

## **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 (Franchise Disclosure Register) 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 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 the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (the Code). This instrument amends the Code.

The purpose of the *Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* (the Regulations) is to amend the Code to increase transparency of the operation and structure of franchise systems, before prospective franchisees enter into franchise agreements. This furthers the objective of the Act to enhance the welfare of Australians by promoting competition and fair trading in the franchising sector.

The introduction of a public Franchise Disclosure Register (the Register) will facilitate free and easy access by prospective franchisees to pertinent information about franchised businesses in Australia. This 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. The Register will provide easy public access to appropriate, useful information, without compromising the individual or commercial privacy of the parties involved or imposing undue burden upon the sector.

The Register will operate as a self-service portal through which information is uploaded by franchisors and is publicly accessible by prospective franchisees. The Secretary will be responsible for establishing and maintaining the Register and has limited powers to adjust content such as to remove outdated or impermissible content. The regulator, the Australian Competition and Consumer Commission, will remain responsible for enforcement and compliance with the Code.

The need for such a register was identified following the *Fairness in Franchising* report, tabled by the Parliamentary Joint Committee on Corporations and Financial Services (the

Committee) in March 2019. The report found that there is an asymmetry of resources, business experience, education and sophistication that exists between franchisees and franchisors. This information asymmetry favours franchisors and can prevent franchisees in conducting due diligence. A well-functioning and efficient franchise sector requires franchisees to be well-informed. The Committee recommended implementing a public Franchise Disclosure Register to assist franchisees in making informed decisions.

In response the Government established the Franchising Taskforce (the Taskforce) to consider the Committee's recommendations. The Taskforce consulted with a range of stakeholders and received submissions to both an Issues Paper and a Consultation Paper which set out proposed reforms for the sector, including the Register.

The Government Response to the *Fairness in Franchising* report subsequently committed to consult on the development of the Register. Targeted consultation with stakeholders on the high-level design for the Register informed a Budget commitment in the 2021-22 Budget to establish the Register, to increase transparency in the franchising sector and the ability of prospective franchisees to make an informed decision before entering a franchise agreement.

Public consultation was undertaken on an exposure draft of the Regulations between 30 September 2021 and 29 October 2021. Twenty-seven submissions were received, representing a spectrum of views on the level of information to include in the Register. In response to feedback from stakeholders, the Government sought to balance the protection of commercially sensitive information with the need to ensure that the Register contains useful information for franchisees through the required information in the Register. Further targeted stakeholder feedback was sought in finalising the Regulations.

The Regulations implement the Government's commitment to improve franchisee information and awareness through the introduction of a Franchise Disclosure Register and incorporate the feedback received from industry stakeholders during consultation. These Regulations complement the changes made in the *Competition and Consumer (Industry Codes – Franchising) Amendment (Fairness in Franchising) Regulations 2021*, which address other commitments made in response to the *Fairness in Franchising* report.

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

The Act does not specify any conditions that must be satisfied before the power to make Regulations may be exercised.

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

The Regulations commence the day after the instrument is registered.

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

The Office of Best Practice Regulation has been consulted and a Regulatory Impact Statement (RIS) has been completed and is available <https://obpr.pmc.gov.au/published->

[impact-analyses-and-reports/changes-regulatory-framework-applying-franchise-sector](#).  
An addendum to the RIS is at [Attachment C](#).

**Details of the *Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2022***

Section 1 – Name

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

Section 2 – Commencement

The Regulations commence 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 – Schedules

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

Schedule 1 – Amendments

Schedule 1 to the Regulations amends the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* to insert Part 5A to establish the Franchise Disclosure Register (the Register).

All 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).

**Item 1 (Subclause 4(1))**

This item inserts definitions for *ANZSIC division and subdivision codes*, *Register* and *Secretary* into the list of definitions at subclause 4(1) of the Code.

ANZSIC is the Australian and New Zealand Standard Industrial Classification 2006, published by the Australian Bureau of Statistics. The Regulations incorporate the ANZSIC division and subdivision level industry codes, by reference to the version of ANZSIC in force at the time the Regulations commence.

The Register is the Franchise Disclosure Register described at clause 53 of the Code.

The Secretary refers to the Secretary of the Department that is administered by the Minister responsible for the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.

### **Items 2 and 3 (Subclause 9(1A))**

These items add new paragraphs into subclause 9(1A) of the Code. Clause 9 requires a franchisor to give documents specified in subclause (1A) to a prospective franchisee, including updated copies of the disclosure document and the key facts sheet of the franchise.

These items clarify how these requirements apply where a newly created franchise does not have existing documents to update. A new franchise may be an entirely new business or an existing business which has recently begun operating as a franchisor.

Item 2 adds paragraph 9(1A)(b)(iii) to provide that where the original disclosure document for a franchise has been created but not yet updated (as would ordinarily be required at the end of the financial year under subclause 8(6)), the franchisor must provide the original disclosure document it created under subclause 8(1) to a prospective franchisee.

Similarly, item 3 adds paragraph 9(1A)(c)(iii), which provides that where the original key facts sheet for a franchise has been created but not yet updated (as would ordinarily be required at the end of the financial year under subclause 9A(2)), the franchisor must provide the original key facts sheet created under subclause 9A(1).

### **Item 4 (Part 5A)**

This item inserts a new Part 5A into the Code. This Part establishes the Register, sets out rules for the governance and maintenance of the Register, and imposes obligations on franchisors to provide relevant information in the Register.

