

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Minister for Small Business**

#### *Competition and Consumer Act 2010*

#### *Competition and Consumer (Industry Code – Franchising) Regulations 2024*

The *Competition and Consumer Act 2010* (the Act) enhances the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.

Section 172 of 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.

Part IVB of the Act provides the legislative framework for industry codes. In particular, section 51AE of the Act provides for industry codes to be prescribed by regulation and declaring the industry code to be mandatory. Section 51ACB of the Act provides that a corporation must not, in trade or commerce, contravene an applicable industry code.

The *Competition and Consumer (Industry Code – Franchising) Regulations 2024* (the Regulations) prescribes a mandatory industry code regulating the conduct between franchisors and franchisees (actual and prospective). The purpose of the code is to regulate the conduct of participants in franchising, in particular to address the imbalance of power between franchisors and franchisees and prospective franchisees, improve standards of franchising conduct and practice and provide a fair and equitable dispute resolution procedure for participants in franchising.

The Regulations remake the *Competition and Consumer (Industry Codes – Franchising) Regulations 2014* (old Regulations) which sunsets on 1 April 2025.

In February 2024 the Government tabled Dr Michael Schaper's Independent Review of the Franchising Code of Conduct. The report made 23 formal recommendations and found the Franchising Code is generally fit for purpose but could benefit from some improvements. In response the Government agreed, or agreed in principle, to all 23 recommendations, including changes to the Code to: ensure the Code remains fit for purpose; simplify and streamline existing obligations; extend key protections; and promote best behaviour. The Regulations have been amended and restructured to implement recommendations that were agreed to in the Government response.

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

This instrument is subject to disallowance and sunseting.

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

The Regulations commence on 1 April 2025.

Details of the Regulations are set out in Attachment A.

**Details of the *Competition and Consumer (Industry Code – Franchising) Regulations 2024***

**Chapter 1 - Preliminary**

**Part 1 - Preliminary**

Section 1 – Name

This section provides that the name of the regulations is the *Competition and Consumer (Industry Code – Franchising) Regulations 2024* (the Regulations).

Section 2 – Commencement

Section 2 provides for the Regulations to commence on 1 April 2025.

Section 3 – Authority

The Regulations are made under the *Competition and Consumer Act 2010* (the Act).

Section 4 – Simplified outline of this instrument

Section 4 provides a simplified outline of the Code to note that it contains requirements around the behaviour of franchisors, franchisees and prospective franchisees. It also includes requirements around terms of franchise agreements, requirements for new motor vehicle dealership franchise agreements, requirements relating to the Franchise Disclosure Register, ASBFEO's functions under the Code, and civil penalty provisions.

The simplified outline is intended to assist readers to understand the substantive provisions and is not comprehensive. Substantive provisions should continue to be relied upon.

Section 5 – Schedule 2

Section 5 notes that the instrument specified in schedule 2, being the old Regulations, will be repealed according to its terms.

**Part 2 - Definitions**

Section 6 – Definitions

Section 6 outlines core definitions relevant to the Code. The note makes clear that some definitions are not included in the Regulations as they are already defined in the Act.

- **ABN** – refers to the definition of ABN under the *A New Tax System (Australian Business Number) Act 1999*.
- **Act** – this definition has been included to make clear that an Act referred to in the Regulations is the *Competition and Consumer Act 2010*.
- **ADR practitioner** – covers both conciliator or mediator.

- **ADR process** – covers both conciliation or mediation. Arbitration is dealt with separately.
- **ANZSIC division and subdivision** - means the division and subdivision codes for an industry that are specified in the Australian and New Zealand Standard Industrial Classification (ANZSIC) 2006, published by the Australian Bureau of Statistics, as existing on the day this instrument commences.
- **Associate** - for a franchisor means a person who is a director or related body corporate of the franchisor, or directly or indirectly controls at least 15 % of the issued voting shares of a proprietary company, or is a partner of the franchisor whose relationship with the franchisor is relevant because the person:
  - supplies goods or services to a franchisee; or
  - gives the franchisee a right to occupy premises, whether under a lease or otherwise; or
  - the person owns intellectual property used in the franchise system; or
  - the person is involved in market research, market testing, market development, sales promotion or management of the franchise system.
- **Code** – covers the Franchising industry code in Chapter 2 of this instrument.
- **Complainant** – see section 67.
- **Cooperatives National Law** - the appendix to the *Co-operatives (Adoption of National Law) Act 2012* (NSW) as applied by the listed pieces of State and Territory legislation.
- **Corporations Act** - this definition has been included to make clear that the Corporations Act refers to the *Corporations Act 2001*.
- **Disclosure document** – a document created in, or professed to be created in, compliance with section 19.
- **Engage in conduct** – engage in an act or omission.
- **Extend** - in relation to the scope of a franchise agreement, has been defined to mean a material change to:
  - (i) the terms and conditions of the agreement; or
  - (ii) the rights of a person under or in relation to the agreement; or
  - (iii) the liabilities that would be imposed on a person under or in relation to the agreement.

What is considered to be a material change to a franchise agreement should be determined having regard to all the circumstances of the case.

An extension of the term of a franchise agreement, occurs when the period of the agreement is extended, other than in a situation where the agreement is renewed.

- **Fair Work Act, Fair Work civil remedy provision, Fair Work-related offence provision, Fair Work serious contravention**

Definitions relating to the *Fair Work Act 2009* have been included due to the new requirements to disclose Fair Work serious contraventions and offences under section 33; and new grounds for termination of a contract by a franchisor under section 55.

- **Financial year** - means a period of 12 months in respect of which financial statements relating to the franchise are prepared for the franchisor. That is, the financial year is that which applies to the franchisor, as some franchisors do not operate on a standard Australian financial year of 1 July to 30 June.
- **Franchise** – includes a master franchise (defined below), subfranchise, interest in a franchise or the rights or obligations under a franchise agreement.
- **Franchise agreement** – see section 7.
- **Franchisee** – a person to whom a franchise is granted or participates as a franchisee, including a subfranchisor in its relationship with a franchisor and any subfranchisee of a subfranchisor.
- **Franchise system** – a business system in which a franchisor grants a franchise to a franchisee.
- **Franchisor** – broadly includes a person who grants a franchise, any subfranchisor relating to a subfranchisee, or a person participating in a franchise as a subfranchisor.
- **Fund administrator** – of a specific purpose fund refers to the franchisor or master franchisor or authorised associate who controls or administers the fund. This definition has been moved up from clause 15 of the old Regulations.
- **Industry code** – as defined in subsection 51ACA(1) of the Act, as a code that regulates the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.
- **Interest in a franchise** – covers a legal or beneficial interest in a franchise agreement, franchised business; or some form of shares, units, voting rights, capital or income in a corporation, trust or partnership that owns a franchised business.
- **Master franchise** - the franchise that grants a subfranchisor the right to grant or participate in a subfranchise.
- **Motor vehicle** – a vehicle that uses some form of power outside of human or animal power as a means of propulsion. This does not include vehicles used on railways or tramways.
- **Motor vehicle dealership** - the definition of ‘motor vehicle dealership’ has been updated to ensure that it captures service and repair work conducted by a motor vehicle dealership.

The definition of ‘motor vehicle dealership’ is assumed to cover all aspects of the franchisees’ business that have been required to be conducted by the franchisor, as

confirmed in the case *AHG WA (2015) Pty Ltd v Mercedes-Benz Australia/Pacific Pty Ltd [2023] FCA 1022*. However, the definition has been amended to clarify its scope.

Although the term ‘service and repair’ is quite broad and involves a range of different services provided by new motor vehicle retailers, independent mechanical repairs, motor body repairers and other automotive specialist trades, there is broad consensus in the industry about what service and repair encompasses.

The new definition captures service and repair work conducted by dealers or associated with a dealership agreement. ‘Service and repair’ within the definition refers to service and repair undertaken by businesses that buy, sell, exchange or lease motor vehicles.

The new definition does not capture service and repair businesses more generally as some brands have a separate service and/or repair arrangements that are not part of a dealer-franchise business.

- **New light goods vehicle** – see clause 4.5.5 of the Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005.
- **New passenger vehicle** – see clause 4.3 of the Vehicle Standard (Australian Design Rule – Definitions and Vehicle Categories) 2005.
- **New road vehicle** – see section 78 of the *Road Vehicle Standards Act 2018*.
- **New vehicle dealership agreement** – a motor vehicle dealership agreement for dealerships that predominantly deals in new passenger vehicles and/or new light goods vehicles.
- **Obligation to act in good faith** – see section 17.
- **Old regulations** – refers to the previous version of these Regulations which is the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014*.
- **Ombudsman** – refers to the Australian Small Business and Family Enterprise Ombudsman.
- **Personal information** – see the *Privacy Act 1988*.
- **Prospective franchisee** – now includes a person who may acquire a franchise business through a transfer of a franchise agreement; in addition to any person who may be looking to be granted a franchise.
- **Register** - means the Franchise Disclosure Register established under clause 53 of Schedule 1 to the old Regulations.
- **Renew** - renewal of a franchise agreement occurs when the franchisee exercises an option during the term of the agreement to renew the agreement.

