

EXPLANATORY STATEMENT

Issued by authority of the Minister for Small Business

Competition and Consumer Act 2010

Competition and Consumer (Industry Codes—Franchising) Amendment (Additional Information) 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 allows the regulations to prescribe industry codes to regulate the conduct of participants in an industry towards other participants in the industry. One such code is the Franchising Code of Conduct, contained in Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code), which is intended to enhance the welfare of Australians by promoting competition and fair trading in the franchising sector.

Part 5A of the Code was recently inserted by the *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* to establish the public Franchise Disclosure Register (the Register). The Register facilitates free and easy access to pertinent information about franchised businesses in Australia for prospective franchisees.

The purpose of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Additional Information) Regulations 2022* (the Regulations) is to amend Parts 5A and 6 of the Code to correct a number of minor issues recognised after the recent establishment of the Register. This includes:

- ensuring the Secretary may, by legislative instrument, determine the additional information franchisors must provide for inclusion on the Register, and additional information or documents that may be removed from the Register;
- ensuring a franchisor's logo can be included on the Register; and
- clarifying when a franchisor is required to provide information for inclusion in the Register on an ongoing basis.

The amendments are intended to ensure the Code is fit for purpose, while supporting the purpose of the Register to enhance the ability of prospective franchisees to make informed decisions about franchise systems that they are considering purchasing by enabling them to easily compare information about different franchise systems.

Treasury consulted with specific stakeholders on a limited exposure draft of the Regulations from 13 October 2022 to 14 October 2022. During the consultation process, comments were received from several stakeholders. The limited consultation period was appropriate, as the Regulations primarily provide a sound legal basis for

the original policy intent and follow extensive consultation on the development of the Register to inform the *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022*. This included:

- targeted consultation with stakeholders on the high- level design for the Register which informed a Budget commitment in the 2021- 22 Budget to establish the Register; and
- public consultation on an exposure draft of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* between 30 September 2021 and 29 October 2021. Further targeted stakeholder feedback was sought in finalising those Regulations.

The Act does not specify any conditions that need to be met before the power to make the Regulations is exercised.

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

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

The Regulations commenced on the day after registration.

Regulation Impact Statement

The Office of Best Practice Regulation advised that as there is no change in policy intent or additional compliance burden as a result of these amendments, a Regulation Impact Statement is not required (OBPR22-03481).

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

Details of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Additional Information) Regulations 2022*

Section 1 – Name

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

Section 2 – Commencement

The Regulations commence on the day 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 Schedule to this instrument will be amended or repealed as set out in the applicable items in the Schedule, and any other item in the Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*

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

Items 1, 3 and 16 (subparagraphs 53A(2)(b)(ii) and 53F(2)(a)(ii), and paragraph 53B(4)(b))

Items 1, 3 and 16 substitute subparagraph 53A(2)(b)(ii), paragraph 53B(4)(b) and subparagraph 53F(2)(a)(ii) respectively with new provisions to clarify that information must not be included on the Franchise Disclosure Register (the Register), and may be removed or redacted from the Register, if that information relates to a particular franchisee of the franchisor, or relates to a particular site being occupied by a franchisee of the franchisor.

Prior to this amendment, the Code referred to information relating to a particular franchisee, or a particular site being occupied by a franchisee. However, in some multi-level systems, a franchisor is also a franchisee. Items 1, 3 and 16 are intended to clarify that the information that must not be included on the Register, and may be removed or redacted from the Register, relates to a particular franchisee of the franchisor, or to a particular site being occupied by a franchisee of the franchisor, not a franchisor that is also a franchisee. This is consistent with the original policy intent of Part 5A.

Similar amendments are made to subclauses 53C(4), 53D(4) and 53E(4) under items 7, 10 and 15 respectively, regarding a franchisor that is also a franchisee.

Item 3 will also insert new paragraph 53B(4)(d) to expand the scope of information that the Secretary of the Department that is administered by the Minister administering the *Australian Small Business and Family Enterprise Ombudsman Act 2015* (the Secretary) can remove from the Register to include information determined under new subclause 53B(5), as inserted by item 4 of the Regulations. Prior to this amendment, clause 53B empowered the Secretary to adjust the contents of the Register in limited circumstances. While in general, franchisors are expected to self-manage their profiles on the Register by updating information as required, the Secretary has ultimate responsibility to establish and keep the register in accordance with clause 53. It is therefore appropriate for the Secretary (or a delegate in accordance with clause 53H) to have the flexibility to determine any additional kinds of documents or information that may be removed from the Register.

