
FCAI Submission:

Response to the Exposure Draft Legislation -
Franchise Disclosure Register



EXECUTIVE SUMMARY

The Federal Chamber of Automotive Industries (FCAI) welcomes the opportunity to respond to the recently released Exposure Draft Legislation - *Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2021*.

At the outset the FCAI notes it is not obvious what material additional benefit will be provided by the Registry given that prospective franchisees will already have access to the more detailed information as part of the normal disclosure process set out in the Franchising Code of Conduct.

According to the Guide released by Treasury and accompanying the draft legislation, the intent of the Register includes:

These features will motivate high quality of disclosure practices, improving the comparability and symmetry of franchising information, and enhancing the franchising industry's reputation through open publication of information while delivering on the Government's commitments in the context of the 2021-22 Budget to implement a Register.

FCAI understands, at least from the new motor vehicle sector, that there has never been a situation where a potential franchisee seeks to compare the disclosure document from one franchisor against another. Putting aside the difficulty that would be inherent in comparing disclosure documents, a more effective comparison could be made through consideration of the Key Fact Sheets which do provide for a standardised format if one did want to compare. However, even in this case the need to redact any information that is personal or could be considered commercial in confidence might limit the value of this high level comparator as well.

On this particular aspect and given the Government intends to proceed with the Franchise Disclosure Registry it must ensure that franchisors can take reasonable steps to redact confidential or commercially sensitive information. The current draft legislation does rightly require the redaction of personal or confidential information relating to franchisees, however these rights of redaction should be extended. There is no material detriment to prospective franchisees of redaction, as they already have another source for access to that redacted information under the terms of the Franchising Code.

The proposal to include potential penalties of 600 penalty units is far in excess of the penalties applying to failure to lodge company documents under other legislation, such as the Corporations Act. The Franchise Code already provides for substantial pecuniary penalties for failure to prepare or update a disclosure document, being what many would consider to be substantive breaches of the Code.

FCAI does not oppose the development of an additional valuable resource for potential franchisees to consider, however our consideration of the Exposure Draft Legislation is that it is unlikely to provide any value to actual prospective franchisees, while it may well, if not amended to enable significant redaction, provide commercial advantage to competitors, other franchisees and suppliers.

ABOUT THE FCAI

FCAI represents 60 brands offering around 380 models, sold, and serviced by almost 3,600 new motor vehicle dealers and service centres. Australia's automotive sector is a large employer and contributor to our economy, lifestyle, and communities big and small. The FCAI also is the peak body for motorcycle and ATVs (ALL Terrain Vehicles).

A significant increase in new technologies is steadily making their way into the market, including zero and low emissions vehicles and automated vehicles, further benefiting consumers with greater choice and increasing competition.

FCAI member organisations, their parent entities and related supply chain partners are at the cutting edge of innovation. According to the US Auto Alliance, in 2018 global vehicle manufacturers invested more than US\$125 billion on automotive research and development in areas including safety, low emissions, connected vehicles and autonomy. This investment compares with US\$22 billion invested in the aerospace and defence industries. Ford Motor Company of Australia and Toyota Motor Corporation Australia retain design and engineering facilities in Victoria which support domestic and global new model and accessory development. Nissan operates a casting plant exporting casting products globally. Australia also remains a source of components (including aluminium castings and alloy wheels) which are sold to several global manufacturers.

The reach of the automotive sector is significant: vehicle importation, distribution, retailing, servicing, logistics/transport, and engineering. Support comes from hundreds of supplier companies, employing thousands of Australians.

FCAI REPOSE TO QUESTIONS

1. Are the amendments in the Exposure Draft likely to produce any unintended consequences?

FCAI believes that there is a significant likelihood that there will be consequences through the use of the information on the Register by third parties who are not franchisees or prospective franchisees but will be able to gain an advantage that would otherwise be unavailable. Third parties would potentially include competitors, suppliers, landlords, debtors, creditors and employees. If the Government's intent is to be achieved in the most efficient means available, there might need to be constraints to free and unfettered access to such a wide variety of people if the sole expressed aim is to enhance transparency for prospective franchisees. On a similar note, the Government will need to track who has accessed the information, and what happens to that information, thus ensuring the data set from which to determine whether the Register will actually add any value.

Turning now to particular clauses:

- Clause 53B(3) gives the Secretary the power to remove a disclosure document from the Register. FCAI suggests this is improved by requiring the Secretary to issue a notice to the franchisor requiring the franchisor to show cause as to why the disclosure document should not be removed. In most cases this will prompt the franchisor to rectify and clarify the situation with the Secretary.