Whether or not an extension or a renewal has taken place, depends on whether or not the franchisee has exercised an option. The definition of renewal does not exclude a conditional renewal or some level of negotiation between the franchisor and franchisee. Further, the agreement entered into by the parties does not have to be

identical to the agreement that already exists. The franchise agreement may contain provisions that place conditions, such as sales targets or licensing requirements, on the franchisee's right to exercise its option to renew the agreement.

- **Respondent** – see section 67.
- **Secretary** - means the Secretary of the Department that is administered by the Minister administering the *Australian Small Business and Family Enterprise Ombudsman Act 2015*.
- **Serious offence** – in the context of the termination provisions at sections 54 and 55, and the disclosure requirement under item 4 of Schedule 1, includes an offence under any Commonwealth, State or Territory law that a person would be liable for at least 5 years imprisonment, or any contravention of the Corporations Act.
- **Specific purpose fund** – see the explanation under section 30 below.
- **Subfranchisor** – a person who is a franchisee to a master franchise but a franchisor to a subfranchise.
- **Trade mark** – refer to the *Trade Marks Act 1995*.
- **Transfer** includes where:
  - (a) the agreement is terminated on the basis that a new franchise agreement is entered into between the franchisor and prospective transferee; or
  - (b) the franchisee's rights and obligations under the agreement are assigned to a prospective transferee; or
  - (c) the agreement contemplates a transfer in specified circumstances and those circumstances happen.
- **Virtual attendance technology** – any technology that allows virtual attendance of an ADR or arbitration process.

#### Section 7 – Meaning of franchise agreement

Section 7 replicates clause 5 of the old Regulations. Section 7 defines 'franchise agreement' for the purposes of the code. A franchise agreement is defined as a written, oral or agreement which has the following characteristics:

- One party (the franchisor or subfranchisor) grants the right to another person (the franchisee or subfranchisee) to conduct a business and is able to exert substantial control over the operation of that business,
- The business will be associated with a trademark or symbol owned, used or specified by the franchisor or an associate, and
- The franchisee is required to pay, or agree to pay, a fee before starting business.

A motor vehicle dealership is specifically identified as a 'franchise agreement'. 'Franchise agreements' include a transfer, renewal, and extension as well.

The code exempts landlord/tenant relationships, employee/employer relationships, partnership relationships, cooperative agreements recognised under State and Territory law and fractional franchises.

### **Part 3 – Mandatory industry code**

#### Section 8 – Mandatory industry code

Section 8 of the Code declares that for the purposes of section 51AE of the Act, the Code is a mandatory industry code.

#### Section 9 - Franchise agreements to which the Code does not apply

Section 9 provides that the Code does not apply:

- where another mandatory industry code prescribed under section 51AE of the Act, applies, except that the Code does apply to a franchise agreement to which the Food and Grocery Code applies; or
- where the goods and services supplied under the agreement are substantially the same as those supplied by the franchisee for at least two years immediately prior to entering into the agreement, and sales of which are unlikely to account for more than 20% of the franchisee's gross turnover for goods and services of that kind for the first year. However, under a franchise agreement where sales provide more than 20% of the franchisee's gross turnover for the goods or services for three consecutive years and the franchisee tells the franchisor of this, the Code will apply to the agreement.
- where a franchise agreement forms part of arrangements under which the franchisee is either a member of a co-operative that is entered on a register maintained under the Co-operatives National Law or *Co-operatives Act 2009*, as in force on 1 April 2025, or a member with voting rights of a mutual entity.

These provisions are intended to avoid regulatory overlap with other mandatory industry codes. They also avoid capturing certain pre-existing business relationships within the Franchising Code in circumstances deemed unnecessary.

#### Section 10 – Civil penalty provisions of the Code

Section 10 makes clear that civil penalty provisions set out in Chapter 2 of the Code is a civil penalty provision for the purposes of Part IVB and section 76 of the Act, which outline pecuniary penalty amounts.

The Code now includes civil penalty provisions for any substantive obligations placed on franchisors, to ensure that enforcement is consistent across the Code.

#### Section 11 - Reviews

Section 11 requires the Minister to conduct a review of the Code in five years to assess the role, impact and operation of this instrument. It is anticipated that the second review after the review conducted on 1 April 2030 would be conducted as part of the sunseting process when remaking the Regulations.

## Section 12 – Interaction with the *Privacy Act 1988*

Section 12 notes the disclosure of personal information in accordance with item 6(5) of Schedule 1, including the name, location, telephone number and email address of each franchisee is authorised in the situations mentioned in item 6(4) of Schedule 1 – that is where a franchise was transferred, ceased to operate, acquired by the franchisor, a franchise agreement was terminated or not extended, and any other event listed in that item.

## **Chapter 2 – Franchising industry code**

### **Part 1 – Preliminary**

#### Section 13 – Purpose of Chapter

Section 13 notes that Chapter 2 will contain the industry code for the franchising industry.

#### Section 14 – Purpose of Code

Section 14 updates the purpose of the Code. The new purpose of the Code is to:

- regulate the conduct of participants in franchising towards other participants in franchising, in particular to address the imbalance of power between franchisors and franchisees and prospective franchisees;
- improve standards of conduct and practice in the industry to minimise disputes through better disclosure of information, to inform decision making, and setting out requirements for franchise agreements; and
- provide a fair and equitable dispute resolution procedure for disputes arising under this Code or a franchise agreement.

The intent of amending the purpose is to emphasise that the Code's purpose is to provide protection for franchisees and prospective franchisees. The new purpose includes principle-based behaviours with a focus on improving standards of conduct in the sector through better transparency, and providing fair and equitable dispute resolution processes for when a dispute arises.

#### Section 15 - Functions of Australian Small Business and Family Enterprise Ombudsman (ASBFEO)

Section 15 outlines the functions of ASBFEO under this Code which includes:

- keeping a list of people who can provide Alternative Dispute Resolution services for the purposes of the Code;
- appointing ADR practitioners if requested by one or more of the parties;
- receiving information about ADR processes or complaint handling procedures of a franchise agreement that are dealt with under the Code, and providing statistical information to the Minister about disputes and complaints under the Code, and



- publishing the names of franchisors who refuse to engage in, or withdraw from, an ADR process for a dispute.

Section 15 operates with section 75 outlined below, allowing the ASBFEO to publicise the names of franchisors who do not meaningfully participate in ADR processes under the Code. Section 15 outlines functions of the ASBFEO in relation to ADR processes under the Code.

#### Section 16 – Amount of civil penalty for certain contraventions by bodies corporate

Section 16 specifies the penalties that apply to certain civil penalty provisions under the Code. The amount of a civil penalty for relevant provisions is the greater of:

- \$10,000,000;
- three times the value of a benefit (if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, has obtained directly or indirectly and that is reasonably attributable to the contravention); or
- 10% of the adjusted turnover of the body corporate during the period of 12 months ending at the end of the month in which the contravention occurred (if the Court cannot determine the value of the benefit).

This is authorised under subsection 51AE(2A) of the Act, which allows the Franchising Industry Code to prescribe higher penalties for contraventions of civil penalty provisions.

### **Part 2 – Obligation to act in good faith**

#### Section 17 – Obligation to act in good faith

Section 17 replicates clause 6 of the old Regulations. This section provides that the parties to a franchise agreement ‘must act towards another party with good faith’. A franchise agreement cannot limit or exclude the obligation to act in good faith (subsections 17(4) and 17(5)). A party may be liable for a civil penalty if it breaches the obligation to act in good faith.

Subsection 17(1) provides that the obligation to act in good faith refers to ‘good faith, within the meaning of the unwritten law from time to time’. That is, the meaning of good faith under the Franchising Code takes on the same meaning that exists at common law, as it continues to develop and evolve in Australia over time. The section aims to ensure that consistency is maintained in relation to the interpretation of good faith under the Franchising Code as at common law.

The obligation has not been defined, however, subsection 17(3) provides that, without limiting the matters it may consider in determining whether a party has contravened the obligation,

... the court may have regard to:

- (a) whether the party acted honestly and not arbitrarily; and
- (b) whether the party cooperated to achieve the purposes of the agreement.

These matters are broadly indicative of the doctrine of good faith at common law. One of the purposes of subsection 17(3) is to provide some guidance to assist franchise participants to understand the typical behaviours that the courts will likely consider are required under this obligation. They are not intended as a definitive statement of the common law obligation to act in good faith.

