

The Treasury

Small and Family Business Division

Franchise Disclosure Register

Submission of:

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I applaud the proposed introduction of the Franchise Disclosure Register – an initiative I have argued for strongly in my submissions to Franchising Inquiries. In my submission to the 2017 Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct I noted that:

A particular initiative which would assist franchisees in exercising due diligence is for the *Code* to be amended to require Disclosure Documents to be lodged – I suggest with the ACCC which is the franchise sector regulator and has the power in any event to conduct *Code* compliance checks/random audits – and be publicly available to enable prospective franchisees to make meaningful comparisons. I am not suggesting an audit or approval regime as exists in several US states – although the ACCC's *Code* compliance check/audit powers may be seen as going some way towards this – and I am not suggesting that lodgement implies or suggests or confers regulatory approval of the franchise offered. I envisage simply a requirement that Disclosure Documents – that under the *Code* have to be prepared each year – be available to other than those who are in negotiations to acquire a particular franchise and to whom a Disclosure Document must be provided, albeit possibly as late as only 14 days before the contract is entered into or non-refundable money transferred. At this stage the time for mature consideration of alternative investment opportunities has probably passed.

A lodgement scheme would provide a range of other advantages. Franchise sector researchers, as well as governments and indeed the sector itself, is disadvantaged by the lack of empirical data. The current gold standard, the biennial Griffith University *Franchising Australia Survey*, which provides the most authoritative source of franchise sector statistics

relies on responses to a survey. Crucial sector data is extrapolated from the replies received – with a usual response rate of about 11%. This data is no doubt statistically valid but not always convincing – at least to this non-statistician. Even the most basic statistic – how many franchise systems in Australia – is a best estimate based on a range of sources when the most authoritative source is not available because Disclosure Documents do not have to be lodged with an appropriate authority. Every franchisor is required by the *Code* to create a Disclosure Document and it is not a big step to require lodgement of these. This would not only facilitate ACCC enforcement, academic research, government decision making, informed media commentary and franchise sector planning but would, and perhaps most importantly, facilitate better informed decision-making by prospective franchisees.

I believe that the lodgement of relevant information on an online electronic portal accessible via business.gov.au is much more appropriate than lodgement with the ACCC as I tentatively suggested in that submission.

Having argued strongly for many years for the lodgement of publicly accessible disclosure documents I now find myself in the unexpected position of questioning whether the object of the proposal which the September 2021 Guide and Exposure Draft - ‘improving the comparability and symmetry of franchising information’ - is best served by the lodging of disclosure documents. Disclosure documents of course, and properly, contain a substantial amount of relevant, necessary and important information to facilitate informed due diligence. The extent of the information contained therein is appropriate for an effective prior disclosure regime but not is not necessarily appropriate for a regime aimed at improving comparability. I am concerned that provision of full disclosure documents, albeit with the redaction of certain items, is not only not necessary at the ‘comparability stage’ but may indeed detract from their impact when a decision is made to join a particular system and the disclosure document in full is again provided along with the package of documentation required by clause 9(1A) -the agreement, the Disclosure Document, the Key Fact Sheet, the Code, the leasing documents.

My submission to the Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct noted that

Prior disclosure is the primary regulatory strategy for franchisee protection and is the most common regulatory mechanism in those countries which specifically regulate their franchising sector – only about a third of those in which franchising is a substantial business activity. It has nevertheless been argued that “mandated disclosure may be the most common and least successful regulatory technique in American law” (Ben-Shahar and Schneider, *More than you wanted to know. The failure of mandated disclosure*, Princeton University Press 2014 p3)... The phenomenon of information overload can limit the effectiveness of prior disclosure and there is increasing evidence – albeit largely anecdotal – that this is a current reality. Increasingly complex, wordy and voluminous disclosure documentation is a real concern.

I believe that the proposal to lodge disclosure documents unnecessarily adds to this information overload.

The recent Code amendments introduced the requirement of provision of a Key Facts Sheet and I believe that this model provides a more effective strategy to achieve the ‘comparability’ objective of

the Franchise Disclosure Register. Treasury's own documentation informs prospective franchisees that:

The Key Facts Sheet contains information specific to the franchise agreement you are proposing to enter into – but it does not cover everything you need to know. The Key Facts Sheet is a starting point – it is not a substitute for carefully reading the Disclosure Document and other documents given to you by the franchisor. The Key Facts Sheet should be used as a guide to reading the Disclosure Document.

The information provided in the Franchise Disclosure Register should similarly be the 'starting point' provided to facilitate 'comparability and symmetry of franchising information' and not as substitute for the Disclosure Document provided by the franchisor. The draft proposal anticipates that particular disclosure items will be redacted from the disclosure documents lodged on the portal. Similar redactions could of course be made if a Key Facts Sheet model was introduced.

In relation to the proposed redacted items, I believe that it is extremely unfortunate that a key, probably the key, item of disclosure relevant to comparability – that of franchise fees -would not be available to prospective franchisees on the Franchise Disclosure Register. For the purpose of comparison a key factor is what the franchisee has to pay to operate the franchise. The redaction of Item 14 information significantly reduces the efficacy of the Register. The Explanatory Memorandum explains that 'Since only one disclosure document per franchise system is to be published online, it is appropriate that franchise specific information be redacted'. But there is unlikely to be any variation in continuing franchise fees paid by franchisees –and, if there is, provision can be made for this as indeed it is in relation to marketing levy information under Item 15 which is not redacted. Item 15(1)(b) provides a precedent. It provides in relation to marketing levies for disclosure of 'how much the franchisee must contribute to the fund and whether other franchisees must contribute at a different rate'

My final comment relates to proposed cl 53A(2) which provides that the Register may contain 'information and documents relating to a franchise that are provided by a franchisor of the franchise for inclusion in the Register'. The purpose of the Register would be frustrated if became another marketing tool with franchisors competing for prospective franchisees attention with excessive promotional material. If franchisors are permitted to post additional material I believe that the franchisors should be constrained by prescribed headings and by the length of the posting.