#### Division 1 – Establishment and Content

Clause 53 establishes the Register. The Secretary is responsible for establishing and maintaining the Register, which must be an online electronic register available to the public without charge to maximise transparency. Giving the Secretary this responsibility ensures a public officer is accountable for the Register, although in practice it is expected franchisors will play an active role in managing their own information in the Register. The Register is not a legislative instrument.

Clause 53A outlines what contents must, and what contents may, be included in the Register with respect to each franchise.

The Register must contain information which is required to be provided by each franchisor under Division 2, comprising:

- core business information for each franchise; and
- any additional information relating to the franchise that is required by the Secretary.

In addition, franchisors may choose to provide additional information and/or documents in the Register, subject to the following limitations:

- *Information:* Information relating to the franchise is permitted to be included in the Register as long as it does not include personal information relating to an individual (other than the franchisor) or site-specific information. In practice, the additional information which may be included in the Register will be limited to specified fields which may be voluntarily populated by a franchisor, at their discretion; and
- *Documents:* Only the key facts sheet, disclosure document and a standard form of the franchise agreement are permitted to be included in the Register.

The Register will present the information and any documents provided by a franchisor in an accessible manner, attached to the profile of each franchisor, to support easy understanding and comparison of each franchise. The Secretary will manage all information collected in relation to the Register in accordance with information handling laws including the *Archives Act 1983* and the *Privacy Act 1988*.

Clause 53B empowers the Secretary to adjust the contents of the Register in certain circumstances, to correct errors or to remove outdated or impermissible content. For example, the Secretary could remove personal or franchise-specific information that has been inadvertently provided, or could correct an erroneous link to a document or website that was provided by a franchisor. While in general franchisors are expected to self-manage their profiles on the Register by updating information as required, this clause provides a mechanism to ensure the Secretary can remove or revise information on the Register in the following circumstances:

- *At the request of the franchisor* – the Secretary must remove information or documents on the Register if a franchisor makes the request because the franchisor has ceased to operate that franchise. A franchisor can also request that information or documents on the Register be replaced. This may occur, for example, if a franchisor is unable to directly update information in their profile or upload documents to the Register due to technical difficulties;
- *Out-of-date documents or information* – the Secretary may remove out-of-date documents or information from the Register. That is, where a document or information is more than 18 months old (based on the end of the financial year to which the document or information relates), and during that period the franchisor has not: provided a replacement document; updated the information; or validated the existing document or information included on the Register as remaining current; and
- *Personal or franchise-specific information* – the Secretary may also remove a document or information included in the Register if the document contains, or the information is, personal information that relates to an individual other than the franchisor or information that relates to a particular franchisee or a particular site being occupied by a franchisee.

The Secretary is not able to amend or remove any other information or documents in relation to a franchisor on the Register other than in accordance with this clause. This limitation reflects the administrative nature of the Secretary's role in establishing and maintaining the Register, in comparison with that of franchisors who will actively self-manage their profile on the Register.

#### Division 2 – Obligation to provide information for inclusion in the Register

Clauses 53C and 53D impose the initial obligations on franchisors to provide the information necessary to establish their profile in the Register. Clause 53E imposes the ongoing obligations on franchisors to provide information, as necessary, to update their profile in the Register.

*Initial requirements for franchisors to establish their profile in Register – franchisors that give a disclosure document on or before 31 October 2022.*

Clause 53C outlines the transitional arrangements for existing franchisors to efficiently populate the Register. This applies to franchisors who have given a disclosure document to a franchisee or prospective franchisee on or before 31 October 2022. In relation to master franchisors, clause 53C only applies if the master franchisor has two or more subfranchisors.

Subclause 53C(2) requires franchisors to provide core business information for inclusion in their franchise's profile on the Register. Fields of required information are specified. Providing the franchisor's name, business trading name, and ABN will allow users to easily search the register for a particular franchise. The requirement to include a business telephone number, email and address of the franchisor provides further search criteria as well as vital contact details for potential franchisees accessing the Register. The publication of ANZSIC industry classification information on the Register is intended to both assist in the identification of franchises relevant to an industry (ANZSIC division level code) and allow for searches to be sorted by sector (ANZSIC subdivision level code).

Subclause 53C(4) empowers the Secretary to require additional information drawn from the disclosure document to be included on the Register. Conferring this power on the Secretary is consistent with section 51AE(1A) and (1B) of the Act. This provides a flexible approach that allows the Register to adapt information fields to meet needs which may arise during operation, within bounds and existing obligations that are expressly prescribed by the Franchising Code. However, to protect privacy and commercially sensitive information, the additional information cannot be personal information that relates to an individual other than the franchisor, or information that relates to a particular franchisee or a particular site being occupied by a franchisee.

All documentation and information lodged on the Register will be publicly accessible and is intended to relate to an entire franchise system.

In accordance with subclause 53C(3), information for the Register must be provided in the manner and form approved by the Secretary (which will be managed in practice through the online portal), on or before 14 November 2022.

As core requirements of this Division, a penalty is necessary to ensure compliance. Failure to provide the required information for inclusion in the Register attracts a maximum civil pecuniary penalty of 600 penalty units for a franchisor. 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 penalty is consistent with civil penalties attaching to core obligations of the Code and is within the maximum permitted for the franchising industry Code under section 51AE of Act.

As outlined in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, serious pecuniary penalties are most appropriately placed in primary Acts of Parliament rather than subordinate legislation. While the penalties in industry codes are prescribed in regulations, the maximum penalty that can be given as a penalty to a breach of the code of conduct is in primary law. As such, the amount of the penalties included in the Regulations for breach of franchisor obligations in relation to the Register balances the need to have sufficient penalties in industry codes to ensure they are a meaningful deterrent, with the principles set out in the Attorney-General's Department's *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

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.