This is a broad obligation that aims to strengthen the commercial dealings between the parties, particularly given the unique, interdependent relationship and imbalance in bargaining power that typically exists in franchising. The obligation to act in good faith will apply to all parties to the franchise agreement, as well as prospective franchisees, during all aspects of the franchise relationship. This includes during negotiation, execution of the franchise agreement, renewal or extension of the agreement, dispute resolution and in relation to obligations arising under the Franchising Code.

A party will not be in breach of the obligation to act in good faith merely by acting in its own legitimate commercial interests (subsection 17(6)). The Franchising Code also provides that if the franchise agreement does not give the franchisee an option to renew the agreement or allow an extension of an agreement, this does not mean that the franchisor has not acted in good faith in negotiating or giving effect to the agreement (subsection 17(7)). Whether or not a party has breached the obligation should be considered having regard to all the circumstances of the case.

The obligation to act in good faith is not intended as a panacea for all potential misconduct in the franchising relationship. Further, it does not replace or amend the prohibitions contained in the Australian Consumer Law, such as those relating to unconscionable conduct, or other prohibitions in the Act more generally. Rather, it is intended to provide a flexible mechanism for addressing opportunistic and unfair conduct in franchising that may fall below the threshold of more serious misconduct provisions within the Australian Consumer Law or the Act.

In summary, section 17 provides certainty to franchise participants that the duty to act in good faith applies to franchise agreements, in accordance with its meaning at common law, and is extended to apply to all aspects of the franchising relationship, including during initial pre-contractual stages.

### **Part 3 – Requirements before entry into, renewal, extension or transfer of franchise agreements**

#### *Division 1 - Application*

##### Section 18 – Application of Part – master franchisors

Section 18 replicates clause 7 from the old Regulations. It exempts a master franchisor from compliance with this Part in relation to a subfranchisee. The effect of this is that a master franchisor does not need to provide a disclosure document to subfranchisees unless the master franchisor is a party to the franchise agreement. This reduces the burden on master franchisors, particularly where they have a direct franchising relationship with a subfranchisor only. A master franchisor will still be required to fully comply with the Franchising Code and provide disclosure to subfranchisors.

#### *Division 2 – Disclosure document*

##### Section 19 – Franchisor must create disclosure document

Section 19 requires a franchisor to create a disclosure document that gives prospective franchisees or franchisees information about the franchise (as set out in Schedule 1), so that they can make an informed decision on whether to enter into the franchise agreement. A failure to create a disclosure document may leave the franchisor liable to a civil penalty.

Section 19 updates the required content of a disclosure document to include the requirement for additional information on whether a franchisor will require the franchisee to undertake significant capital expenditure, including the justification for the expenditure. The purpose of this amendment is to provide greater transparency between franchisor and franchisees in respect of capital expenditure in the franchised business.

A disclosure document must state whether the franchisor will require a franchisee to undertake significant capital expenditure during the term of the franchise agreement and certain information about the expenditure. Section 57 sets out limitations around significant capital expenditure.

Section 19 also updates the Code to clarify that a disclosure document can be signed electronically.

#### Section 20 – Updating disclosure document – general

Section 20 clarifies the requirement for franchisors to update a disclosure document within four months from the first day of the current financial year. The franchisor must update its disclosure document by reflecting the current position of the franchise and, or, franchisor, as at the date of the update; and any relevant amendments made to the Code since the disclosure document was created or last updated.

A civil penalty may apply to a contravention of the section.

#### *Division 3 – Information statement*

#### Section 21 – Information statement to be given by franchisors

Section 21 replicates clause 11 of the old Regulations, with the added note to clarify that information can be provided in writing electronically.

Section 21 provides that a franchisor must give a prospective franchisee a copy of the information statement published on the Commission's website, as soon as practicable after the prospective franchisee formally applies or expresses an interest in acquiring a franchised business.

The purpose of the information statement is to provide simple, easy to understand information to a prospective franchisee of the risks and rewards in franchising before it makes the commitment to the relevant franchised business.

Section 21 also sets out certain timeframes for when a franchisor must give an information statement to a prospective franchisee.

A civil penalty may apply to a contravention of the section.

#### *Division 4 – Considering documents*

#### Sections 22 and 23 – Entering into, renewing, extending and transferring franchise agreements

Under section 22, the franchisor must give the following things to a prospective franchisee prior to entering into, renewing or extending a franchise agreement: a copy of the franchise agreement; a copy of the most recent disclosure document; a copy of the lease if relevant, and a copy of this Code. Any changes to the agreement prior to the agreement being executed should also be provided.

Section 22 now allows prospective franchisees to opt out of receiving disclosure documents from the franchisor, by written notice, if the franchise agreement is the same or substantially the same as the existing agreement and the business is the same or substantially the same as under the existing agreement.

Section 23 provides the same option to opt out of receiving disclosure documents where there has been a transfer of franchise agreement. A prospective franchisee should only be able to do opt out where a franchisee is the transferee of a second (or third or fourth etc.) franchise from *the same* franchisor. The prospective franchisee would be required to opt out in writing.

These changes reduce the regulatory burden for both parties and create a more efficient commercial transaction, particularly as they apply to existing franchisees. To ensure adequate protections for franchisees remain, the opt-out has to be in writing and franchisees will still have the ability to request a disclosure document at any point under section 31.

Under both section 22 and 23, a franchise agreement should not be agreed to until after a 14-day consideration period. The consideration period begins the latest of:

- the day the franchisor gives the documents required under subsections 22(2) or 23(2),
- the day a changed agreement is provided, or
- the day earnings information is provided if it is provided after the disclosure documents.

Subsection 22(8) has been updated to include an obligation on a franchisor to repay any payments made by the franchisee during the 14-day consideration period, if requested by the franchisee in writing. The franchisor must do so within 14 days of receiving the request. Failure to do so may incur a civil penalty. The intent of this is to discourage franchisors from requiring any payments during the consideration period, though they are not prevented from doing so.

The Code also no longer contains references to a key facts sheet. Previously franchisors were required to create, maintain or provide a key facts sheet. The intent of the removal of key facts sheets is to improve readability by removing repeated information and merging all requirements into one place, the Disclosure Document.

#### Section 24 - Form of documents

Section 24 ensures that the franchisee can request that documents mentioned in sections 22 and 23 be given in printed form, electronic form or both. The franchisor must comply with the request. This ensures accessibility for the franchisee.

#### *Division 5 – Statements to be received by franchisors*

#### Section 25 – Statements with respect to disclosure document and this Code

Section 25 replicates subclause 10(1) of the old Regulations by providing that before a franchisor can enter into, renew, transfer or extend the term or the scope of a franchise agreement, it has to receive a written statement from the franchisee, prospective franchisee or prospective transferee stating that it has received, read and had a reasonable opportunity to understand the disclosure document and this Code. The section now has a civil penalty provision attached.

#### Section 26 – Statements with respect to independent advice

Section 26 replicates subclause 10(2) of the old Regulations. Under section 26, a franchisor cannot enter into a franchise agreement until it receives:

- a signed statement from an independent legal adviser, business adviser or accountant that that person has provided advice to the prospective franchisee or the prospective transferee, or
- a signed statement by the prospective franchisee that the prospective franchisee has been given the relevant advice or is aware of the need to obtain the advice but has decided not to obtain the advice.

A civil penalty may be applied to a contravention of the section.

Section 26 does not apply to a renewal or extension of a franchise agreement, however, the franchisor can still require the franchisee to obtain one of the statements referred to in paragraph 26(1)(a).

### **Part 4 – Franchise agreements**

#### *Division 1 – Application*

##### Section 27 – Application of Part – master franchisors

Section 27 ensures that a master franchisor is not subject to the obligations under this Part in relation to a subfranchisee unless the master franchisor is a party to the franchise agreement.

Similar to section 18, the effect of this clause is to limit the disclosure a master franchisor is required to provide to a subfranchisee. This provides for a significant reduction in compliance and administrative costs for both master franchisors and subfranchisees.

A master franchisor is still required to comply with the Franchising Code in relation to a subfranchisor.

#### *Division 2 – Franchisor's obligations*

##### *Subdivision A – Disclosure obligations*

##### Section 28 – Copy of lease etc.

Section 28 replicates clause 13 of the old Regulations. Section 28 requires a franchisor to provide a franchisee with documents (copy of lease or agreement to lease) and information where the franchisee leases premises from the franchisor or an associate of the franchisor. This includes the provision of details on any incentives or financial benefits

that the franchisor or associate is entitled to receive as a result of the lease or agreement to lease. A failure to provide a franchisee with a copy of documents and information may leave the franchisor liable to a civil penalty.

The franchisor must also provide those documents within one month of the lease or agreement being signed by the parties. A failure to provide required documents within that time period may also leave the franchisor liable to a civil penalty.

