

Subject: Submission Derek Sutherland

Treasury

To whom it may concern

This is a supplementary submission to the previous submission I lodged earlier this week.

The sector is extremely concerned with the limited ability to redact information from a disclosure document lodged on the proposed registry. In particular whilst "personal information" must be redacted and information that relates to a particular franchisee or site under a number of items, it fails to allow a franchisor to redact confidential and sensitive information that should not be available on a searchable public register.

For example:

Item No
Issue
Submission
6.1- 6.5
Personal
information
about existing
franchisees
Currently it is unclear if the name, location and contact details under items 6.1 and 6.2 are personal information under ED53C(4) (a) (i).

Make it clear in the EM or ED53C(4) (a) (i) whether the name location and contact details of existing franchisees is covered and MUST be redacted under 53C(4) (a) (i) or (ii). This is because item 6.5 only relates to the table in Item 6.4 about former franchisees and not current also the franchisor is normally obliged NOT TO DISCLOSE the name location and contact details of a former franchisee if they have made a written request to them not to be disclosed

Recommendations: ED clause 53C(4) (a) (ii) should require or permit you to redact all information about a current or existing franchisee under the entire Item 6 (and not be limited to Item 6.5).

7

Master
franchises

It is currently NOT a code obligation for the franchisor to give a franchisee a copy of the master franchise agreement or master franchise disclosure document.

ED 53C(1) may have several unintended consequences.

Firstly, ED Clause 53C(1) (b) appears to work retrospectively (rather than in future effect by reference to "the copy is given on

or before 30 June 2022" there is no reference to "after".

Clarify whether the requirement for a disclosure document to be given "on or after 30 June 2022" rather than "before". In that way franchisors and master franchisees who had given disclosure documents years before 30 June 2022 but who were no longer franchising did not have to create a profile and lodge documents.

Secondly it will create a red tape burden on master franchisors to look for a disclosure document they gave out to a master franchisee and require a master franchisor to upload the Master Franchise Disclosure Document to the register even if the master franchise agreement was granted many years ago (given the Code was introduced Oct 1, 1998) in circumstances where it had to give out a disclosure document and there is only 1 Master franchise.

There may be master franchises out there where NO disclosure document was given because the old foreign franchisor single franchise exemption applied. It is not unusual for a master franchise to be for a term of 20 years or more. There are quite a number of foreign master franchisors who have appointed master franchisees for the entire of Australia and some of which may have entered into master franchise agreements before 1 March 2008 when the foreign franchisor exemption ceased to apply.

The obligation in ED 53C(1) would not seem to apply to a master franchisor if they had given out a disclosure document to a current master franchisee.

Some time ago there was also a requirement for the master franchisee to give its own disclosure document or a joint disclosure document to a prospective franchisee. The joint DD idea was removed in 2015.

The Code commenced to apply to franchise agreements entered into on and after 1 October 1998. Before that time there was a voluntary code of practice and a disclosure document of a limited kind was given. Treasury should also remember that the original code had an overseas franchisor exemption which started in 1998 but was removed on 1 March 2008.

Originally the application provision (clause 5(3)(a)) exempted a franchisor from complying with the disclosure requirements in circumstances where the master franchisor was resident, domiciled or incorporated outside Australia and who granted only 1 franchise or master franchise to be operated in Australia.

That exemption was removed in 2008 when the 1 March 2008 version commenced. When that exemption was removed foreign franchisors had to create a disclosure document for their master franchise and then update their disclosure document within 4 months after the end of the financial year even if they had only granted 1 Master franchise in Australia.

Recommendation:

1. Clarify whether the words "on or before 30 June 2022" should read "on or after 30 June 2022"
2. Consider exempting foreign master franchisors who have

granted only 1 master franchise or franchise in Australia from being required to register and create a profile in a way similar to the original foreign franchisor exemption. Potentially the information gathered at registration of the profile by the current Australian Master franchisee could ask some key pieces of information which it can answer (rather than the master franchisor).

