civil penalty for a franchisor who unreasonably withholds consent to the transfer of a franchise agreement. This amendment also includes a note that clarifies the circumstances in which a franchisor may reasonably withhold their consent. Where a suitable transfer is proposed that does not pose a risk to the franchisor, a civil penalty will ensure that the franchisor does not prevent the transfer from occurring.

Item 32 repeals subclause 25(3) to align with current drafting practices and to allow for the provision to apply to both withholding and revoking consent.

Item 33 amends subclause 25(6) to more clearly articulate the obligation for the franchisor to not unreasonably revoke consent to transfer a franchise agreement and to provide a penalty for the provision. This item also introduces subclause 25(6A) which lists the circumstances in which a franchisor's consent may be reasonably withheld or revoked. These were previously included in subclause 25(3). The amendment aligns this subsection with current drafting practices and provides clarity for the exceptions under which a franchisor may refuse or revoke consent to transfer a franchise agreement.

### **Item 34-37 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 26(3), 26A(4), 26A(6) and 27(2) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the obligations surrounding the termination of a franchise agreement. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

### **Item 38 (Repeal and substitution of subclause 27(4))**

This item repeals and substitutes subclause 27(4) to clarify the franchisor's obligation to not terminate a franchise agreement where the franchisee has remedied their breach of the agreement and to provide a penalty for the provision.

This provision allows the franchisee a reasonable time to remedy a breach before the franchisor may terminate a franchise agreement. This amendment introduces a penalty for non-compliance with this obligation of 600 penalty units as a strong deterrent, as breaching this obligation is extremely detrimental for franchisees.



### **Item 39 (Amendment to subclause 28(3))**

This item amends the maximum penalties available for a contravention of the civil penalty provision in subclause 28(3) of Schedule 1 from 300 penalty units to 600 penalty units.

This provision relates to the requirement for the franchisor to provide reasonable written notice before terminating a franchise agreement, where the franchisee has not breached the agreement. As outlined above, the new maximum penalty aligns with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

### **Items 40 and 41 (Amendments to subclauses 29(2) and 30(1))**

These items introduce new civil penalties for subclauses 29(2) and 30(1). Item 40 ensures that the franchisor does not terminate a franchise agreement without providing seven days' notice and reason for the termination. Item 41 ensures that the franchisee does not have to undertake significant capital expenditure in relation to their franchise business.

These penalties have been introduced in line with the Committee's recommendation to strengthen penalties for non-compliance with important obligations. These penalties will ensure compliance and act as a deterrent from this kind of behaviour.

### **Items 42-45 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 31(2), 31(3), 31(4) and 32(3) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the obligations surrounding franchise agreements that require the franchisee to pay money into a marketing fund and the obligations surrounding the nondisclosure of a former franchisee's details. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

### **Item 46 (Amendment to clause 33)**

This item amends the civil penalty of subclause 33 to the stronger penalty scheme for a body corporate under clause 5A or \$500,000 for a person who is not a body corporate. Clause 33 gives franchisees and prospective franchisees the freedom to form associations by penalising franchisors that engage in conduct that restricts or impairs franchisees forming an association.

Ensuring franchisees (current and prospective) can form associations is particularly important in the context of dispute resolution, where disparity of their resources compared to franchisors is acutely felt. Associations of franchisees or prospective franchisees in this context increase access to justice and reduce the potential power imbalance in mediation and fear of retribution which could otherwise deter franchisees from enforcing their rights. The higher penalty introduced by the amendment reflects the importance of this freedom and is designed to deter

franchisors seeking to prevent associations among franchisees and potential franchisees.

#### **Items 47-48 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 41A(3) and 43B(8) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the requirements for each party to a dispute to attend the ADR process and, if agreed to escalate to arbitration, to attend any arbitration. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

#### **Item 49, 50 and 51 (Amendments to subclauses 46A(1), 46A(2) and 46A(3))**

These items amend the civil penalties for contravention of subclause 46A(1), (2) and (3) to the amount under clause 5A for a body corporate or \$500,000 for a person who is not a body corporate.