A franchisor has a similar obligation where the franchisee occupies premises that are leased by the franchisor or an associate of the franchisor, without a lease. A failure to provide required documents or to provide them within the time period specified may leave the franchisor liable to a civil penalty.

#### Section 29 – Copy of other agreements

Section 29 replicates clause 14 of the old Regulations. Subsection 29(1) provides that where a franchise agreement requires the franchisee to enter into other agreements, as set out in subsection 29(2), the franchisor must give the franchisee a copy of those other agreements within the time frame provided for in subsection 29(3). A failure to provide the required agreements in accordance with subsection 29(1) may leave the franchisor liable to a civil penalty.

Subsection 29(3) provides that the document referred to in subsection (2) must be given at least 14 days before the franchise agreement is signed or, if it is not available, as soon as it becomes available.

#### Section 30 – Financial statements for specific purpose funds

Section 30 builds upon clause 15 of the old Regulations. Section 30 provides that there are certain financial administrative obligations placed on the franchisor and that these obligations apply to any payment arrangement where the franchisor requires the collection of money from franchisees for a specific common purpose. Franchisors may require franchisees to pay a fee to the franchisor for a specific purpose, such as marketing and advertising the brand or funding technology upgrades. When these funds are pooled together, they have previously been known as marketing funds or cooperative funds.

Previously, subclauses 15(2) and 15(4) applied financial administrative obligations on the franchisor where there is a franchise agreement that requires the franchisee to pay money into a marketing fund or other cooperative fund administered or controlled by the franchisor. Whilst it was clear that a marketing fund includes marketing and advertising funds, clause 15 did not provide a definition for 'cooperative fund' leaving some uncertainty as to when these obligations apply.

To increase clarity, the Regulations take a principles-based approach by introducing a new term 'specific purpose fund' which refers to any payment arrangement where the franchisor requires the collection of money from franchisees for a specific common purpose. This would include funds collected for marketing, for example, where the franchisor collects money from franchisees for the use of the franchisor's technology platform or funding technology upgrades. The obligations in section 30 should apply, regardless of what the money is used for so long as it's a specific common purpose for the fund.

Item 15 of Schedule 1 (disclosure document) has also been changed to require the franchisor to disclose whether the franchisor must spend part of the funds collected on the franchisees specific business each financial year.

The intention is that franchisees should know what they will receive from the fund collected. For example, a franchisee should know whether the franchisors are spending funds on advertising in every location where there are franchisees or just in some locations or whether certain technology upgrades will be provided to all franchisees or just a portion of the franchisees. Broadly, the principle is if a franchisee has to contribute money to a fund, they should be told meaningful information about how it will be used and whether they see personal benefit from it.

### Sections 31 and 32 – Updated disclosure documents

Sections 31 and 32 update clause 16 of the old Regulations on how a franchisee may request updated disclosure documents from a franchisor.

Section 31 notes that a franchisee can make a request in writing, once every 12 months, to the franchisor to provide a copy of the disclosure document.

Section 32 provides that where a franchisor is required under section 31 to provide a copy of the disclosure document relating to the franchise, the franchisor's disclosure document must reflect the position of the franchise as at the end of the most recent financial year when the request is made. The franchisor has two months to provide a copy of the updated disclosure document. There is nothing that prevents a franchisor from updating its disclosure document on a regular basis outside of this process.

The simplification of disclosure obligations in relation to existing franchisees is particularly relevant in the context of the new opt-out provisions. To ensure adequate protections for franchisees remain, in addition to requiring the opt-out to be in writing, franchisees will still have the ability to request a disclosure document at any point under section 31.

A failure to provide a disclosure document in accordance with the requirements of section 32 may leave the franchisor liable to a civil penalty.

The obligation to provide a disclosure document under sections 31 and 32 is also relevant to the provisions of the Australian Consumer Law relating to misleading or deceptive conduct.

### Section 33 – Disclosure of materially relevant facts

Section 33 replicates clause 17 of the old Regulations which sets out obligations on a franchisor to provide a franchisee or prospective franchisee with materially relevant facts that are not included in the disclosure document.

Subsection 33(1) provides that if updated financial documents (being those documents referred to in item 21 of Schedule 1) become available between when the prospective franchisee receives the disclosure document and when it intends to enter into the franchise agreement, then at least one of those financial documents must be given to the prospective franchisee as soon as reasonably practicable, but in any event before the franchise agreement is entered into. A franchisor may be liable for a civil penalty if it fails to provide a prospective franchisee with a copy of the updated financial documents.

The franchisor has the choice of which financial document to provide where more than one is available at the required time and providing that document satisfies the obligation in section 33.

Financial details, such as the franchisor's solvency statement and financial reports, are often critical to the prospective franchisee's ability to make a reasonably informed decision about the franchise. This is particularly the case if those updated financial details reveal a significant downturn in the franchisor's financial position that is not reflected in the disclosure document which was given to the franchisee.

This provision does not oblige the franchisor to create any new documents, it only requires that the relevant documents be provided to the prospective franchisee if they become available before the prospective franchisee enters into the franchise agreement. It does not prevent a prospective franchisee from requesting from the franchisor the most recently updated disclosure document or updated financial statements prior to entering into the franchise agreement.

Subsection 33(2) requires a franchisor to provide a franchisee with the additional information set out in subclause 33(3). Failure to disclose any of the additional information required by section 33 may leave the franchisor liable to a civil penalty.

Section 33 must be read in conjunction with item 22 of Schedule 1. Item 22 requires a franchisor to update any information given under section 33 if this has changed between the date of preparation of the disclosure document and the date when this was provided under the Code.

Section 33(3) has been updated to require the franchisor to disclose any proceedings by a public agency or a judgement against a responsible franchisor entity where there is an alleged contravention of subsection 558B(1) or (2) of the *Fair Work Act 2009*. Previously, proceedings and judgements related to the enforcement of a contravention under the *Fair Work Act 2009* was not expressly included in disclosure requirements however, this has been changed as it is of relevance for someone seeking to enter a franchise agreement.

*Subdivision B – Notification obligations (other than for new vehicle dealership agreements)*

#### Section 34 – Application of Subdivision

Section 34 replaces clause 17A of the old Regulations and provides that subdivision B does not apply to a new vehicle dealership agreement.

#### Section 35 – End of term arrangements

Section 35 updates clause 18 of the old Regulations to provide that a franchisor of a franchise agreement must notify the franchisee in writing, if the franchisor does not intend to extend the agreement nor enter into a new franchise agreement with the franchisee.

This is in addition to the franchisor's existing written notification requirements to advise whether it intends to extend the agreement or enter into a new agreement, at least 6 months before the end of the agreement (if it is for a period longer than 6 months) or at least one month before the end of the agreement (if it is for a period for less than 6 months).



Under subsection 35(3), if the franchisor intends to extend the agreement, it must advise the franchisee that it can request a disclosure document, subject to subclause 16(2).

Not providing notice of the franchisor's intentions or not advising the franchisee it can request a disclosure document, if the agreement is to be extended, may leave the franchisor liable to a civil penalty.

### *Subdivision C – Record keeping obligations*

#### Section 36 – Keeping certain information and documents

Section 36 updates clause 19 of the old Regulations to improve readability and also introduces penalty provisions for each subsection to ensure compliance with each disclosure requirement.

Under section 51ADD of the Act, if a corporation is required to keep, to generate or to publish information or a document under an applicable industry code, then the Australian Competition and Consumer Commission (ACCC) may require that such information be provided to it for investigation and auditing purposes.

Section 36 specifies that a franchisor must keep:

- each document, or a copy of each document, that it receives from a franchisee or prospective franchisee under the Franchising Code for a period of at least six years after the franchisor receives it; and
- any document that supports a statement made in the franchisor's disclosure document for a period of at least six years after the document was most recently provided to the franchisee or prospective franchisee.

This is in keeping with the limitation period on an action for a breach of the Code of six years. Section 36 does not affect a provision in any other legislation that requires a franchisor to keep a document for a longer.

The *Electronic Transactions Act 1999* (Cth) applies to any requirement to provide a document under the Code. Under section 36, where a franchisee provides a document electronically, the franchisor is required to keep the document, but it is up to the franchisor whether it keeps an electronic or a hard copy. If the franchisor is required to provide a document to the ACCC that it has received electronically, it may do so in electronic form.

The purpose of these provisions is to allow the ACCC to access necessary documents to conduct its audit and enforcement functions in relation to the Franchising Code, under section 51ADD of the Act. This strengthens the ACCC's ability to regulate the franchising sector, however, it does not require a franchisor to create a new document, and so should not significantly increase the administrative burden placed on franchisors by the extension of the audit power.

### *Division 3 – Terms of franchise agreements*

#### Section 37 – Franchisor's legal costs relating to franchise agreement

Section 37 updates clause 19A of the old Regulations, by including paragraph 37(2)(c) to provide that in exceptional circumstances where a franchisor and franchisee agree to the

passing on of legal costs of preparing the franchise agreement, that the fixed sum does not exceed reasonable and genuine legal costs.