Item 10
Disclosure of
rebates and
financial
benefits

The important thing for a franchisee to consider at a high level comparing franchise systems is the information in Item 10.1(j) whether a rebate or financial benefit will be paid to the franchisor , associate etc.

The information in Items 10.(k), (l) and (m) are commercially sensitive and should be one of the items that a franchisor "may redact" under ED 53C(4) (b).

Recommend that ED53C(4) (b) allow a franchisor to redact confidential or commercially sensitive information under Item 10.1(k), (l) and (m) entirely
Item 15.1(f)
and (g)

Marketing
Funds

ED 53C(4) (a) (ii) does not refer to item 15 at all and it should. The information contained in Item 15.1(f) and (g) is commercially sensitive and a franchisor should have the discretion to redact that information if a franchisor does not want that information disclosed on the register.

Recommend: Expand ED 53C(4) (b) to include these items as well so a franchisor MAY redact that commercially sensitive information

ED53C(4) (a) (ii)
Commercially
sensitive
information

This provision needs to exclude commercially sensitive information and not just "information relating to a particular franchisee or site"

For example Item 20 financial details - earnings information may not identify the individual franchisee but include ratios and sensitive commercial information. A prospective franchisee MUST receive it with the un-redacted version of the disclosure document however that information should not be available to the public.

Recommend: Amend the ED to give a franchisor the discretion to be able to redact "commercially sensitive or confidential information" under any of the Items of a disclosure document (or at least a list of items)

ED 53C(5)
Operations
Manual, annual
financial
statements and

audit reports

The ability of the Secretary to ask for documents or information needs to be clarified in the EM and restricted, to allay sector concerns that things such as confidential operations manuals will not be required to be given to the Secretary and made available on the register.

Similarly annual financial statements of the marketing fund and audit reports should not be required to be published on the register for the same reasons as information in Items 15.1(f) and (g) above This is despite the fact that they are required to be given to a franchisee under the Code.

The ACCC has the power to require them to be produced but it is commercially disadvantageous to a franchisor to have to disclose their marketing strategy to their competitors when their competitors are not required to disclose theirs.

This is my own submission and does not necessarily reflect the views of any organisation of which I am a member.

I am happy for it to be published.

Example Franchisor Registration Searchable Details

1.	Franchise Registration Number:	##allocated by registry##	
2.	Registration Date:	1 July 2022	
3.	ANZSIC Industry group:	E 30	
4.	Industry Codes:	301 Residential Building Construction 302 Non-residential Building Construction	
5.	Franchisor:	Name:	Bob the Builder Franchising Pty Ltd as trustee for the Bob the Builder Unit Trust
		ACN:	999 999 999
		ABN/ ARBN:	ABN 01 999 998 888
6.	Franchise System Name:	Bob's Builders	
7.	Franchisor's Financial Year:	1 July to 30 June	
8.	Offering franchises since:	1985	
9.	Number of current franchisees in Australia as at date of last filing:	100 as at 1 July 2022	
10.	Master Franchise:	No	
		If Yes, Name, ACN, ABN, ARBN or foreign equivalent of Master Franchisor	Not applicable
11.	Business model:	Franchise involves the franchisee operating a construction business under which the franchisee constructs commercial and residential buildings, and provides other services including renovations and remediation construction work.	
12.	Key Industry Licenses and regulatory requirements:	Registered Qld builders licence Approved insurance to conduct building work up to \$20,000,000	
13.	Details of core amounts payable to the Franchisor or associate:	<p>Initial Franchise Fee: <i>Amount:</i> Range High \$100,000 Low \$50,000 depending on size of territory <i>Payable:</i> on signing Franchise Agreement</p> <p>Monthly Franchise Fee: <i>Amount:</i> 5% of Gross Sales discounted to 4% of Gross Sales if prompt payment compliance discount of 1%. <i>Payable:</i> Monthly on 7th day of the Month by EFT</p> <p>Marketing Levy: <i>Amount:</i> 2% of Gross Sales <i>Payable:</i> Monthly on 7th day of the Month by EFT</p> <p>Transfer Fee:</p>	