Item 2 (after subclause 53A(3)(c))

Item 2 inserts new paragraph 53A(3)(d) to ensure that a franchisor's logo may be included in the Register.

Prior to this amendment, subclause 53A(3) restricted the documents that could be included on the Register to the key facts sheet, disclosure document and a standard form of the franchise agreement. This amendment increases flexibility by expanding the scope of documents that can be included on the Register to include a document that is a logo. It does not mandate the inclusion of a logo on the Register.

Item 4 (at the end of clause 53B)

Item 4 will insert new subclause 53B(5) to ensure the Secretary may, by legislative instrument, determine the kinds of information that may be removed from the Register, or enable a document to be removed from the Register.

Prior to this amendment, clause 53B empowered the Secretary to adjust the contents of the Register in limited circumstances. New paragraph 53B(4)(d), as inserted by item 3, will expand the scope of information and documents that the Secretary may remove from the Register to include those prescribed in a determination made under new subclause 53B(5), pursuant to subsections 51AE(1A) and 51AE(1C) of the Act. While in general, franchisors are expected to self-manage their profiles on the Register by updating information as required, the Secretary has ultimate responsibility to establish and keep the register in accordance with clause 53. It is therefore appropriate for the Secretary (or a delegate in accordance with clause 53H) to have the flexibility to determine any additional kinds of documents or information that may be removed from the Register.

Determinations made pursuant to new subclause 53B(5) will be legislative instruments. In accordance with the *Legislation Act 2003*, a determination, and any changes to a determination, made by the Secretary will need to be tabled in each House of Parliament within six sitting days of registration to be scrutinised. A determination will then be subject to disallowance by either house for fifteen sitting days.

Items 5 to 13 and 15 (subclauses 53C(4), 53D(4) and 53E(4), paragraphs 53C(2)(g), 53C(3)(a), 53D(2)(g), 53D(3)(a), 53E(2)(c) and 53E(3)(a), and subparagraph 53E(2)(b)(vii))

Items 5 to 13 and 15 amend clauses 53C, 53D and 53E respectively to ensure that the Secretary may, by legislative instrument, determine the additional information required from franchisors for inclusion on the Register. This is consistent with the original policy intent of Part 5A.

Prior to this amendment, subclauses 53C(2), 53D(2) and 53E(2) prescribed a list of specific information franchisors were required to provide for inclusion in the Register, relevantly including any additional information required to be provided to the Secretary under subclauses 53C(4), 53D(4) and 53E(4).

Items 5, 8, 11 and 12 amend the list of information required from a franchisor under subclauses 53C(2), 53D(2) and 53E(2) to include any information required to be provided to the Secretary under a determination.

Items 7, 10 and 15 substitute subclauses 53C(4), 53D(4) and 53E(4) to ensure that, pursuant to subsections 51AE(1A) and 51AE(1C) of the Act, the Secretary (or a delegate in accordance with clause 53H) can determine the additional information required from all relevant franchisors by legislative instrument.

The Secretary can only require information under a determination that is required to be included in a disclosure document, however this cannot include information that relates to a particular franchisee of the franchisor, or information that relates to a particular site being occupied by a franchisee of the franchisor. Clause 4 defines a disclosure document for the purpose of the Code, while Clause 8 requires certain information to be included in a disclosure document.

Information required under a determination made pursuant to new subclauses 53C(4), 53D(4) and 53E(4) may apply to a specific franchisor, each franchisor (that is, all franchisors to which the clause applies), or a class of franchisors in accordance with subsection 13(3) of the *Legislation Act 2003*.

Determinations made pursuant to new subclauses 53C(4), 53D(4) and 53E(4) will be legislative instruments. In accordance with the *Legislation Act 2003*, a determination, and any changes to a determination, made by the Secretary will need to be tabled in each House of Parliament within six sitting days of registration to be scrutinised. A determination will then be subject to disallowance by either house for fifteen sitting days.