Subsection 37(1) replicates subclause 19A(1) which prohibits franchisors from entering into agreements with clauses that have the effect of requiring or allowing the franchisor (or their associate) to require, a franchisee to pay all or part of the franchisor's legal costs relating to the preparation, negotiation or execution of the agreement or documents relating to the agreement.

Subsection 37(2) replicates subclause 19A(2) which provides an exception to this prohibition whereby franchisors may require a franchisee to make a payment, before the franchisee starts the franchised business, of a fixed sum with no evidence of the genuine legal costs incurred by the franchisor. Paragraph 37(2)(c) has been added to ensure that the fixed sum does not exceed reasonable or genuine legal costs.

#### Section 38 – Prohibition on release from liability

Section 38 replicates clause 20 of the old Regulations which prohibits a franchisor from requiring a franchisee to sign a general release from liability or a waiver of any representations made by the franchisor.

As this section imposes a substantive obligation on the franchisor, it has been updated to include a civil penalty with an increased scope of 600 penalty units to ensure enforcement is consistent across the entire Code.

#### Section 39 – Jurisdiction for settling disputes

Section 39 replicates clause 21 of the old Regulations. Subsection 39(2) prohibits a franchisor from entering into a franchise agreement with a clause that requires a party to bring proceedings or seek mediation of a dispute in any jurisdiction, other than that in which the franchised business is based.

As this section imposes a substantive obligation on the franchisor, it has been updated to include a civil penalty with an increase scope of 600 penalty units to ensure consistency in enforcement is across the entire Code.

#### Section 40 – Costs of settling disputes

Section 40 updates clause 22 of the old Regulations. Section 40 specifies that a franchise agreement must require the franchisee to pay the franchisor's costs in settling a dispute. Any such clause in an agreement will have no effect. The provision has been updated to make clear that this covers dispute resolution processes both under this Code or otherwise.

This section is intended to capture provisions in franchise agreements that require the franchisee to pay for costs associated with settling a dispute, such as the franchisor's legal costs, travel costs, mediator fees and venue hire. It is not intended to prevent the parties entering into an agreement in relation to the franchisor's costs at any time after the franchise agreement has been entered into.

#### Section 41 – Restraint of trade clause if franchise agreement not extended

Section 41 updates clause 23 of the old Regulations to improve readability and reframe the rule on restraint of trade clauses. The circumstances where a restraint of trade clause does not apply are largely maintained as they appear in the old Regulations, except that it now includes circumstances where a franchisee has sought to renew an agreement.

Under the old Regulations, a restraint of trade clause had no effect and was not enforceable. Section 41 now expressly prohibits a franchisor from entering into an agreement that includes a restraint of trade clause that would apply in the circumstances specified. This aligns with the broader approach in the Code of providing that franchisors must not include certain content in a franchise agreement. As a note, section 64 also prohibits a franchisor from relying on or purporting to rely on such a clause in the relevant circumstances.

As this section imposes a substantive obligation on the franchisor, it has been updated to include a civil penalty with an increase scope of 600 penalty units to ensure consistency in enforcement is across the entire Code.

The use of a restraint of trade clause under the circumstances within this section does not preclude the consideration of restraint of trade clauses under the Unfair Contract Terms regime.

#### Section 42 – Franchise agreement must provide for compensation for early termination

Section 42 expands the scope of clause 46A of the old Regulations, which previously only applied to new vehicle dealership agreements and applies it to all franchise agreements. Under section 42, all franchising agreements must include provisions for early termination of the franchise agreement in specific circumstances. This includes requirements for the franchisor to buy back or compensate the franchisee for all outstanding stock of the franchise purchased by the franchisee, where those things were specified by the franchisor and required in order to operate that franchise in line with the franchise agreement or any operations manual (or similar document). This would also include all essential specialty equipment, branded product or merchandise purchased or maintained by the franchisee that could not be repurposed for a similar business and any other thing that the franchisee was required to purchase or maintain for the purposes of the franchise.

For example, if a franchisee is intending to purchase a café franchise and the franchisor will require the franchisee to sell coffee only in branded coffee cups and using a specific brand of coffee beans the agreement must provide for how the franchisor will buy back or compensate for the outstanding stock of branded coffee cups. However, the franchisor would not be required to compensate or buy back the coffee beans as they are not specific to the franchise and could be repurposed for another business.

To ensure the existing protections for new vehicle dealerships continue to provide adequate coverage of the items unique to their businesses, paragraph 42(3)(d) retains the reference to ‘new road vehicles, spare parts and special tools’.

Failure to meet the requirements under section 42 may incur a civil penalty. This section works in conjunction with section 43 (see below).

#### Section 43 – Franchise agreement must provide reasonable opportunity for return on franchisee’s investment

Section 43 expands the scope of clause 46B of the old Regulations, which previously only applied to new vehicle dealership agreements and applies it to all franchise agreements. Under this section, franchisees must have a reasonable opportunity to recoup any capital investment required by the franchisor upon entering into or under the agreement. Franchisors must not enter into an agreement unless it provides for this, otherwise they may face a civil penalty.

What is considered a reasonable opportunity will be specific to the terms of each agreement, the costs paid by the franchisee and the length of the agreement. Franchisors are not expected to provide a contractual guarantee of a profit or the success of the franchisee's business. It is not intended to remove the inherent risks of running a business but is intended to ensure that the term of a franchise agreement is consistent with the level of capital investment required.

#### Section 44 – Discussion about significant capital expenditure disclosed in disclosure document

Section 44 updates clause 30A of the old Regulations. Under section 44, the franchisor has an obligation to discuss with the franchisee any significant capital expenditure disclosed in the disclosure document provided in subsection 19(4) and the circumstances in which the franchisor considers that the franchisee or prospective franchisee is likely to recoup the expenditure. The obligation in this provision is on the franchisor as the franchisor generally has the relevant knowledge about issues that might impact on the franchisee's or prospective franchisee's ability to recoup the expenditure.

A civil penalty may be applied for non-compliance with the provision.

#### *Division 4 – Transfer of franchise agreements*

##### Sections 45 and 46 – Franchisor's consent to transfer

Sections 45 and 46 largely replicate clauses 24 and 25 of the old Regulations with some structural changes. The definition of transferee has now been removed and included as part of the definition of prospective franchisee in section 6.

#### *Division 5 – Termination of franchise agreements in cooling off periods*

##### Sections 47 to 50 – Termination by franchisee

Sections 47 to 50 simplify obligations under the Code in relation to existing franchisees.

Section 47 updates clause 26 of the old Regulations to grant existing franchisees the ability to opt-out of the 14-day cooling off period, allowing them to operate the business immediately in certain circumstances (subsection 47(7)). This new option does not automatically apply, rather, the franchisee would be required to opt-out in writing.

This situation would arise when a franchise agreement comes to an end and is not renewed or extended. In this circumstance a franchisor might offer the franchisee a new agreement.

This should only apply if it is the same or substantially the same franchise and carrying on the same or substantially the same business. That is, it should not apply if it is an agreement in relation to a different franchise offering from the same franchisor. However, if the franchisee has a physical location for the franchise, such as a bricks and mortar store, and that location changes but the franchise business they carry on is the same, the opt out provision should apply.

Section 48 requires the franchisor to repay all payments made by the franchisee in relation to the franchise agreement, less any reasonable expenses arising out of the termination. They can only do this if reasonable expense amounts or the method for calculating them is set out in the franchise agreement.

Section 49 updates clause 26A of the old Regulations which applies to cooling off periods that apply when transferring an existing agreement. An existing franchisee that has a current franchising agreement with a franchisor will also be able to opt out of the cooling off period provided for in section 49. This situation would arise where a franchisee is the transferee of a second (or third or fourth etc.) franchise from *the same* franchisor. The franchisee would be required to opt out in writing.

This should apply where the transferred franchise is the same or substantially the same as the franchise the franchisee owns. For example, if a person owns one John's Gym, this provision would apply to the transfer of another John's Gym but not a John's remedial massage franchise.

Section 50 mirrors section 48 except it provides for a similar repayment obligation on the old franchisee to the new franchisee, if provided for in the transfer agreement.

#### *Division 6 - Termination of franchise agreements other than in cooling off periods*

##### Section 51 – Franchisee may propose termination at any time

Section 51 replicates clause 26B from the old Regulations with some structural changes.

Consistent with the policy decision to impose a civil penalty for all substantive obligations under the Code, a civil penalty provision has now been added for situations where the franchisor refuses to terminate the franchise agreement on the terms proposed or does not provide reasons for the refusal.

##### Section 52 – Termination by franchisor – breach by franchisee

Section 52 replicates clause 27 from the old Regulations with some structural changes and the added clarification that it applies in situations where sections 54 and 55 do not apply.