Example Franchisor Registration Searchable Details

		<p><i>Amount:</i> Greater of 10% of total sale price or \$10,000 (plus GST) <i>Payable:</i> On transfer</p> <p>Renewal Fee: <i>Amount:</i> \$5,000 (plus GST) <i>Payable:</i> On or before Renewal</p> <p>Licence Fee: Payable to Bob the Builders Leasing Pty Ltd <i>Amount:</i> If Bob the Builders leasing Pty Ltd holds the head lease and subleases or licences the premises or display home to the franchisee then the Licence Fee equal to the amount of rent and outgoings and other payments payable under the Lease <i>Payable:</i> In accordance with Licence to Occupy 7 days before the amounts are payable by Bob the Builders Leasing Pty Ltd to the landlord under the lease</p> <p>Interest: <i>Amount:</i> 6 % of amount outstanding calculated daily <i>Payable:</i> Monthly until outstanding amount paid in full</p> <p>Reimburse franchisor's legal costs for preparing documents for new grant documentation : <i>Amount:</i> \$5,000 plus GST and disbursements <i>Payable:</i> Once cooling off period commences</p>
14.	Marketing or Other Cooperative Fund	<p>Yes /No: Yes</p> <p>General Purpose of the Fund: Marketing Fund to maximise general public recognition and patronage of the brand, products and services offered for the benefit of the Franchisor and franchisees overall.</p> <p>Who contributes to the fund: Franchisor in respect to its corporate offices and the Franchisees.</p> <p>Relevant Rate: <i>Marketing Levy Amount:</i> 2% of Gross Sales <i>Payable:</i> Monthly on 7th day of the Month by EFT</p> <p>Audited: Yes</p>
15.	Establishment costs:	<p>Acquire or lease approved commercial premises: Fit out of Commercial Office: Landlords Works: High \$50,000 Low \$35,000 Lessees Works: High \$175,000 Low \$50,000 Fixtures and fittings: High \$350,000 Low \$250,000 Vehicles: High \$100,000 Low \$25,000 Stock: Initial tools and construction supplies up to \$150,000, ongoing monthly cost High \$75,000 Low \$45,000</p>
16.	Guarantee and Indemnity or other security documents:	

Example Franchisor Registration Searchable Details

	<i>Does the agreement require someone to sign a personal guarantee and indemnity:</i>	Yes Details: The directors and Shareholders of the franchisee must guarantee the obligations of the franchisee and indemnify the franchisor	
	<i>Does the agreement require someone to sign a security agreement that will be registered on the PPSA:</i>	Yes Details: The franchisee must grant a security interest over the personal property of the franchisee in the form of the general security agreement to secure the obligations of the franchisee	
17.	Term and Renewal:		
	<i>At the end of initial term does the franchisor have to offer or negotiate a new agreement:</i>	Only if the franchisee exercises its conditional right to renew	
	<i>At the end of initial term and any renewal does the franchisor have to negotiate a new agreement or extend the term:</i>	No	
	<i>Typical Initial Term:</i>	10 years	
	<i>Does the franchisee have a right or option to renew (whether conditional or otherwise)</i>	Yes. A conditional option or right to enter into a new agreement to renew the franchise	
	<i>Typical Renewal Term</i>	<i>New Grant:</i> 1 renewal term of 10 years	
		<i>Transfer:</i> Only if existing agreement contains an option to renew	
	<i>Are there conditions attaching to exercising the right to renew</i>	Yes	
	<i>How much written notice must be given to exercise the right or option to renew:</i>	Not more than 9 months nor less than 6 months	
	<i>Form of agreement to sign on renewal:</i>	Exactly same commercial terms	No
		A new agreement on the franchisor's then current terms	Yes
18.	Training:		
	<i>Initial:</i>	Yes: <i>Details:</i> Training Fee of \$10,000 plus GST per person 2 weeks in head office before commencement 1 Week in Bob the Builders training facility, All costs of travel and accommodation, food and meals payable by franchisee	
	<i>Ongoing</i>	Yes. <i>Details:</i> Refresher training if required all costs of travel and accommodation, food and meals payable by franchisee	
19.	Site, Territory or Prime Marketing Area:		
	Office: Must operate from 1 approved commercial premises within a specified Territory and to provide goods and services to customers within the Territory Other premises: Must construct and use a Display Home within the territory at approved location		