#### *Initial requirements for franchisors to establish their profile in the Register – other franchisors*

For those franchisors to whom the transitional arrangements in clause 53C do not apply, clause 53D outlines the requirements for establishing their profile in the Register. That is, clause 53D applies to a franchisor where:

- the franchisor has not previously established their profile in the Register in relation to the franchise; and
- the franchisor is proposing to enter into a franchise agreement with a prospective franchisee in relation to the franchise; and
- the disclosure document relating to the franchise has been given to the prospective franchisee on or after 1 November 2022; and
- if the franchisor is a master franchisor—the franchisor has two or more subfranchisors.

Clause 53D establishes an obligation for new franchisors to provide information for inclusion on the Register before entering a new franchise agreement. A franchisor must provide the information prescribed in subclause 53D(2) (such as the name of the franchisor, name under which the franchisor carries on business in Australia relevant to the franchise, and the industry classification of the franchise) at least 14 days before the franchisor enters into a franchise agreement with the prospective franchisee.



Consistent with the obligations outlined in clause 53C, the Secretary may also require franchisors to provide additional information for inclusion on the Register. The additional information that the Secretary can require is limited to information that is already required to be provided in the disclosure document relating to the franchise. The information cannot be personal information that relates to an individual other than the franchisor or information that relates to a particular franchisee or a particular site being occupied by a franchisee.

A franchisor can face a maximum civil penalty of 600 penalty units if the franchisor fails to provide the required information for inclusion on the Register. The civil penalty is necessary to promote timely compliance with this important core obligation and to deter misconduct, as outlined above in relation to clause 53C.

*Ongoing requirements for franchisors to provide updated information for inclusion in the Register*

Clause 53E creates an ongoing obligation for a franchisor to provide updated core information for inclusion on the Register. For master franchisors, this obligation only applies if they have more than one subfranchisor.

The franchisor must update the required basic information each year, in line with the financial year on which the franchisor operates to ensure it is up to date.

Under subclause 53E(4), the Secretary may also require additional information for inclusion on the Register. The additional information that the Secretary can require is limited to information that is already required to be provided in the disclosure document relating to the franchise. The information cannot be personal information that relates to an individual other than the franchisor or information that relates to a particular franchisee or a particular site being occupied by a franchisee. In practice, this will allow the Secretary to request further information from franchisors who are required to update their disclosure documents under clauses 8(6) and 8(8) of the Code. These circumstances tie into existing obligations for franchisors to update disclosure documents under the Code, to avoid duplication.

The information must be given in the manner and form approved by the Secretary, within 14 days after the four-month period after the end of each financial year. This timeframe aligns with other reporting timeframes under the Code – that is, the four-month period at the end of each financial year in which that the franchisor is required to update the disclosure documents – plus an additional 14 days to allow franchisors to then update the Register. In practice, for most franchisors using the 1 July to 30 June financial year, this means the Register needs to be updated by 14 November each year.

This obligation ensures that the Register contains useful and relevant data. Updating the Register regularly will inform prospective franchisees of critical operational changes in a franchise system. To encourage compliance, this core obligation to provide updated information is a civil penalty provision, subject to a maximum pecuniary penalty of

600 penalty units for franchisors. This is consistent with the approach and penalties attached to other core obligations of the Code.

### Division 3 – Redacting certain information from certain documents

Clause 53F sets out which information a franchisor must, or may, redact from documents that a franchisor provides for inclusion in the Register.

This clause applies to all documents uploaded to the Register. Clause 53F also applies to any documents outside of the Register which can be accessed via a link provided to the Register. Put simply, if a document can be accessed via the Register, it must be redacted in line with the requirements of clause 53F. The uploading of documents to the Register is a voluntary action on behalf of franchisors and the requirements in clause 53F apply to all documents voluntarily provided to the Register.

While some identifying information is necessarily required in relation to a franchise, the documentation and information lodged in the Register will be publicly accessible and is intended to relate to an entire franchise system. To protect privacy, a franchisor must redact personal information that relates to an individual other than the franchisor, as well as information that relates to a particular franchisee or franchisee site from documents to be published or linked in the Register.

A franchisor may redact information that is of a commercial nature and is commercially sensitive. This discretion balances the importance of providing full information to franchisees, with recognition that public disclosure of certain information may risk putting a franchise at relative competitive disadvantage. A prospective franchisee can seek access to the redacted information through the disclosure obligations in the Code.

### Division 4 – Giving of information by agents

Clause 53G provides that a franchisor's obligations in relation to providing or giving information to the Register are satisfied if those obligations are fulfilled by another person acting on the franchisor's behalf (their agent). For example, a franchisor may wish to appoint an agent to manage the franchisor's Register profile on an ongoing basis and assist in the authentication of documentation and information that appears in the Register.

This provision supports efficiency through delegation to reduce the regulatory burden on franchisors. It also provides important clarity that where a franchisor has not personally fulfilled their obligations, but an agent has done so on the franchisor's behalf, those obligations are taken to have been met and the franchisor will not be subject to penalties for non-compliance with the Code.

In practice this will be made possible through authentication mechanisms that will be part of the process for accessing and self-managing franchisor profiles on the Register. These authentication mechanisms will allow franchisors to delegate authority to agents to act on their behalf.

## Division 5 – Other Matters

Clause 53H allows the Secretary to delegate all or any of their functions or powers in Part 5A to a Senior Executive Service (SES) employee, or acting SES employee in the Department. The delegate must comply with any written directions of the Secretary in performing any delegated function or exercising a delegated power. This delegation power reflects the ordinary operations of a Department and supports efficient maintenance of the Register.

