

EXPLANATORY STATEMENT

Issued by authority of the Secretary of the Department of the Treasury

Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Competition and Consumer (Industry Codes—Franchising) (Additional Information Required by the Secretary) Determination 2022

Section 51AE of the *Competition and Consumer Act 2010* (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 enhances the welfare of Australians by promoting competition and fair trading in the franchising sector.

Subsection 51AE(1A) of the Act allows an industry code to confer on a person or body a function or power in relation to the code. Subsection 51AE(1C) of the Act allows a code to provide that such a power or function is to be exercised by legislative instrument.

Part 5A of the Code established the Franchise Disclosure Register (the Register) to facilitate free and easy access to pertinent information about franchised businesses in Australia for prospective franchisees. The *Competition and Consumer (Industry Codes—Franchising) Amendment (Additional Information) Regulations 2022* (the Regulations) amended Parts 5A and 6 of the Code to correct a number of minor issues recognised after the recent establishment of the Register. This included amendments to provide the Secretary with the power to determine, by legislative instrument, additional information required from a franchisor.

Subclause 53C(4) and 53D(4) of the Code provide that the Secretary may, by legislative instrument, determine information that each or a specified franchisor must provide to the Secretary for inclusion in the Register. This is additional to the core information franchisors must provide to establish their profile in the Register under the Code.

The purpose of the *Competition and Consumer (Industry Codes—Franchising) (Additional Information Required by the Secretary) Determination 2022* (the Determination) is to prescribe the additional information that a class of franchisors must provide to the Secretary for inclusion in the Register, pursuant to subclause 53C(4) and 53D(4) of the Code. The additional information required by the Determination will enhance the ability of prospective franchisees to make informed decisions about franchise systems that they are considering purchasing by enabling them to easily compare information about different franchise systems.

Public consultation on the Determination was not undertaken as it is minor or machinery in nature. The additional information prescribed in the Determination is already set out in the Register and may be voluntarily populated by a franchisor, at their discretion. The additional information is also limited to information that is required to be provided in a disclosure document created by a franchisor.

Targeted stakeholder feedback was sought in finalising the Regulations.

The Determination does not impose undue burden upon the sector as franchisors are already required to share this information with a prospective franchisee under the Code. The Office of Best Practice Regulation advised that the proposal is unlikely to have more than a minor regulatory impact as there is no change in policy intent or additional compliance burden as a result of the Determination. As such, a Regulation Impact Statement is not required (OBPR references 25083 and 22-03481).

The power to make the Determination was delegated by the Secretary in accordance with the *Competition and Consumer (Industry Codes—Franchising) (Treasury) Delegations 2022*.

Details of the Determination are set out in Attachment A.

The Determination is subject to disallowance under section 42 of the *Legislation Act 2003*.

The Determination is subject to sunseting under Part 4 of the *Legislation Act 2003*.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Determination commenced on the day after this instrument was registered on the Federal Register of Legislation.

A Statement of Compatibility with Human Rights is at Attachment B.

Details of the *Competition and Consumer (Industry Codes—Franchising) (Additional Information Required by the Secretary) Determination 2022*

Section 1 – Name of the Instrument

Section 1 provides that the name of the Determination is the *Competition and Consumer (Industry Codes—Franchising) (Additional Information Required by the Secretary) Determination 2022* (the Determination).

Section 2 – Commencement

The Determination commences on the day after the instrument is registered on the Federal Register of Legislation.

Section 3 – Authority

The Determination is made under the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code).

Section 4 – Definitions

Section 4 provides that the term ***Franchising Code of Conduct*** means the code set out in Schedule 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

Other expressions have the same meaning as in the Code as in force from time to time, in accordance with paragraph 13(1)(b) of the *Legislation Act 2003*. This includes the meaning of disclosure document.

Sections 5 and 6 – Additional information required to be provided in relation to certain franchisors

Sections 5 and 6 specify the franchisors that are required to provide the Secretary with the additional information covered by section 7.

Subsection 5(1) provides that a franchisor to which clause 53C of the Code applies must provide the additional information in relation to each disclosure document created by the franchisor. Clause 53C of the Code applies to a franchisor if:

- the franchisor has given a disclosure document to a franchisee or prospective franchisee on or before 31 October 2022 (that is, they are an existing franchisor); and
- if the franchisor is the master franchisor in a master franchise system—the master franchise system has 2 or more subfranchisors.

Subsection 6(1) provides that a franchisor to which clause 53D of the Code applies must provide the additional information in relation to each disclosure document created by the franchisor. Clause 53D of the Code applies to a franchisor if:

- the franchisor is proposing to enter into a franchise agreement with a prospective franchisee (that is, they are a new franchisor); and
- a copy of the disclosure document relating to the franchise is required to be given to the prospective franchisee under clause 9 of the Code; and
- the franchisor has not previously provided information relating to the franchise for inclusion in the Franchise Disclosure Register (the Register) under clause 53C or 53D of the Code; and
- if the franchisor is the master franchisor in a master franchise system—the master franchise system has 2 or more subfranchisors.