Section 52 sets out the procedure for termination of an agreement by the franchisor where the franchisee is in breach of the agreement and the franchisor proposes to terminate the agreement because of that breach. The franchisor must give the franchisee written notice that it proposes to terminate the agreement, advise it what must be done to remedy the breach and give the franchisee reasonable time to remedy the breach.

Failure by the franchisor to give the required notice may attract a civil penalty.

##### Section 53 – Termination by franchisor – no breach by franchisee

Section 53 replicates clause 28 of the old Regulations, with the added clarification that it applies in situations where sections 54 and 55 do not apply.

Section 53 sets out the procedure for termination of an agreement where there is no breach by the franchisee. This clause applies where the franchisor terminates the franchise agreement in accordance with the agreement, before it expires and without the consent of the franchisee. A franchisor must give notice, even if there is a provision in the franchise agreement that states that the franchisee consents to termination where it has not breached the agreement.

Under subsection 53(3) the franchisor is required to give the franchisee reasonable written notice of the decision to terminate the agreement and the reasons for it. What is 'reasonable' should be considered in all the circumstances of the case. Failing to

give the franchisee notice of the termination and reasons for the decision may attract a civil penalty.

#### Section 54 – Termination by franchisor with 7 days’ notice on grounds for which franchisee may not notify dispute

Section 54 is a new version of clause 29 in the old Regulations and implements a more streamlined approach to termination for ‘serious breaches’ of the franchise agreement, as represented by the grounds set out in subsection 54(1). The relevant grounds are circumstances where there has been a finding against the franchisee by a competent authority in relation to matters that represent serious misconduct by the franchisee.

Section 54 provides that the franchisor must not terminate the agreement on any of the grounds listed unless they have provided the franchisee 7 days written notice of the proposed termination and ground.

The full list of grounds include:

- the franchisee no longer holds a licence that is needed to carry on the franchised business;
- the franchisee becomes bankrupt, insolvent under administration or a Chapter 5 body corporate;
- the franchisee is deregistered by the Australian Securities and Investments Commission;
- the franchisee has been found by a court to have committed a Fair Work serious contravention of a civil remedy provision;
- the franchisee is liable for a civil penalty or has been convicted of an offence in relation to the employer sanction provisions under section 245AAA, 245AAB or 245AAC of the *Migration Act 1958*;
- the franchisee is convicted of a serious offence;
- the franchisee is convicted of the wage theft offence under subsection 327A(1) of the Fair Work Act, or a Fair Work related offence provision in another Act (for example the Criminal Code) that relates to an offence against that subsection.

Under the above grounds, a decision has already been made under a process external to the Code (for example, a decision has been made by the Australian Securities and Investments Commission if a company is deregistered or a court if the franchisee is convicted of one of the listed offences). As there has already been a decision in these made by an external decision-maker, franchisors will be able to terminate a franchise agreement after they have provided 7 days’ notice.

A franchisee does not have access to the dispute resolution process in these circumstances as the franchisee has already gone through the process of a decision being made in regard the items listed in subsection 54(1). This provision allows for an easier pathway to termination where there has been a serious breach by the franchisee and the franchise relationship would be unable to continue due to a decision made by another independent body.

The operation of this section does not prevent the franchises from accessing justice if they feel the franchisor should not be terminating their agreement as they can still apply to a court to stop the termination.

### Section 55 – Termination by franchisor on grounds for which franchisee may notify dispute

Section 55 maintains the termination requirements and dispute resolution process as set out in clause 29 of the old Regulations for those grounds specified in subsection 55(1). Those grounds include:

- the franchisee voluntarily abandons the franchised business or the franchise relationship;
- the franchisee operates the franchised business in a way that endangers public health or safety;
- the franchisee acts fraudulently in connection with the operation of the franchised business.

The franchisor must not terminate an agreement on one of the relevant grounds without adherence to the prescribed notice timeframes set out in subsection 55(3). A civil penalty may apply to a breach of these requirements.

Where a relevant ground applies, the franchisee can:

- request the matter to an ADR practitioner if there is no prompt agreement on how to resolve the dispute,
- if no agreement can be reached on the appointment of the ADR practitioner, either party can request the Ombudsman appoint one as soon as practicable after receiving the request.

Under this expedited process, the time periods set out in subsections 69(3)-(5) do not apply.

The parties can also request an expedited arbitration process. Despite the time period laid out in paragraph 77(4)(a) for the appointment of an arbitrator, the Ombudsman must appoint an arbitrator as soon as practicable after receiving a request.

### Section 56 – Requiring franchisee to cease operating franchised business on termination grounds

Under section 56, if the franchise agreement allows a franchisor to take such action, a franchisor can provide written notice to the franchisee requesting that they not operate the business or part of the business, because of a ground mentioned in subsections 54(1) or 55(1).

This supports a franchisor to manage the risk associated with a franchisee continuing to manage a franchise business in relevant circumstances, such as where the franchisee ceases to hold a necessary licence, or where there is endangerment of public health and safety.

### *Division 7 – Miscellaneous*

### Section 57 – Franchisor may require only certain significant capital expenditure

Section 57 replicates clause 30 of the old Regulations but with reference to the significant capital expenditure requirements that must be outlined in the disclosure document in accordance with subsection 19(4).

Section 57 prohibits a franchisor from requiring a franchisee to undertake significant capital expenditure in relation to the franchised business, except in the circumstances set out in subsection 57(2). The circumstances in which a franchisor may require significant capital investment are where the significant capital expenditure is:

- disclosed in the disclosure document that is given to the franchisee before entry into, renewal, or extension of an agreement, whichever is the most recent;
- to be incurred by all or a majority of franchisees and is approved by a majority of those franchisees
- incurred by the franchisee to comply with legislative obligations; or
- agreed by the franchisee.

#### Section 58 – Payments to and from specific purpose funds

Section 58 is largely the same as clause 31 of the old Regulations, but now with reference to a specific purpose fund and without reference to marketing funds. Section 58 sets out procedures relating to the management of fees paid by franchisees for a specific purpose. It requires the franchisor to maintain a separate account for these fees and, in relation to franchisor operated franchise units, pay fees on the same basis as other franchisees.

In conjunction with section 30, section 58 seeks to maintain a high-level of transparency about the management of specific purpose funds. Subsection 58(4) provides that fund fees may only be used to meet expenses that have been disclosed in the disclosure document, are legitimate specified purpose for the fund, have been agreed to by a majority of franchisees or are used to pay the reasonable costs of administering or auditing the fund.

The Code does not prescribe a method for how a majority of franchisees should be determined. This allows flexibility for franchise systems to make this determination in the most appropriate and equitable manner considering the circumstances of the franchise system.

#### Section 59 – Franchisor not to vary franchise agreement retrospectively without franchisee's consent

Section 59 replicates clause 31A of the old Regulations and now includes a civil penalty, consistent with other substantive obligations on franchisors in the Code. The section provides that a franchisor must not retrospectively vary a franchise agreement without the consent of the franchisee.

This section does not preclude the consideration of variation clauses under the Unfair Contract Terms regime.

#### Section 60 – Disclosure of personal information of former franchisees



Section 60 replicates clause 32 of the old Regulations. It provides that a former franchisee may give a written request to a franchisor not to disclose their personal information to a prospective franchisee, and the franchisor must not disclose that information. Further information can be found in the explanation under item 6 of Schedule 1 of this document.

Subsection 60(2) now has a civil penalty attached, consistent with other substantive obligations on franchisors in the Code.

Subsection 60(3) also provides that a franchisor must not engage in conduct intending to influence a former franchisee in relation to the disclosure of their personal information. A civil penalty attaches to such conduct.

#### Section 61 – Association of franchisees or prospective franchisees

Section 61 replicates clause 33 of the old Regulations. Section 61 prevents a franchisor from engaging in conduct that would restrict franchisees or prospective franchisees from forming an association for a lawful purpose. A franchisor may be liable for a civil penalty if it breaches this requirement.

#### Section 62 – Franchisor not to require franchisee to pay franchisor’s legal costs relating to franchise agreement

Section 62 provides that a franchisor or an associate of a franchisor must not require a franchisee to pay all or part of the franchisor’s legal costs relating to the franchise agreement except in the circumstances outlined in subsection 62(2).

Section 62 complements section 37, however section 62 prohibits the franchisor from passing on legal costs relating to a franchise agreement rather than prohibiting a franchisor from entering into an agreement that requires franchisees to pay legal costs. Failure to do so could incur a civil penalty, consistent with the other substantive obligations on franchisors in the Code.

#### Section 63 – Franchisor not to require franchisee to pay costs of settling disputes

Under section 63, a franchisor must not require a franchisee to pay costs incurred by the franchisor when settling a dispute. Failure to do so may incur a civil penalty, consistent with the other substantive obligations in the Code.