Clause 53J provides that the Minister responsible for the *Australian Small Business and Family Enterprise Ombudsman Act 2015* must ensure that a review of the operation of Part 5A of the Code occurs. The review will commence after 15 November 2023 and must be completed by 30 June 2024. This ensures the review does not commence until one year after the transitional arrangements have concluded (franchisors having established their profiles in the Register by 14 November 2022 under clause 53C). This timeframe is reasonable and appropriate as the review ensures that the Register is fully operational, and stakeholders have had the opportunity to engage in this mandatory obligation prior to the review. The review will also align with the normal sunseting review process, which would be expected to occur in 2024 (ahead of the Code's sunseting date of 1 April 2025).

As part of the review, franchise industry stakeholders must have an opportunity to make written submissions on the operation of Part 5A. The person or persons undertaking the review must give the Minister a written report of the review upon its completion. This requirement will allow the Government to carefully examine the effectiveness of the reforms and any potential changes that should be considered in future.

The industry code review processes contained in regulations do not generally include requirements for reports of reviews to be tabled in Parliament or published online. However, it is standard practice that reports of reviews are published online by the relevant Department administering the code. Consistent with current practice, this report will be published online to ensure that all stakeholders have the opportunity to consider the findings and recommendations from the review. Publishing the report of the review online will promote transparency and accountability, as well as ensure appropriate oversight of the review process. It is not necessary for the report to be tabled; since the Regulations have broad support, executive oversight of the review process is sufficient.

**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 (Franchise Disclosure Register) 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 purpose of the *Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2022* (the Regulations) is to increase transparency of the operation and structure of franchise systems, before prospective franchisees enter into franchise agreements.

The Regulations establish a public Franchise Disclosure Register (the Register), for which franchisors must provide certain information about the franchise. The Register will facilitate free and easy access by prospective franchisees to pertinent information about franchised businesses. This 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.

The Register will operate as a self-service portal through which information is uploaded by franchisors and accessible by prospective franchisees. The Secretary of the Department that is administered by the Minister responsible for the *Australian Small Business and Family Enterprise Ombudsman Act 2015* is responsible for maintaining the Register and has powers to remove information and documents from the Register in certain circumstances.

The regulator, the Australian Competition and Consumer Commission, will remain responsible for enforcement and compliance with the Code. Franchisors may incur civil penalties for non-compliance with obligations to provide information for the Register. Individuals are not subject to civil penalties.

**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 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 empower the Secretary to establish the Register to enhance transparency of the franchising industry, to support prospective franchisees to make informed decisions about franchise systems. These Regulations authorise the collection and use of information relating to a franchise, which may include personal information identifying the franchisor, for the purpose of publishing and keeping the Register. The Regulations prescribe information fields which must be provided and updated by franchisors [*clauses 53C(2), 53D(2) and 53E(2) of the Regulations*]. Prescribed fields include franchisor contact details and basic information which allows users of the Register to identify and easily compare franchises. The Register will also contain:

- If required by the Secretary, additional information about a franchise drawn from a disclosure document [*clauses 53A(1), 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.
- Certain documents voluntarily provided by a franchisor [*clause 53A(3) 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 purpose of establishing the Register.

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, the Regulations ensure the Register does not include personal information other than of the franchisor or identifying information of franchise sites, to protect privacy and commercial sensitivities. To achieve this, the Regulations contain the following safeguards to protect personal information:

- Franchisors may provide additional information for inclusion in the Register if the information relates to the franchise and is not personal information that relates to an individual other than the franchisor or information that relates to a particular franchisee or a particular site being occupied by a franchisee [*clause 53A(2) of the Regulations*].

- The Secretary’s power to require a franchisor to provide information about the franchise for inclusion in the Register is subject to express limits including that the additional information required by the Secretary cannot include personal information other than relating to the franchisor *[clauses 53C(4), 53D(4) and 53E(4) of the Regulations]*.
- If a franchisor voluntarily chooses to upload certain documents to the Register, the franchisor must ensure that all personal information other than relating to the franchisor is redacted from any documents provided to the Register *[clause 53F(2)(a)(i) of the Regulations]*.
- The Secretary has the power to remove personal information or documents that contain person information other than relating to the franchisor from the Register *[clause 53B(4) of the Regulations]*.

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 Regulations 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.

**Addendum to the Changes to the Regulatory Framework Applying to the Franchise Sector RIS for the purposes of the Franchise Disclosure Registry NPP**

**INTRODUCTION**

This is an addendum to the decision Regulatory Impact Statement (RIS) “Changes to the Regulatory Framework Applying to the Franchise Sector”, published by the Department of Industry, Science, Energy and Resources (DISER) in August 2020. This Addendum now forms part of the published RIS and should be read in conjunction with that document.

The purpose of this addendum is to update the decision RIS to reflect the Australian Government’s response to the recommendations of the Parliamentary Joint Committee on Corporations and Financial Services (the PJC) *Fairness in Franchising* report, released in August 2020.

**1. WHAT IS THE PROBLEM YOU ARE TRYING TO SOLVE?**

The most recent data from IBISWorld (2020) indicates that there are approximately 1,200 franchise brands in Australia with 91,000 franchise establishments, providing employment for approximately 518,000 people. The sector’s estimated revenue is \$154.0 billion in 2020-2021.<sup>1</sup>

Despite the important role that franchising plays in the economy, the sector’s reputation has been damaged by unscrupulous behaviour by some franchisors. Calls for improved transparency of franchisors have been made repeatedly in numerous inquiries and reviews of the sector to address the imbalance of power and asymmetry of information between franchisors and franchisees.

