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Dear Sir/Madam:

## Franchise Disclosure Register Exposure Draft

We are legal advisers for Australian and international franchise systems and make the comments below in relation to the Exposure Draft *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2021* ("Draft Regulation").

## The Government's commitment and objectives

We recognise that the Government has committed to a franchise registry. Its stated objectives are "*to improve transparency in the franchise sector*", to "*motivate high quality of disclosure practices, improving the comparability and symmetry of franchising information*" and 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*".

The Minister has confirmed that the Government maintains its objective of eliminating red tape and the Explanatory Statement to the Draft Regulation states that the proposed changes will not impose "undue burden upon the sector".

The Draft Regulation needs to be assessed against these objectives.

We comment as follows:

### 1. Use by prospective franchisees

Prospective franchisees will receive a disclosure document and key facts sheet once they approach a franchisor. They may be asked to sign a non-disclosure agreement before they

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receive them.  
In light of the  
stated  
objectives, the  
Draft  
Regulation  
seems to be  
intended to  
provide  
information to  
a prospective

franchisee who has yet to approach a franchisor: who is making very preliminary enquiries and looking to compare franchise systems, before deciding who to approach. The information they would need at that early stage would be limited, such as the level of investment likely to be required and information G about the nature of the business. In our experience, they would not then want or need a full disclosure document, which is given to them directly by the franchisor after they contact them in accordance with the requirements of clause 9 of the Code. o

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Disclosure documents can run to over a hundred pages, and a prospective franchisee may need professional assistance to fully understand them. We cannot see how providing a long and detailed disclosure document at this preliminary stage would assist a prospective franchisee to "*easily compare information about different franchise systems*".

The length and detail of the key fact sheet is more likely to be useful to them, but arguably even that is more than they would want or need at this stage.

## 2. Information to be Redacted

Much of the information in a disclosure document is confidential. The Draft Regulation permits limited redaction. It is highly likely that franchised and non-franchised competitors of a franchisor will access the information on the Register to assist them to better compete with the franchisor and to put pressure on suppliers. The potential anticompetitive impact may reduce the ability of franchise systems to compete on a level playing field with non-franchised businesses. This would be to the detriment of current and future franchisees.

At a minimum, we consider it important that the following additional information be redacted from disclosure documents on the Register:

- item 10.1(k)(ii) and (m): the names of suppliers providing rebates and how any sharing is calculated. This is highly confidential and would not be relevant to a prospective franchisee making preliminary enquiries who had not yet approached the franchisor. It would be information prized by competitors.
- item 14 establishment and ongoing costs are usually very detailed, essentially providing break-downs of a budget for the business. It is reasonable to provide an early stage prospective franchisee a headline number but the pages and pages of detail in item 14 of most disclosure documents would be extremely valuable to competitors.
- item 15.1(f) and (g): marketing fund spend in the last year and how it may be spent is highly confidential. It would be valuable to competitors.
- item 20: all earnings information should be redacted, as it is inherently bespoke. If it is a new franchise and is not site specific, the exclusion in clause 53C(4) would not apply, as the information does not relate to a particular franchisee or particular site.
- item 21.2: financial reports for the last 2 years. It would be unfair for these to be publicly available for franchisors who are not required to file them with ASIC.

This information would be available to the prospective franchisee after they approach the franchisor directly, which is the appropriate time for it to be provided.

### 3. Clarify the information on the Register

Clause 53C(5) or the Exposure Draft Explanatory Statement, should be amended to clarify exactly what is to be included on the Register. As drafted, clause 53C(5)(b) would allow the Secretary to require a franchisor to provide all information the Code requires the franchisor to give to a franchisee, which would include:

- franchise agreement;
- copy of the Code;
- key facts sheet;

2

- premises information if they are to be sub-leased (which makes no sense as this would be unique to each premises);
- Code information statement;
- lease, hire purchase agreement, security agreement, confidentiality agreement, non-compete agreement;
- marketing fund financial statements; and
- updated financials/solvency statement.