#### Section 64 – Franchisor not to rely on restraint of trade clause if franchise agreement not extended

Section 64 complements section 41 and provides that a franchisor must not rely on, or purport to rely on, a restraint of trade clause in the circumstances set out in section 41.

### **Part 5 – Resolving disputes**

#### *Division 1 – General*

#### Section 65 – Right to bring proceedings unaffected by this Part

Section 65 replicates clause 37 of the old Regulations. Section 65 specifies that Part 5 of the Franchising Code does not affect a party’s right to bring legal action under the agreement or otherwise.

## Section 66 – Internal complaint handling procedure

Section 66 replicates clause 34 of the old Regulations. Section 66 requires a franchise agreement to include a complaint handling procedure, which contains the obligations set out in subsections 69(1) to (4) and section 71. These are the minimum standards which must apply to the franchisor's internal complaint handling procedure.

## Section 67 – Resolving disputes

Section 67 replicates clause 35 of the old Regulations. Section 67 allows a party to an agreement to commence a dispute resolution procedure, either under the procedure set out in the agreement or under the procedure set out in Division 2 of Part 5.

This means that a party to the franchise agreement may choose not to follow the complaints handling procedure set out in the agreement, but rather utilise the procedure in the Franchising Code.

## Section 68 – When a party is taken to be trying to resolve a dispute

Section 68 is largely the same as clause 36 of the old Regulations. Section 68 describes behaviours a party should exhibit if it is to be taken to be trying to resolve the dispute in a reconciliatory manner.

## *Division 2 – Code complaint handling procedure*

### *Subdivision A – Notification of dispute*

## Section 69 – Notification of dispute

Section 69 replicates clause 40A of the old Regulations. It sets out the requirements of a dispute notification and steps for how the parties should try to resolve the dispute.

Section 69 requires appointments of an ADR practitioner by the Ombudsman to occur within 14 days of a request if the parties cannot agree on an ADR practitioner. This is intended to avoid delay in the initiation of dispute resolution proceedings.

## Section 70 – Similar disputes between 2 or more franchisees and one franchisor

Section 70 replicates clause 40B of the old Regulations. Section 70 provides a procedural framework for the initiation and conduct of dispute resolution processes involving multiple franchisees that have a corresponding dispute with a franchisor. This section clarifies that the Code allows for multi-party dispute resolution processes to be undertaken by agreement, by referral to an ADR practitioner, or by request to the Ombudsman.

### *Subdivision B – ADR process*

## Sections 71 to 75 – ADR process

Subdivision B broadly replicates the ADR process from the old Regulations but now includes section 75 which provides ASBFEO with the power to publicise the names of franchisors who refuse to engage in the ADR process.

Under section 75, ASBFEO may publicise the names of franchisors who refuse to engage in or withdraw from the ADR process. The Ombudsman does not have the power to

publish the specific outcomes of ADR as there are legal obligations around disclosure of what has been agreed to in the ADR process. The provision is based on section 74 of the *Australian Small Business and Family Enterprise Ombudsman Act 2015*, which broadly gives ASBFEO a similar power for general disputes.

The Ombudsman can be publish franchisors names in any way that it thinks appropriate to draw attention to the behaviour of the franchisor. This change intends to encourage franchisors to meaningfully participate in the ADR process.

Sections 71 and 72 replicate clause 41A of the old Regulations, restructured into two sections. Section 72 clarifies that the parties are taken to attend an ADR process, if a person who has authority to settle the dispute represents the party.

The remaining provisions are consistent with the old Regulations. Section 73 replicates clause 41B of the old Regulations. Section 74 replicates clause 41C of the old Regulations.

### *Subdivision C – Arbitration*

#### Sections 76 to 79 – Arbitration process

Section 76 replicates clause 43A of the old Regulations. Section 76 allows for a complainant and respondent to agree in writing to resolve disputes by arbitration. In some instances, the parties might agree that the most appropriate and cost-efficient mechanism to resolve a dispute may be to engage in a determinative process outside of the court system.

Section 77 replicates clause 43B of the old Regulations. The object of this provision is to ensure that certain minimum standards of conduct are observed throughout the process. The clause is based on the arbitration process set out in the Dairy Code of Conduct. The clause requires all parties to attend an arbitration and the arbitrator to give notice of the commencement and successful completion of an arbitration (if applicable). This is to ensure transparency and certainty for parties to a dispute who agree to have the dispute resolved by arbitration.

Section 78 replicates clause 43C of the old Regulations. Section 78 states that the arbitrator must terminate the arbitration in accordance with this section if the parties mutually request the arbitrator to do so. The arbitrator is then to issue a certificate relating to the termination of the process and provide it to the parties and the Ombudsman as a record of the attempt to resolve the dispute.

Section 79 replicates clause 43D of the old Regulations. Section 79 gives parties a greater degree of certainty regarding the allocation of the costs of arbitration. Unless the parties agree otherwise, each party is to pay half of all reasonable costs associated with the conduct of the arbitration, and each is to bear their own costs of attending.

### *Subdivision D - Confidentiality*

#### Section 80 – Confidentiality requirements

Section 80 replicates clause 44A the old Regulations. Section 80 requires parties to a dispute arising under the Code to observe confidentiality requirements relating to resolving the dispute. This section reflects best practice by reinforcing the enforcement of ‘without prejudice’ clauses and recognises that a substantial benefit of commercial arbitration is its confidential nature.

## **Part 6 – New vehicle dealership agreements**

Part 6 partly replicates Part 5 from the old Regulations. Sections 46A and 46B have been moved to a different part of the Regulations to apply more broadly than to just new vehicle dealership agreements.

### *Division 1 – Preliminary*

#### Section 81 – Application of Part

This section replicates clause 46 of the old Regulations and provides that Part 6 applies to new vehicle dealership agreements.

### *Division 2 – End of term obligations*

#### Section 82 – Notification obligation – franchisor

This section replicates clause 47 of the old Regulations. It sets out the obligation on a franchisor to notify a franchisee whether they intend to extend or enter into a new agreement and the timeframes that apply to the notification.

Subsection 82(4) provides that if the franchisor intends to enter into a new agreement, the franchisor's notice must include a statement that the franchisee may request a disclosure document.

Subsection 82(5) provides that if a franchisor does not intend to extend or enter into a new agreement, the notice must provide reasons.

#### Section 83 – Notification obligation – franchisee

This section replicates clause 48 of the old Regulations. It sets out the obligation on a franchisee to notify a franchisor whether or not they intend to renew or enter into a new agreement with the franchisor and the timeframes that apply to the notification.

Subsection 83(4) provides that where the franchisee does not intend to renew or enter into a new agreement, the notice must include reasons.

#### Section 84 – Obligation to manage winding down of agreement

This section mostly replicates clause 49 of the old Regulations, except that a note points to the good faith obligations of the parties under section 17, instead of a requirement to cooperate as set out in subclause 49(3) of the old Regulations.

The franchisor and the franchisee are obligated to cooperate to develop and implement a written plan for winding down the dealership, including management of the franchisee's stock.

A civil penalty has been included for this provision consistent with general approach of imposing a penalty for substantive obligations.

### *Division 3 – Resolving disputes*

#### Section 85 – Franchisees may request multi-franchisee dispute resolution

This section replicates clause 52 of the old Regulations. It provides that where 2 or more franchisees have a dispute of the same nature with a franchisor, they may request multi-franchisee dispute resolution.

A note refers to the general provisions relating to resolving disputes in Part 5.

## **Part 7 – Franchise Disclosure Register**

### *Division 1 – Keeping and content of Register*

#### Section 86 – Secretary to keep Register

This section has been drawn from clause 53 of the old Regulations and removes subclause (2) as this is redundant. Subclause (2) previously specified that the Register, established by the Secretary, is to be known as the Franchise Disclosure Register.

The intent is for the Secretary to keep the Register that has been established and is known as the Franchise Disclosure Register.

#### Section 87 – Contents of Register

Section 87 outlines what contents must, and what contents may, be included in the Register with respect to each franchise.

This section mostly replicates clause 53A of the old Regulations, subject to structural changes to subsections (2) and (3).

Subsection (4) has been amended to exclude reference to the “key facts sheet created and maintained by the franchisor” under clause 9A the old Regulations.

#### Section 88 – Secretary may correct clerical errors and remove, update and replace certain information and documents

This section replicates clause 53B of the old Regulations and sets out the circumstances in which the Secretary may correct clerical errors and remove, update and replace information and documents.

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

#### Section 89 – Initial obligation to provide information for inclusion in Register

This section replicates clause 53D of the old Regulations. It sets out requirements for franchisors to provide certain information for inclusion in the Franchise Disclosure Register, that the information must be provided in a form and manner approved by the Secretary and the timeframe within which the information must be provided.

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.