- Clauses 53C(4) and 53D(4) require that the franchisor must redact “any personal information that relates to an individual that is included in the document”. FCAI support this clause but suggest that there is consideration of guidance as to what personal information would need to be redacted so there can be no ambiguity.
- Clause 53C(5)(b) should be amended to read “given to a franchisee under subclause 17(3)”. Otherwise, the Secretary has the power to require a franchisor to include things on the Register that go well beyond the intended purpose of the Register such as:
 - a copy of a franchise agreement (as required under clause 9(1A)(a) of the Code)
 - a copy of the Code (as required under clause 9(1A)(d) of the Code)
 - specific leasing information (as required under clause 9(1A)(e) of the Code)
 - the information statement (as required under clause 11 of the Code)
 - leasing documents (as required under clause 13 of the Code)
 - other agreements (as required under clause 14 of the Code)
 - financial statements for marketing funds or other cooperative funds (as required under clause 15 of the Code)
 - end of term notifications (as required under clauses 18 and 47 of the Code); and
 - potentially samples of confidential letters sent by the franchisor to the potential franchisee.

While no doubt there would be some pragmatism applied to the above, the FCAI is of the view that clarification by making the amendment suggested above would significantly reduce any ambiguity.

2. Are there any consequential amendments to the Franchising Code which may be required which aren't reflected in the Exposure Draft?

No comment.

3. Is the information to be included on the Register appropriate?

The disclosure documents that apply to a new motor vehicle dealership can run to 1800 -2000 odd pages. These documents are developed, and regularly updated, in accordance with the provisions of the Franchise Code of Conduct. Of the 1800 – 2000 pages there will be hundreds of references to commercially valuable and sensitive information that is the core of the agreement. Redactions in any document loaded to a register that is generally available will be significant, and more importantly significant to the extent that the reality is there will not be enough relevant information for a sophisticated investor, which new motor vehicle dealers invariably are, to make any determination or comparison to aid in their own decision making process.

The disclosure document required under the Franchise Code serves the purpose of providing the detail that a committed and resourced investor will need. As mentioned above, the key facts sheet introduced into the process through recent legislative amendments is a much more relevant document to suggest as the reference document on the register. The register could simply include the key facts sheet plus any other sectoral data that is considered relevant. However, the FCAI view is that franchise specific information and franchisor information must be limited in any event.

Importantly, the information that is suggested for inclusion in the register will not, in our view, inform the prospective franchisee. That is the object and impact of the disclosure document.

As briefly mentioned above there is also the issue that the proposal is that almost all of the information contained in the disclosure document is available to anyone, not just prospective franchisees. This is not appropriate for any number of commercial reasons, let alone when compared to other business models that are not expected to release such information into a public forum.

4. Are there other types of information, not within the existing scope of disclosure, that are important for prospective franchisees to compare?

The proper process for disclosure for genuine prospective franchisees is through the disclosure document required under the Code. That said, there is so much information in these documents, as required by the Code, that it is likely to be very difficult to make any comparison, were that comparison a realistic market activity.

5. Is the information to be redacted from franchisors' Disclosure Documents appropriate?

The data subject to redaction under the current proposal should be included in an expanded redaction direction. There should be more redaction noting that redaction does not prejudice a prospective franchisee, as they can get the unredacted information from the franchisor. A more complete form of redaction protects the franchisor and the franchise system, including from use of the information to their detriment by third parties (e.g., competitors, suppliers, the media). As examples of areas which are potentially required to be included in the Disclosure Document but should be redacted, we provide the following:

Details of the franchisor's intellectual property, registration status, and details of any agreement that impacts the franchisor's right to use intellectual property.

For some franchise systems this information could be highly confidential. In the hands of competitors or the media the information would be open to abuse, to the detriment of the franchise system.

Nature of rebates or financial benefits received from every supplier and the name of every supplier.

Highly confidential information that places franchise systems at a substantial competitive disadvantage to non-franchised networks.

The method for working out how rebates are shared amongst members of a franchise network, and a description of each direct or indirect benefit received by the franchisee.

Competitors will have access to this information, which they can use to the disadvantage of franchise systems in negotiations with suppliers.

Details of online sales, including profit sharing with franchisees.

Non-franchised networks do not have to publicly disclose their online strategy, or the details of the arrangements that apply to those involved in online sales. Although this information is relevant to a franchisee or prospective franchisee, it is available to a franchisee or prospective franchisee in un-redacted form as part of normal franchise disclosure.

Details of all establishment and operating costs, including real estate, equipment, inventory, security deposit and working capital in extensive detail.

This important information for prospective franchisees is highly confidential and market sensitive for most franchise systems.

Earnings information.

There seems no justification for providing earnings information publicly. Noting the proposed amendments already allow some redaction, the right to redact should be extended to any earnings information that is confidential and commercially sensitive.

Solvency statement to be provided.

Providing an assurance of solvency in the context of the signing of a franchise agreement is one thing. However, it is quite another to require this to be done in a publicly available document, that can then potentially be misused by third parties or others who might claim to have relied upon it. This is an unreasonable extension of potential third party liability.

Financial reports for the franchisor for the past 2 years.

This cuts across reporting obligations of exempt proprietary companies under the Corporations Act and provides highly sensitive information to the general public.

6. Are the transitional arrangements appropriate?

The transitional arrangements appear appropriate, although much depends on the appropriate development of the portal.