The PJC report and an Australian Competition and Consumer Commission (ACCC) report into food franchises<sup>2</sup> highlight concerns concerning disclosure practices in the franchising sector. It can be difficult for prospective franchisees to access disclosure documents and franchise agreements from different franchise systems at an early information-gathering stage. This hampers the ability for prospective franchisees to negotiate with franchisors and can result in franchisees paying more than the business is worth or entering into undesirable franchise agreements.

The PJC and the Franchising Taskforce also found that there is egregious franchisor conduct in the sector, which can lead to significant financial detriment for franchisees. Well-known brands have been involved in unscrupulous conduct, including misrepresentation to franchisees.

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<sup>1</sup> IBISWorld, September 2020, *Franchising in Australia Industry Report X0002*.

<sup>2</sup> ACCC, 2019, *Disclosure practices in food franchising*. Checks were conducted on 12 franchisors for the purposes of this report.

As identified in the decision RIS, availability of statistics on the franchising sector is limited. Griffith University's most recent Franchising Australia report from 2016 identified that 'the lack of any official registration requirements on franchisors makes it impossible to accurately identify the population'.<sup>3</sup>

## **2. WHY IS GOVERNMENT ACTION NEEDED?**

### Recommendation for a government operated franchise register in the 2008 PJC report

In its 2008 report, *Opportunity not opportunism: improving conduct in Australian franchising*, the PJC recommended that the government investigate the benefits of developing an online registration system for the Australian franchise sector. In its response to the report, the Government indicated that the cost of an online registration system would need to be borne by businesses in the franchise sector, and that the benefits would be unlikely to outweigh the costs.

However, the PJC again identified the need for a government operated register in its *Fairness in Franchising* report in 2018. Consultation by the Franchising Taskforce, and the Government following its response to the PJC report reaffirmed the view that a franchise registry is needed in order to increase transparency in the sector.

### FRANdata's Australian Franchise Registry

In 2014 FRANdata, a US based market research and consulting firm, launched the Australian Franchise Registry. While FRANdata confirms the status of a franchise on receipt of an up-to-date disclosure document and franchise agreement, FRANdata does not verify whether the franchise documentation complies with the Code or relevant laws, nor does it publish the documents on its website. FRANdata is voluntary and offers free registration for members of the Franchise Council of Australia. FRANdata offers a rating system for franchise brands for an additional fee, which is based on objective measurement of franchise system performance including franchisee financial performance, engagement and satisfaction; franchisor financial performance and lender relations.<sup>4</sup>

Given its voluntary status, FRANdata has had a low take-up amongst franchisors. It submitted to the 2018 PJC inquiry that it had received disclosure documents from approximately 150 of the listed brands, or roughly 13 percent of franchise systems in Australia.

The Government has heard from franchisees and franchise advisers that the sector would have greater confidence in a Government operated registry. Further, the Government has heard that the franchise registry must be mandatory to maximise take-up and increase transparency across the sector.

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<sup>3</sup> Griffith University Asia-Pacific Centre for Franchising Excellence, 2016, *Franchising Australia 2016*.

<sup>4</sup> FRANData, FRANdata's Franchise Rating System, available online at <http://www.frandata.com.au/franchise-ratings/>



### *The Government's Response to the PJC report*

On 20 August 2020 the Government released its response to the PJC's *Fairness in Franchising* report. As part of the response, the Government is amending the Franchising Code of Conduct to improve disclosure, end of term arrangements, dispute resolution and to double the penalties available under the Code.

The Government also committed to consultation to inform its development of a public register of franchisors, to increase transparency in the sector and the ability of prospective franchisees to make an informed decision before entering a franchise agreement.

### **3. WHAT POLICY OPTIONS ARE YOU CONSIDERING?**

#### Option 1: Status Quo

*What does this option involve?*

Under this option, a registry will not be introduced. The franchise sector will continue to operate with the existing disclosure requirements under the Franchising Code of Conduct.

*What are the costs and benefits of this option?*

There would be no additional regulatory impact on the franchise sector if a registry was not introduced. 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.

However, the PJC report, as well as the consultation with the sector undertaken by the Franchising Taskforce and DISER, highlights the need for greater transparency in the sector. Establishing a registry will increase transparency of franchise documentation, and provide prospective franchisees with the opportunity to compare franchise systems' operational obligations and fee structures.

#### Option 2: Voluntary franchise disclosure registry

*What does this option involve?*

Franchisors will be encouraged to upload documents to a voluntary registry.

*What are the costs and benefits of this option?* This option minimises the regulatory impact on the franchise sector associated with the establishment of the registry.

However, the Government has heard from the sector that the registry must be mandatory to ensure take-up within the sector. FRANdata's Australian Franchise Registry has operated since 2014 and is free for FCA members, however, take-up is still relatively low.

A voluntary registry risks low engagement from the franchise sector which may affect a prospective franchisees' ability to compare and consider the available franchise offerings.

*Regulatory burden estimate (RBE)*

Assuming that the take-up of the voluntary registry would be similar to FRANdata's Australian Franchise Registry, it can be estimated that 13 per cent, or 156 of the 1,200 franchise systems may provide documentation to the registry in the first year.