Items 6, 9 and 13 amend paragraphs 53C(3)(a), 53D(3)(a) and 53E(3)(a) respectively to clarify that the information required under a determination must be provided by a franchisor in a form and manner approved by the Secretary in writing.

A franchisor that fails to provide the information prescribed under a determination will be subject to a maximum civil pecuniary penalty of 600 penalty units, pursuant to the existing civil penalty provisions under subclauses 53C(2), 53D(2) and 53E(2). The amount of the penalty reflects the importance of this obligation to achieve industry transparency and means non-compliance cannot be a mere cost of doing business.

The courts will continue to have discretion to apply an appropriate penalty up to the maximum amount. A court would consider the relevant facts of any given case, and impose a penalty that is proportionate to that conduct, making it unlikely that the maximum penalty would be imposed in every instance. In practice, the maximum amount would only be applied in the most egregious instances of non-compliance.

Item 14 (paragraph 53E(3)(b))

Item 14 substitutes paragraph 53E(3)(b) to clarify when a franchisor is required to provide information for inclusion in the Register on an ongoing basis under clause 53E.

Clauses 53C and 53D are intended to impose an initial obligation on franchisors to provide the information necessary to establish their profile in the Register in the first instance, while clause 53E is intended to impose an ongoing obligation on franchisors to provide information to update their profile in the Register. This amendment ensures the sequencing of these obligations applies as intended.

Item 14 clarifies that if a franchisor is required to provide information under clause 53C in the first instance, the franchisor must update their information in accordance with clause 53E at least once for each financial year that ends after 31 October 2022, on or before the 14th day of the fifth month following the end of that financial year. This ensures that the obligation to provide information under clause 53E is subsequent to the obligation to provide information under clause 53C.

Example 1

Franchisor A is required to provide information for inclusion in the Register in accordance with clause 53C and does so on 14 November 2022. Franchisor A's financial year ended on 2 November 2022. As the end of the financial year occurs after 31 October 2021, Franchisor A would be required to update the Register in accordance with clause 53E on or before 14 April 2023. This would provide Franchisor A 14 days to update their information in the Register, following the requirement to update their disclosure document (the disclosure document must be updated within 4 months after the end of financial year under subclause 8(6)).

Item 14 also clarifies that if a franchisor is required to provide information under clause 53D in the first instance, the franchisor must update their information in accordance with clause 53E at least once for each financial year that ends after the day the franchisor enters into the franchise agreement, on or before the 14th day of the fifth month following the end of that financial year. This ensures the obligation under clause 53E is subsequent to the obligation to provide information under clause 53D.

Example 2

Franchisor B is required to provide information for inclusion on the Register in accordance with clause 53D and does so on 14 March 2023, ahead of entering into a franchise agreement on 28 March 2023. Franchisor B's financial year ends on 30 June 2023.

Franchisor B would be required to update the Register in accordance with clause 53E on or before 14 November 2023. This provides Franchisor B 14 days to update their information in the Register, following the requirement to update their disclosure document (the disclosure document must be updated within 4 months after the end of financial year under subclause 8(6)).

Item 17 (in the appropriate position in Part 6)

Item 17 inserts new Division 5 into Part 6 of the Code to clarify the application of the amendments made by the Regulations.

New subclause 72(1) ensures that amendments made to clause 53B by the Regulations apply in relation to information or documents included in the Register before, on or after the commencement day.

New subclause 72(2) ensures that amendments made to clause 53D by the Regulations apply in relation to franchise agreements entered into on or after the commencement day.

New subclause 72(3) provides franchisors with additional time to provide information required under clause 53D in certain circumstances.

Prior to these amendments, subclause 53D(3) required relevant franchisors to provide information at least 14 days before the franchisor enters into the franchise agreement with the prospective franchisee. New subclause 72(3) will allow a franchisor to provide the information on or before 30 November 2022, in circumstances where the franchisor is required to provide the information at least 14 days before a day in November 2022 that is on or after the commencement of the Regulations (that is, where the proposed day a franchisor will enter into a franchise agreement is on or after the commencement day).