Example Franchisor Registration Searchable Details

	Local Area Marketing: Must conduct local area marketing within the Territory		
	<i>Exclusivity:</i>	Yes conditional exclusivity	
	<i>Territory:</i>	Yes	Determined by Map and Postcodes
	<i>PMA:</i>	Yes	PMA is the Territory Franchisee must conduct local area marketing within the Territory
20.	Premises		
	<i>Does the franchisor have an interest in the lease of the premises occupied by the franchisee?:</i>	Yes; <i>If Yes, Details:</i> An associate of the franchisor , Bob the Builder Leasing Pty Ltd will usually hold the head lease of the premises and any Display Home and sublease or licence the occupancy right to the franchisee.	
	<i>What sort of interest is offered to the franchisee</i>	A sublease or licence the occupancy right	
21.	Supply arrangements:		
	<i>Does the franchisee have to acquire goods and services from the franchisor or associate?</i>		Yes
	<i>Does the franchisee have to acquire goods or services from suppliers nominated or approved by the franchisor?</i>		Yes
	<i>Can the franchisee acquire goods and services from suppliers of its choosing without the consent of the franchisor?</i>		Yes
	<i>Rebates and Financial Benefits:</i>		
	<i>Does the franchisor or its associate receive a rebate or financial benefit from suppliers to the franchise network</i>		Yes
	<i>Is the rebate or financial benefit shared with franchisees</i>		Yes
21.	Is the franchisee required to sell the entire range of goods and services if the franchise:	Yes	
22..	Internet and social media:	Franchisee must use franchisor's webpage and not set up its own website Franchisee can accept orders over the internet directed from franchisors webpage There are restrictions on the use of the brand and trade marks on the internet and social media platforms	
23..	Who owns the Intellectual Property:	All intellectual property is owned by Bob the Builder, LLC (USA) which licenses it to the franchisor	
24.	Restraint of trade:		
	<i>Is there a restraint of trade or similar covenant:</i>	Yes	
	<i>Who has to provide the restraint:</i>	All directors, shareholders and guarantors	
	<i>What is the nature of the restraint:</i>	Covenant to protect franchisor's goodwill	

Example Franchisor Registration Searchable Details

		<i>During Term:</i>	Yes
			<i>Details:</i> Must not during the Term directly or indirectly own, operate or have an interest in, (in any relevant capacity) another similar business offering the same or similar goods or services in the Territory
		<i>Post termination or expiration:</i>	Yes
			<i>Details:</i> Must not during the Restraint Period after the termination or expiration of the agreement (or transfer of the franchise) directly or indirectly own, operate or have an interest in, (in any relevant capacity) another similar business offering the same or similar goods or services in the Territory
		<i>Details:</i> <i>Restraint Period:</i> means after termination or expiration or transfer: A cascading maximum enforceable period of 18 months, 12 months or 6 months after the termination or expiration or transfer of the franchise <i>Restraint Area:</i> means within the territory Restrained from operating the same or similar business either inside or outside the territory during the Term and for the Restraint Period after termination or expiration <i>Relevant Capacity:</i> means in the capacity as a director, shareholder, beneficiary, unitholder, employee, consultant, contractor, franchisor, franchisee, licensor or licensee, lender, lessor or any other interest	
25.	Earnings information:		
	Will "earnings information" usually provided with the disclosure document	Yes/ No/ Sometimes <i>If Yes or sometimes, Details:</i> Not applicable	
Signed this 1 st day of July 2022		Information is authorised to by uploaded on the register by: Bob Builder Sole Director/ Secretary DIN: 123456 Bob the Builder Franchising Pty Ltd as trustee for the Bob the Builder Unit Trust	