In the first year of operation, the franchisor would need to familiarise themselves with the registry's requirements and processes, and receive legal advice on documentation for registry submission. It is therefore assumed that one hour of a lawyer's time, and two hours of a franchisor's time will be needed to submit documentation to the registry in the first year. For the franchisor, this includes engaging with their lawyer, creating a profile on the registry's portal and uploading documentation. Assuming that the average cost of a franchisor's time is \$39 per hour<sup>5</sup> and the average hourly cost of legal advice is \$500 per hour<sup>6</sup>, the voluntary registry would lead to a regulatory burden of  $\$39 \times 2 \times 156 = \$12,168$  plus  $\$500 \times 156 = \$78,000$  which equates to \$90,168 to franchisors in the first year.

In subsequent years, it could be assumed that franchisors would need less time to prepare documentation. It is also assumed that franchisors will not need the same level of legal advice, rather, they would have their lawyer review the documentation as part of their annual disclosure update process. Therefore it is assumed that half an hour of a lawyer's time to review the registry documents, and one hour of a franchisor's time will be needed to review and submit documentation to the registry from the second year onwards.

The most recent Franchising Australia report by Griffith University (2016) shows that over time new franchise brands open and old brands cease to operate. The latest data can be used to estimate that in a given year, 4 per cent of franchise brands may be new brands and 2 per cent of franchise brands have ceased to operate from the previous year<sup>7</sup>. Thus, the total growth of the sector is 2 per cent per annum, with 4 per cent of total brands being new.

Using the above, it is possible to estimate the number of new and continuing brands that will be utilising the voluntary registry, and how much regulatory burden this would result in for franchisors.

It is also expected that educational and awareness raising activities will deepen the sector's engagement with the registry. Over ten years, up-take may increase by 5 per cent each year. As engagement with the registry is voluntary, it is expected that participation may reach between 50-60 per cent. This growth in participation is reflected in the table below.

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<sup>5</sup> 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](#).

<sup>6</sup> DISER's legal area have advised that this is the market rate for legal advice.

<sup>7</sup> Based on the Franchising Australia 2016 report, which stated that Griffith University's franchisor database had a confirmed population of 1,124 franchisors in 2014 -- from 2014 to 2016, it was stated that 90 brands opened and 48 brands closed. Estimating this as an annual percentage figure, 45 of 1,124 franchisors = 4 % of franchisors are new brands in a given year and 24 of 1,124 franchisors = 2% of franchisors close in a given year. Therefore it can also be estimated that the franchise sector may grow by an average of 2% per year, if all other factors are considered to be held constant.

***RBE estimation from Year 2 to 10 of the voluntary franchise disclosure registry being in place***

Year	Estimated total brands utilising voluntary registry	Participation level of sector (%)	New franchise systems count	Continuing franchise systems count	Estimated regulatory burden on franchisors (\$)
Year 2 <sup>8</sup>	220	18	9	212	\$66,219
Year 3	287	23	11	276	\$86,306
Year 4	357	28	14	342	\$107,169
Year 5	429	33	17	411	\$128,833
Year 6	503	38	20	483	\$151,320
Year 7	581	43	23	558	\$174,655
Year 8	662	48	26	635	\$198,863
Year 9	745	53	30	715	\$223,970
Year 10	832	58	33	799	\$250,001

Note figures may not be exact due to rounding error.

Calculating the regulatory burden estimate as the average annual equivalent cost over the first 10 years of the policy, the RBE of the voluntary franchise disclosure registry is estimated below:

***RBE of a voluntary franchise disclosure registry (10 year average)***

	Business costs	Community costs	Individual costs	Total costs
<b>Total Costs</b>	\$147,751 <sup>9</sup>	\$ n/a	\$ n/a	\$147,751

The regulatory burden estimate (RBE) is calculated as the average annual equivalent cost over the first 10 years of the policy.

<sup>8</sup> The following shows the calculation method for the figures in the ‘Year 2’ row. Using the figures in the *Franchising Australia* 2016 report, it can be estimated that the number of franchise systems increases by 2% each year i.e.  $1,200 \times 2\% = 24$ . Since this model is voluntary, it is assumed that it will only be taken up by 13% of the sector in the first year but engagement will increase by 5% per year i.e. from the second year  $1,224 \times 18\% = 220$  franchisors will utilise the voluntary registry. The proportion of these brands that are new brands compared to the previous year can be estimated based on Griffith University’s figure of 4% i.e.  $220 \times 4\% = 8.8$ . Finally, assuming that it would take one hour of legal advice and two hours of a franchisor’s time for new registry entries, and half an hour of legal advice and one hour of a franchisor’s time for existing entries, the RBE of the voluntary registry can be estimated i.e.  $(9 \text{ franchisors} \times 1 \text{ hour} \times \$500 + 9 \text{ franchisors} \times 2 \text{ hours} \times \$39) + (212 \text{ franchisors} \times 0.5 \times \$500 + 212 \text{ franchisors} \times 1 \times \$39) = \$66,470$  (displayed as \$66,219 in the table above due to rounding error). The same calculations have been utilised for Year 3 onwards.

<sup>9</sup> This was calculated by adding the regulatory burden from year 1 to year 10 of the registry being in place, divided by 10 to determine the average annual RBE over a 10 year period.

### Option 3: Mandatory franchise disclosure registry (preferred option)

#### *What does this option involve?*

Under this option, the Government will introduce a mandatory franchise disclosure registry.

All franchisors will be required to annually upload key information about their franchise brands on the registry. The information will include or be drawn from existing disclosure documents<sup>10</sup>, template franchise agreements, and the new Key Facts Sheet<sup>11</sup>. Information uploaded on the registry will be publicly available.