Clause 53C from the old Regulations has been omitted as it was a transitional provision for franchisors that gave a disclosure document on or before 31 October 2022 and will no

longer apply to the current year. The new provision notes that it will only apply if the franchisor has not previously provided the relevant information under this section or clause 53C or 53D of the old Regulations.

#### Section 90 – Obligation to annually update or confirm information included in Register

Section 90 replicates clause 53E from the old Regulations. It sets out requirements for franchisors to confirm information which remains current and provide updated information for inclusion on the Register where information is incorrect, out-of-date or has not previously been provided.

A civil penalty attaches to the obligation to provide information, to encourage compliance. This is consistent with the approach and penalties attached to other core obligations of the Code.

Subsection 90(4) provides that the Secretary may determine, through a legislative instrument, specific information that is required to be included in a disclosure document by a franchisor.

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.

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

##### Section 91 - Redacting certain information from documents

Section 91 replicates clause 53F from the old Regulations and sets out a requirement for the franchisor to redact personal information (as described in subsection 87(3)) from a document to be included in the Register or a document accessible at a link included in the Register. A civil penalty attaches to that requirement.

Subsection 91(3) provides that a franchisor may also remove information of a commercial nature from a document provided for inclusion in the Register. This 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 information by agents*

##### Section 92 - Agents may provide or give information

Section 92 replicates clause 53G from the old Regulations. Section 92 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 (such as 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*

##### Section 93 – Delegations by Secretary

Section 93 replicates clause 53H from the old Regulations. Section 93 allows the Secretary to delegate all or any of their functions or powers in Part 7 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 administering legislation within government and supports efficient maintenance of the Register.

### **Chapter 3 – Application, saving and transitional provisions**

#### **Part 1 – Provisions relating to this instrument as made**

##### Section 94 – Saving – *Competition and Consumer (Industry Codes – Franchising) (Additional Information Required by the Secretary) Determination 2022*

Section 94 ensures that the *Competition and Consumer (Industry Codes – Franchising) (Additional Information Required by the Secretary) Determination 2022* remains in force even after the old Regulations are repealed for continuity.

## **Schedule 1 – Disclosure document for franchisee or prospective franchisee**

Schedule 1 replicates Annexure 1 of the old Regulations with some amendments.

### **Item 1 – First page**

Item 1 outlines what should be included on the first page of the disclosure document including certain information and a prescribed statement about the disclosure document and the franchising relationship.

Item 1 has been updated to remove references to the Key Facts Sheet which will no longer be used. It also makes clear that a person can request a disclosure document in either electronic *or* physical form by including a reference to the *Electronic Transactions Act 1999*.

### **Item 2 – Franchisor’s details**

Item 2 outlines what details of the franchisor’s business should be included such as the names of associates of the franchisor and its relationship with those associates.

### **Item 3 – Business experience**

Item 3 requires details of the business experience of the franchisor and each person mentioned in item 2, over the previous ten years.

### **Item 4 – Litigation**

Item 4 requires disclosure of litigation involving the franchisor, a director of the franchisor or an associate of the franchisor.

Item 4 has been updated to require disclosure of any proceedings or judgments against a responsible franchisor entity for contravention of section 558B(1) or (2) of the *Fair Work Act 2009*. Previously, proceedings and judgements related to the enforcement of a contravention under the *Fair Work Act 2009* was not expressly included in disclosure requirements however, this has been changed as it is of relevance for someone seeking to enter a franchise agreement.

### **Item 5 – Payments to agents**

Item 5 requires details of payments by the franchisor ‘in connection with the introduction or recruitment of a franchisee’.

### **Item 6 - Existing franchises**

Item 6 requires franchisors to provide contact details of franchisees, and details of franchised businesses which were transferred or ceased to operate during the previous three years in the disclosure document. The intention of this is to assist a prospective franchisee in conducting their due diligence before entering into an agreement. Item 6 has been updated to clarify that the ‘contact details’ required to be the former franchisees’ name, location, telephone number and email address.

Section 60 has been updated to ensure that the legislation is clear that the contact details provided to a franchisor by a franchisee is personal information. Disclosure of this information is authorised for the purposes of paragraph 6.2(b) of Australian Privacy



Principle 6, however a franchisor must not disclose a former franchisee's information if they have received a written request not to do so.

#### Item 7 - Master franchises

Item 7 requires information about the master franchisor and master franchise agreement, where the franchisor is also a subfranchisor.

#### Item 8 – Intellectual property

Item 8 requires details of intellectual property, which includes 'any trade mark...patent, design or copyright that is material to, the franchise system'.

#### Item 9 – Franchise site or territory

Item 9 has been updated to include information that was previously included in the Key Facts Sheet but will now be required to be included in the disclosure document instead. This will require information about whether the franchisee could face competition from businesses not associated with the franchisor.

#### Item 10 – Supply of goods or services to a franchisee

Item 10 requires details of the franchisor's requirements around the supply of goods or services to a franchisee. Item 10 has had a minor consequential change to refer to the new term 'specific purpose fund'.

#### Item 11 – Supply of goods or services by a franchisee

Item 11 requires details of the 'franchisor's requirements for the supply of goods or services by a franchisee'.

#### Item 12 – Supply of goods or services – online sales

Item 12 requires details of online sale of goods and services by the franchisor or an associate of the franchisor and franchisees.

#### Item 13 – Sites or territories

Item 13 requires the franchisor's policy for selection of the site or territory of the franchised business, including information about a franchised business for that site that ceased to operate.

#### Item 14 – Significant capital expenditure, and payments other than payments to agents

Item 14 has been updated to require the franchisor to disclose the rationale, amount, timing, nature, outcomes, benefits and risks of any significant capital expenditure that may be required of the franchisee as outlined in section 8. Item 14(9) notes that if two or more of items 14(1A), 14(1B), 14(1), 14(3) and 14(6) apply to a payment, that information disclosed as a requirement of those items, do not need to be repeated.

#### Item 15 – Specific purpose funds

Item 15 has been updated to refer to 'specific purpose funds'. This item requires the franchisor to disclose certain details for each specific purpose fund to which the franchisee

is required to contribute. It also requires the franchisor to disclose whether the franchisor must spend part of the funds collected on the franchisee's specific business each financial year – as outlined in item 15(i). Item 15(d) notes that subsection 30(2) requires the fund administrator to prepare annual financial statements for the specific purpose fund for each financial year and to provide a copy of the statement.

#### Item 16 – Financing

Item 16 requires details of the 'material conditions' of any financing arrangement offered to the franchisee by the franchisor for the establishment or operation of the franchised business.

#### Item 17 – Unilateral variation of franchise agreement

Item 17 requires details of the circumstances in which the franchisor has unilaterally varied a franchise agreement in the last three financial years and the circumstances in which it may unilaterally vary an agreement in the future.

This provision does not relate to operation manuals, unless they are considered part of the franchise agreement. Whether or not this is the case will depend on the terms of the agreement.

#### Item 17A – Arbitration of disputes

Item 17A requires information on whether the franchise agreement provides for arbitration of disputes as consistent with Subdivision C of Division 3 of Part 5.

#### Item 17B – Ways of ending the franchise agreement early

Item 17B requires a summary of the rights both the franchisor and franchisee have to terminate the franchise agreement before it expires.

#### Item 18 – Term of agreement and arrangements to apply at the end of the franchise agreement

Item 18 outlines the process that will apply in determining arrangements for the end of the franchise agreement, including whether the franchisor has, in the previous three years, considered how significant capital expenditure by franchisees may impact these arrangements.

This item includes statements that must be included in the franchise agreement that set out for a franchisee the arrangements that apply at the end of the agreement.

The reference to 'an option' in item 18(1)(a) includes a reference to a legal right.

#### Item 19 – Amendment of franchise agreement on transfer of franchise

Item 19 requires note of whether the franchisor will amend the franchise agreement on or before transfer of the franchise.

#### Item 20 – Earnings information

If earnings information for a franchise business is provided, historical earnings data, the assumptions on which any projected earnings are based and any other information from which financial details of the franchised business can be assessed. This item does not require earnings information to be included in the disclosure document.

#### Item 21 – Financial details

Item 21 requires a statement reflecting the franchisor's solvency and financial records for the previous two completed financial years. Franchisors do not need to provide financial reports for the last two completed financial years in circumstances where an independent audit is provided with the solvency statement. Different requirements apply where the franchisor has existed for less than two years or was insolvent in that time.

#### Item 22 – Updates

Item 22 requires any materially relevant facts to be disclosed, as required under section 33, that has changed between the date of disclosure document and the date it is given to the franchisee.

#### Item 23 – Receipt

Item 23 requires that the last page of the disclosure document has a statement that allows the prospective franchisee to keep the disclosure document, and that there is a form on which the prospective franchisee can acknowledge it has received the disclosure document.

EXPOSURE DRAFT