We assume this is not intended. It would be preferable to be clear on this important issue.

### 4. Increasing Red Tape

The Government's stated objective of reducing red tape is not supported by the requirement in clause 53F that a franchisor which is not granting new franchises must annually file an update with the Register providing the reason that it is not required to update its disclosure document. Surely, a one-off advice until they re-start franchising would suffice.

It does not assist potential franchisees for the Register to include information about franchisors who are not granting franchises. This is likely to mislead and confuse potential franchisees. Franchisors who are not granting new franchises should be permitted or required to remove themselves from the Register.

### 5. Unintended Consequences

5.1 The government's stated intention 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*" requires the information on the Register to be current and relevant to the intended audience.

5.2 The intended audience is a person comparing different franchise models and looking for generic information about franchises which may be available to them. It will not be relevant to them, and will be confusing, if information is included on the Register in relation to an opportunity which is no longer available, or would not be available to them.

For example, a foreign or Australian franchisor entered into a master franchise agreement some years ago. Their master franchisee is currently granting subfranchises. The master franchisee should register and lodge the disclosure

document it intends to give to potential sub-franchisees. Requiring the head franchisor to lodge the disclosure document it provided to the master franchisee some years ago makes no sense. Historical information is not relevant to a potential new (sub) franchisee. In addition, although item 7 of Annexure 1 of the Code requires a franchisor to give some details of the franchisor's arrangements with its master franchisor, the Code does not require a disclosure document given by a head franchisor to a master franchisee to be given to the master franchisee's

sub-franchisee. Requiring that disclosure document to be publicly available would have no purpose and would publicly reveal confidential information. Multiple listings on the Register for a franchise system would confuse potential franchisees. Master franchisees are inherently sophisticated businesses. They are highly unlikely to use the Register, or to rely on any information it contains. For these reasons, we recommend that master franchises should be excluded from registration under Part 5A.

- 5.3 Information which is not current is unhelpful and can be misleading. The initial obligation to register in clause 53C applies to any franchisor who gave a disclosure document on "or before" 30 June 2022. This would include disclosure documents given from when the Code commenced in 1998. Again, clogging the Register with irrelevant information which does not relate to a franchise currently available to a potential franchisee is unhelpful and will not advance the objective of helping a person "*to make informed decisions about franchise systems that they are considering purchasing*".

The obligation in clause 53C to initially register is not limited to franchisors who are granting new franchises. If they are not currently granting new franchises, clause 53C(2)(f)(ii) requires them to lodge "the most recently updated disclosure document relating to the franchise", which could be as old as 1998. So that the Register holds only relevant information, it would be preferable to:

- exclude franchisors who are not required to update their disclosure document under clause 8(7) from registering, or require their removal from the Register; or
- amend clause 53C to only require franchisors who give a disclosure document "on or after 1 July 2022" to register, with registration required by 31 October 2022 if the disclosure document is given between 1 July and 31 October 2022 and if given after that date, within 30 days after the date the disclosure document is given. Clause 53C(2)(f) could then read " a copy of the most recently updated disclosure document relating to the franchise".

If clauses 53C(2)(f)(i) and (ii) are both retained, paragraph (ii) should read: " the most recently updated disclosure document relating to the franchise, if later".

- 5.4 Some franchisors grant exclusive area franchise rights (in master franchise agreements or area development agreements) to a franchisee. It is very common that they would then enter into separate franchise agreements with the master franchisee or developer (or a related corporation) for each unit they open. If these are the only franchises granted, they will all be to the same master franchisee/ developer group. There is no opportunity available for a potential franchisee. The only opportunities are available to the current franchisee or its corporate group. It would be unhelpful to have information about them on the Register and they are irrelevant and confidential. As with the master franchise example given in 5.2 above, it would be better to exclude them, or ensure that they do not trigger an obligation to register.