#### *Education and awareness*

A range of education products to aid awareness and understanding of issues in the franchising sector will be developed. The intent is to equip franchisees, through education, with improved understanding of the importance of due diligence and other key information regarding operating a franchise.

Communication activities will be undertaken prior to and post release of the registry to ensure key franchisor personnel and other franchising sector participants are aware of the new obligations under the Franchising Code and how to comply.

#### *Compliance and enforcement*

The Government will rely on complaints, sector tip-offs and ongoing monitoring of the system to identify franchisors that do not engage with the registry or submit incomplete or misleading documentation. Once identified, franchisors will be contacted and encouraged to comply and be guided through the registry process.

If franchisors still fail to engage with the Registry, or do not remedy incomplete or misleading documentation, these cases may be referred to the ACCC for action under the Franchising Code in line with its compliance and enforcement policy.

#### *What are the costs and benefits of this option?*

The introduction of a franchise disclosure registry will benefit franchisees, franchisors, professional advisers, franchise associations and government bodies. Franchisees will have access to more information before and during the operation of their franchised business, which will improve their ability to conduct due diligence and make informed business decisions. Highly transparent and competitive franchisors may find the registry to be a useful recruitment tool to attract franchisees and provide further opportunities for job creation. Government, regulators, policy makers, industry associations, professional advisers, investors and researchers will have easier access to franchising information and sector trends for analysis.

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<sup>10</sup> The disclosure document includes important information that a franchisee should know before entering the franchise agreement.

<sup>11</sup> The Key Facts Sheet will be a simplified form of disclosure, which summarises the key facts and figures of the offer being made to a prospective franchisee. Although the final content of the Key Facts Sheet is yet to be settled, it could include high-level information on franchise fees, supplier arrangements, earnings and end of term arrangements etc.

### *Regulatory burden estimate*

The analysis for this option was conducted in a similar manner to Option 2 above, however the costing of this option covers a larger proportion of franchisors in the sector given this option is mandatory.

It is expected that full compliance will not be achieved in the first year. It is estimated that participation may begin at 80 per cent of all franchisors, which equates to 960 franchisors. Assuming that the average cost of a franchisor's time is \$39 per hour and the average hourly cost of legal advice is \$500 per hour, the mandatory registry would lead to a regulatory burden of  $\$39 \times 2 \times 960 = \$74,880$  plus  $\$500 \times 1 \times 960 = \$480,000$  which equates to \$554,880 to franchisors in the first year.

As with option 2, it could be assumed that franchisors would need less time to prepare documentation and would not need the same level of legal advice from year 2 of the registry's operation. Therefore it is assumed that half an hour of a lawyer's time to review the registry documents, and one hour of a franchisor's time will be needed to review and submit documentation to the registry from the second year onwards.

Using the assumptions of franchisor entry and exit and the calculation method from Option 2 above, the below figures can be estimated to calculate the regulatory burden of the mandatory registry from year 2 to 10 of the policy being in effect.

Full compliance with the mandatory registry will need to be achieved over two years through communications and outreach initiatives. This growth in participation is reflected in the table below, with participation increased from 80 per cent to 90 per cent by year 2, and then capping at the maximum possible participation rate of 100 per cent from year 3 onwards. While these participation levels may be optimistic, this demonstrates the highest estimates of regulatory burden. This ensures that the regulatory burden on the sector is over estimated rather than underestimated.

***RBE estimation from Year 2 to 10 of the mandatory franchise disclosure registry being in place***

Year	Estimated total brands utilising voluntary registry	Participation level of sector (%)	New franchise systems count	Continuing franchise systems count	Estimated regulatory burden on franchisors (\$)
Year 2	1102	90	44	1058	\$331,097
Year 3	1248	100	50	1199	\$375,243
Year 4	1273	100	51	1223	\$382,748
Year 5	1299	100	52	1247	\$390,403
Year 6	1325	100	53	1272	\$398,211
Year 7	1351	100	54	1297	\$406,175
Year 8	1378	100	55	1323	\$414,299
Year 9	1406	100	56	1350	\$422,585
Year 10	1434	100	57	1377	\$431,036

Calculating the regulatory burden estimate as the average annual equivalent cost over the first 10 years of the policy, the RBE of the mandatory franchise disclosure registry is estimated below:

***RBE of a mandatory franchise disclosure registry (10 year average)***

	Business costs	Community costs	Individual costs	Total costs
<b>Total Costs</b>	\$410,668	\$ n/a	\$ n/a	\$410,668

The regulatory burden estimate (RBE) is calculated as the average annual equivalent cost over the first 10 years of the policy.

**4. WHAT IS THE LIKELY NET BENEFIT OF EACH OPTION?**

**Option 1: Status Quo**

This option will not result in a change to the regulatory setting of the franchising sector. Therefore there will be no net benefit for this option.

**Option 2: Voluntary franchise disclosure registry**

Establishing a voluntary franchise disclosure registry is estimated to result in an annual regulatory burden of \$157,720, assuming that take-up for the registry starts at 13 per cent of franchise systems and increases by 5 per cent per year.

Although the regulatory burden of this option is lower than that of option 3, there is a risk that many franchisors will not engage with the registry and thus transparency and comparability of their franchise documents will remain limited.

This may result in the continuation of negative outcomes for some franchisees, which may have been avoided if there was greater transparency of franchise documents across systems.

For these reasons, it is likely that the voluntary registry would lead to a net benefit for the sector, however, the benefit is likely to be less than that of a mandatory franchise disclosure registry.

### Option 3: Mandatory franchise disclosure registry (preferred)

Establishing a mandatory franchise disclosure registry is estimated to result in an annual regulatory burden of \$410,668.