Clause 46A requires a franchise agreement to provide for compensation for early termination. The increased penalties for each obligation within this clause reflect the serious consequences for franchisees which flow from termination, including loss of profits and opportunity, as well as expenses associated with setting up and winding up the franchise business.

#### **Item 52 (Amendment to clause 46B)**

This item amends the civil penalty for contravention of subclause 46B to the amount under clause 5A for a body corporate or \$500,000 for a person who is not a body corporate.

Clause 46B requires that a franchisor not enter into a franchise agreement unless the agreement provides a reasonable opportunity for a return on the franchisee's investment. This clause is designed to ensure a franchisor only enters into agreements for a viable business opportunity, which have a reasonable prospect to make it profitable.

A breach of this clause is very serious for a franchisee. If a franchisor enters into a franchise agreement where there is no reasonable opportunity for return on the investment the franchisee may lose their investment or be trapped with a failing business. The increased penalty reflects the importance of this aspect of a franchise agreement and the seriousness of potential harm which flows from non-compliance.

#### **Items 53-56 (Amendments to civil penalty provisions)**

These items amend the maximum penalties available for a contravention of the civil penalty provisions in subclauses 47(2), 47(3), 47(4) and 47(5) of Schedule 1 from 300 penalty units to 600 penalty units.

These provisions relate to the franchisor's notification requirements surrounding the end of term obligations of a franchise agreement. As outlined above, the new maximum penalties align with the maximum set in the Act and provide a meaningful deterrent to non-compliance with core obligations of the Code.

Part 2- Other Amendments *Competition and Consumer (Industry Codes- Franchising) Regulation 2014*

**Item 57 (Section 6)**

This item repeals section 6 of the Code which is a redundant transitional provision.

**Item 58 (Clause 3A)**

This item repeals and substitutes clause 3A to clarify the exclusion of co-operatives from the obligations imposed by the code and extend this exclusion to mutual entities.

This exemption also now includes co-operatives, which are defined as mutual entities federally registered under the *Corporations Act 2001*. Members of mutual entities are required to have voting rights for the Code not to apply to that member. Both co-operatives and mutual entities are defined in section 4 of the Code and mutual entities also includes mutual entities defined by section 51M of the *Corporations Act 2001*.

**Item 59 (Subclause 4(2))**

This item inserts the definition of a mutual entity as the definition found within the *Corporations Act 2001* for the purposes of 58.

Part 3 – Application, saving and transitional provisions *Competition and Consumer (Industry Codes- Franchising) Regulation 2014*

**Item 60 (Application of amendment relating to penalty increases)**

This item provides Part 1 of the Regulations applies in relation to contraventions which occur on or after the commencement of the Regulations.

**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 (Penalties and Other Matters) Regulations 2022***

This Legislative Instrument 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 *Competition and Consumer Act 2010* (the Act) provides for industry codes to be prescribed by regulation in order to regulate the conduct of participants in an industry (sections 51AE and 172). One such Code is the Franchising Code of Conduct, contained in the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code), which regulates franchising industry participants.

The *Competition and Consumer (Industry Code-Franchising) Amendment (Penalties and Other Matters) Regulation 2022* (this Instrument) seeks to amend the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code). This Instrument introduces new civil penalty provisions and increases the current penalties for certain obligations contained in the Code. This Instrument also applies a new civil penalty scheme for breaches of core obligations that extends to non-bodies corporate. These latter amendments are the focus of this Statement, as human rights impact natural persons rather than bodies corporate.