This does not require a franchisor to resubmit any information listed under paragraphs 53D(2)(a) to (f) of the Code before commencement. Rather, it extends the period of time in which information can be provided to ensure a smooth transition to the new requirements. This includes information required under paragraphs 53D(2)(a) to (f) of the Code, and any new information required to be provided under a determination under new subclause 53D(4) as substituted by item 10 of the Regulations.

New subclause 72(4) introduces the terms *amending regulations* and *commencement day* for use in Division 5 of Part 6.

A note to new subclause 72(4) provides that the information required by subclause 53C(3) of the Code is to be provided on or before 14 November 2022. This includes any information required to be provided under a determination under subclause 53C(4), as substituted by item 7 of the Regulations, if:

- the commencement day is 14 November 2022 or an earlier day; and
- that determination is made on or before 14 November 2022.

This note is intended to clarify that any obligation to provide additional information under a determination made pursuant to new subclause 53C(4) of the proposed Regulations after 14 November 2022, would not operate retrospectively.

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
(Additional Information) 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 Franchising Code of Conduct, contained in Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code), enhances the welfare of Australians by promoting competition and fair trading in the franchising sector. Part 5A of the Code was recently inserted to establish the public Franchise Disclosure Register (the Register).

The purpose of the *Competition and Consumer (Industry Codes—Franchising) Amendment (Additional Information) Regulations 2022* (the Regulations) is to amend Parts 5A and 6 of the Code to correct a number of minor issues recognised after the establishment of the Register. This includes:

- ensuring the Secretary may, by legislative instrument, determine the additional information franchisors must provide for inclusion on the Register, and additional information or documents that may be removed from the Register;
- ensuring a franchisor’s logo can be included on the Register; and
- clarifying when a franchisor is required to provide information for inclusion in the Register on an ongoing basis.

Human rights implications

The Regulations engage the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR) as franchisors are required to provide information which may identify the franchisor for publication in the Register.

The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. For an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR, and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

The Regulations allow:

- The Secretary to determine, by legislative instrument, additional information required from a franchisor for inclusion in the Register. This information must be drawn from a disclosure document (new subclause 53C(4), 53D(4) and 53E(4) of the Regulations). Franchisors are already required to share this information with a prospective franchisee under the Code.
- A franchisor to voluntarily provide their logo for inclusion in the Register (new paragraph 53A(3)(d) of the Regulations).

These arrangements ensure collection and use of personal information for the Register are authorised by law, and are in keeping with the original purpose of the Register to facilitate free and easy access by prospective franchisees to pertinent information about franchised businesses in Australia.

Collection and use of personal information by Government is subject to the *Privacy Act 1988*, which gives effect to the right to privacy under the ICCPR. The Act imposes obligations to protect personal information, ensuring its collection and use are in accordance with law and any limitations of privacy are reasonable in the circumstances. As such, the Secretary will collect and securely handle personal information in relation to the Register in accordance with obligations under that Act. Supporting this, existing provisions in the Code ensure the Register does not include personal information other than information of the franchisor or identifying information of franchise sites, to protect privacy and commercial sensitivities. The following safeguards are in place to protect any personal information that may be provided:

- The Secretary's power to require a franchisor to provide additional information for inclusion in the Register is subject to express limits, including that it must be drawn from a disclosure document, and it cannot include personal information other than relating to the franchisor (new subclauses 53C(4), 53D(4) and 53E(4) of the Regulations).
- The Secretary has the power to remove personal information or documents that contain personal information other than relating to the franchisor from the Register (subclause 53B(4) of the Code).

Accordingly, to the extent that the Regulations engage the right to privacy, that engagement is reasonable in the circumstances. In particular, collection of some personal or identifying information about a franchisor is necessary to achieve the purpose of the Regulations to better inform prospective franchisees of core information about businesses they are considering engaging with. The collection of personal information is proportionate to the end sought as the Regulations balance the need for transparency in the franchise industry with protection of personal and commercial information. Mechanisms are expressly included in the Code to prevent personal information of an individual other than a franchisor being collected or included in the Register, and to remove such information if it is inadvertently included in the Register. Any limitation to the right to privacy from these arrangements is consistent with the ICCPR as the collection and use of any personal information is

authorised by and consistent with the law, proportional to the end sought, and necessary in the circumstances.

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.