The PJC and Franchising Taskforce have 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.<sup>12</sup>*

The mandatory franchise disclosure registry may not be able to resolve such outcomes alone, but will be an important part of the suite of franchising reforms that aim to improve the power imbalance that currently exists in the sector.

The mandatory franchise disclosure registry will increase the amount of pre-entry disclosure in the sector and give prospective franchisees access to more information before they enter into a franchise agreement. Consultation has highlighted that better informed franchisees are often more likely to succeed and have less disputation with their franchisors. Although difficult to quantify, the benefit that franchisees receive from the registry are likely to outweigh the costs, if the ability to compare systems at the pre-entry stage allows franchisees to make better informed business decisions.

For this reason it is estimated that the mandatory franchise registry would have the greatest net benefit of the three options.

## **5. WHO WILL YOU CONSULT ABOUT THESE OPTIONS AND HOW WILL YOU CONSULT THEM?**

Following the release of the Government Response to the PJC *Fairness in Franchising* report, DISER held targeted stakeholder meetings from October 2020 to December 2020.

DISER met with franchisors, franchisees, franchise associations, professional advisers, franchise sector experts, and government agencies. The consultations provided

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<sup>12</sup> Submission 184 to the PJC inquiry.

opportunity to better understand concerns raised by franchisors in relation to commercial in confidence information and balance these concerns with the need for increased transparency to assist prospective franchisees.

The Australian franchise sector were generally supportive of the concept of a mandatory franchise disclosure registry. Stakeholders were generally supportive of the registry being operated by the Government but there was some differing views about the type of information that would be lodged on the registry.

Franchisees generally agreed with the recommendation of the Parliamentary Joint Committee *Fairness in Franchising* report. The report stated that standard form franchise disclosure documents and franchise agreements be publicly accessible on the registry to allow early access in the due diligence process. Recent consultation highlighted that:

- Currently, some franchisors withhold disclosure documents from potential franchisees as late as possible in the due diligence process to get buy-in. Many potential franchisees receive disclosure documents only after they have made payments to the franchisor and attended information sessions and meetings. At this stage they have become too invested to seek professional advice.
- Many potential franchisees assume/are led to believe that they only have 14 days to conduct due diligence and are unclear if any monies paid are refundable or not.

Franchisors agreed with lodging the standard form franchise disclosure documents and franchise agreements on the registry but cited privacy and commercial in confidence concerns about public disclosure. Franchisors suggested that these documents could be lodged with the registry owner but not made publicly accessible. Alternatively, franchisors could upload a summary document onto the registry that contained no sensitive information. Some franchisors suggested that the registry simply operate as a centralised list of franchise systems with basic franchisors details and no document requirements.

Government bodies who assist in facilitating dispute resolution for the franchise sector were consulted, and there was general agreement that disclosure documents and franchise agreements should be on the registry. They noted that commercially sensitive information could be redacted.

Franchising stakeholders, including franchise research and consulting firm Franchise Redress<sup>13</sup>, have indicated that a Government enforced but privately run registry would not be well regarded by the sector.

FRANdata's September 2020 Pulse Check Survey, which received responses from 109 Australian franchise systems, found that 92 per cent of respondents rated "security and preservation of confidentiality for those providing information (including inability of competitors to access information)" as having "high" or "very high" importance.

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<sup>13</sup> Franchise Redress, 2019, A Public Franchise Register Must Be Government Run, accessed online at <https://www.franchiseredress.com.au/2019/09/a-public-franchise-register-must-be-government-run/>



The Government has heard that prospective franchisees may reduce their due diligence if they perceive the registry to be a Government endorsement of a franchisor, or consider the registry the only information source to consult. This risk will be mitigated during implementation through clear caveats that being on the registry does not equal Government endorsement, and that it is important for prospective franchisees to look beyond the information contained on the registry (e.g. speaking to former franchisees, seeking financial statements not disclosed and obtaining professional advice).

## **6. WHAT IS THE BEST OPTION FROM THOSE YOU HAVE CONSIDERED?**

Building on the RIS “Changes to the Regulatory Framework Applying to the Franchise Sector”, this review and consultation process has tested suggested options against their respective costs and benefits.

The development of the RIS involved a thorough consultation process. The RIS recommended the implementation of a public register of franchisors supported by education measures designed to improve the education levels of franchisees prior to entering into franchising.

Recent consultations with key franchising bodies, including franchisors and franchisees, indicate general support for the implementation of a mandatory franchise disclosure registry supported by a compliance and enforcement regime that focuses primarily on education measures. Option 3 responds to problems so that it is likely the costs of taking action will be outweighed by the benefits. The proposal presents an opportunity to address the transparency issues in the sector identified by the PJC while limiting red tape and complexity. It is recommended that the Government reform franchising regulation in accordance with Option 3.

## **7. HOW WILL YOU IMPLEMENT AND EVALUATE YOUR CHOSEN OPTION?**

### Implementation and transition

As part of implementation, the Government will engage closely with the franchise sector about the information to be disclosed on the registry to ensure there are no unintended consequences while still meeting the policy objectives. Engagement with the sector will also consider the final platform design, education and awareness raising, and activities to support franchisor compliance. Other experienced regulators, such as the ACCC and the Australian Securities and Investments Commission (ASIC), will be consulted to ensure best practice approaches are applied to the operation of the registry.

The operational aspects of the registry will be informed through ongoing engagement with the sector.

### Evaluation

The Government will formally evaluate the effectiveness of the registry as part of a review of the Franchising Code prior to its sunset in 2025.