The amendments address recommendations in the *Fairness in Franchising* report tabled by the Parliamentary Joint Committee on Corporations and Financial Services in March 2019. The report found the current penalty provisions and maximum penalties under the Code have been insufficient to deter non-compliance, as franchisors could include potential penalties in the cost of doing business or were not incentivised to meet their obligations if there was not a penalty attached. The increased and additional new penalties are designed to encourage proactive compliance and to deter breaches, while remaining proportionate to the seriousness of the contravention.

The Code regulates conduct of franchisors and franchisees (current and prospective) towards each other, to encourage a fair and accountable industry. The current penalty regime, however, does not extend to breaches by non-body corporates (i.e. individuals), which means the current penalties are not an effective deterrent against non-compliance by natural persons participating in the industry.

As such, certain penalty provisions are extended to apply to individuals to deter future non-compliance, and provide a fairer approach where other participants in the franchising industry may face penalties for contravening core obligations, not only bodies corporate.

The amendments that affect natural persons are contained in clauses 33 and 46B and subclauses 17(1), 17(2), 46A(1), 46A(2) and 46A(3) of the Code. These provisions include the requirements for a franchisor to disclose materially relevant facts and for their franchise agreements to provide for early termination. Importantly, these provisions only apply to participants in the franchising industry, who should be aware of the Code and their obligations under it, not to the general public.

These provisions currently carry a maximum civil penalty of 300 penalty units. This Instrument will increase the maximum civil penalty a court can impose under each of these provisions to \$500,000. This increase reflects the seriousness of the consequences that may result from a failure to comply with the requirements and obligations imposed by the Code. It is also designed to prevent penalties for non-compliance being factored into profit margins as a regular cost of business, to address recommendations of the *Fairness in Franchising* report. The maximum penalty allows a court discretion to determine a penalty up to that amount which is proportionate to the circumstances of the case, and is consistent with the maximum penalty available under the Act for contravention by a non-body corporate.

### **Assessment of Compatibility with Human Rights**

Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) set out the right to a fair trial and to equity before the courts, which applies to both criminal and civil proceedings. This Legislative Instrument may engage Articles 14 and 15 to the extent it provides civil penalties for individuals who contravene core obligations of the Code.

This instrument provides a civil penalty of up to \$500,000 where a person contravenes certain core obligations or engages in certain conduct in relation to the franchising industry. The provisions this attaches to have potentially serious adverse consequences for the parties involved and the franchising sector, as such they require significant enough penalties to serve as a meaningful deterrent for breaches of these provisions.

As discussed in the *Guidance Note 2: Offence provisions, civil penalties and human rights* published by the Parliamentary Joint Committee on Human Rights, civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR, regardless of the distinction between criminal and civil penalties in domestic law. Determining whether penalties could be considered to be criminal under international human rights law requires consideration of the classification of the penalty provisions under domestic law, the nature and purpose of the penalties, and the severity of the penalties.

The civil penalty provisions contained in this Legislative Instrument are expressly classified as civil penalties. While the domestic classification alone may not be determinative, it is indicative of the nature of the penalty. A criminal penalty is punitive and may include imprisonment in addition to pecuniary sanctions. In contrast, the civil penalties imposed by this Instrument are regulatory and disciplinary in nature, and solely involve pecuniary penalties in the form of a debt payable to the Commonwealth.

The civil penalties aim to deter non-compliance with the Code and will not impose criminal liability; a finding by a court that they have been contravened does not lead to the creation of a criminal record.

Further, these provisions do not apply to the general public, but to members of a particular class of people who deal in the franchising industry. These members should reasonably be aware of their obligations under the Code as they engage in an activity that is regulated under very clear conditions.

Finally, the civil penalties do not carry a sanction of imprisonment for non-payment of the penalty. These factors all suggest that the civil penalties imposed by the legislative instrument are civil rather than criminal in nature. Based on the above factors, the cumulative effect and the nature and severity of the civil penalties in the Instrument is not ‘criminal’ for the purposes of human rights.

### **Conclusion**

This Legislative Instrument is compatible with human rights because, to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.