The requirement to provide the information covered by section 7 in relation to each disclosure document is intended to ensure a franchisor with multiple disclosure documents in relation to a franchise provides the required information for each document.

Subsection 5(2) and 6(2) provide that the requirement to provide additional information in section 7 does not apply to a disclosure document if:

- the disclosure document relates to a franchise where the franchisor has entered into less than 2 franchise agreements; and
- the disclosure document relates to a franchise where the franchisor does not intend, or if the franchisor is a company, its directors do not intend, to enter into franchise agreement.

This is intended to align with subclause 8(7) of the Code, which excludes certain franchisors from the requirement to update a disclosure document under the Code.

Clause 53C and 53D of the Code impose an initial obligation on existing franchisors (that have given a disclosure document on or before 31 October 2022) and new franchisors respectively, to provide information to establish their profile on the Register.

Clause 53E of the Code imposes an ongoing obligation on franchisors to provide information, as necessary, to update their profile in the Register. Clause 53E of the Code applies to a franchisor if information was included or was required to be included in the Register under clause 53C and 53D of the Code. Paragraph 53E(2)(vii) of the Code requires such a franchisor to update information required under subclause 53C(4) and 53D(4) of the Code. This means that a relevant

franchisor is required to update the information listed in section 7 of the Determination on an ongoing basis.

Section 7 – Details of the additional information to be provided

Section 7 sets out the additional information that a franchisor (to which section 5 or 6 applies) must provide for inclusion in the Register pursuant to subclause 53C(4) and 53D(4) of the Code.

Subsection 7(1) provides that the additional information the franchisor must provide is subject to certain limitations. Information is not permitted to be included in the Register if it is:

- personal information that relates to an individual other than a franchisor;
- information that relates to a particular franchisee of a franchisor; or
- information that relates to a particular site being occupied by a franchisee of a franchisor.

This is consistent with subclause 53C(4) and 53D(4) of the Code.

Subsection 7(2) lists the additional information required from a relevant franchisor in relation to each disclosure document created by the franchisor. This includes, for example, the number of years that the franchisor has operated the franchise or franchise system in Australia, and whether the franchise agreement may be unilaterally varied by the franchisor.

Consistent with subclause 53C(4) and 53D(4) of the Code, the additional information is drawn from information required to be included in a disclosure document created by a franchisor. Clause 8 of the Code requires certain information to be included in a disclosure document. The notes to subsection 7(2) are intended to clarify the items in Annexure 1 of the Code (which sets out the content and form of a disclosure document, pursuant to subclause 8(3) of the Code) the additional information relates to.

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) (Additional Information Required by the Secretary) Determination 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 established the Franchise Disclosure Register (the Register) to facilitate free and easy access to pertinent information about franchised businesses in Australia for prospective franchisees.

The *Competition and Consumer (Industry Codes—Franchising) Amendment (Additional Information) Regulations 2022* (the Regulations) amended Parts 5A and 6 of the Code to correct a number of minor issues recognised after the recent establishment of the Register. This included amendments to provide the Secretary with the power to determine, by legislative instrument, additional information required from a franchisor.

Subclause 53C(4) and 53D(4) of the Code provide that the Secretary may, by legislative instrument, determine information that each or a specified franchisor must provide to the Secretary for inclusion in the Register. This is additional to the existing obligation, under subclause 53C(2) and 53D(2) of the Code, for a franchisor to which clause 53C and 53D of the Code respectively applies, to provide certain core information to establish their profile in the Register.

The purpose of the *Competition and Consumer (Industry Codes—Franchising) (Additional Information Required by the Secretary) Determination 2022* (the Determination) is to prescribe the additional information that a class of franchisors must provide to the Secretary for inclusion in the Register, pursuant to subclause 53C(4) and 53D(4) of the Code. The additional information required by the Determination will enhance the ability of prospective franchisees to make informed decisions about franchise systems that they are considering purchasing by enabling them to easily compare information about different franchise systems.

Human rights implications

The Determination engages 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 Determination requires a franchisor to provide the additional information in relation to each disclosure document created by the franchisor [section 5 to 7]. This includes, for example, the number of years that the franchisor has operated the franchise or franchise system in Australia and details on the term of the franchise agreement.

Franchisors are already required to share this information with a prospective franchisee under the Code.

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 in the Regulations 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 that of the franchisor.

- The Secretary has the power to remove personal information or documents that contain personal information other than that of the franchisor from the Register.

Accordingly, to the extent that the Determination engages 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 Register 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 Determination balances 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

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