

29 October 2021

Our ref: KB:FrLC

Small and Family Business Division
Treasury
Langton Cres
Parkes ACT 2600
By email: franchisedisclosureregister@treasury.gov.au

Dear Consultation Team

Exposure Draft of Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2021

Thank you for the opportunity to provide feedback on the exposure draft of the Competition

Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2021 (**Exposure Draft**). The Queensland Law Society (QLS) appreciates the opportunity to contribute to this policy development.

QLS is the peak professional body for the State's legal practitioners. This response has been drafted with assistance of the QLS Franchising Law Committee, whose members have substantial expertise in this area.

The Exposure Draft amends the *Competition and Consumer (Industry Codes – Franchising) Regulation 2014* to insert Part 5A to establish the Franchise Disclosure Register.¹ The purpose of the Exposure Draft is to increase transparency in the franchising sector, and assist prospective franchisees to make an informed decision before entering a franchise agreement.² **Executive summary**

- QLS has reservations as to the operation of the Franchise Disclosure Register and its capacity to achieve its stated objective under the current provisions contained in the Exposure Draft;
- The searchable register should include an upfront notice to those inspecting the register (including the disclosure document if that requirement is retained) that the information and documents have not been checked, vetted or otherwise assessed for quality or completeness, and further, there should be a recommendation to seek professional

¹ Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register)

Regulations 2021 s 53. ² Draft Explanatory Statement, Competition and Consumer (Industry Codes – Franchising) Amendment (Franchise Disclosure Register) Regulations 2021 1

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guidance from a solicitor with expertise in the franchising sector before acting on the information accessed.

To avoid unnecessary burden, decrease risk of improper use of information and damage to a franchisor's and franchisee's brand and value, and to assist the proper purpose of

the searchable register to enable informed prospective franchisee decision making, only certain information should be uploaded and searchable.

- This information should be limited to specified questions and answers from the key fact sheet, together with some additional tailored information, that would practically benefit a prospective franchisee.
- The disclosure document can be uploaded to the portal, but should not be publicly available and searchable.
- If the disclosure document is to be uploaded and searchable, there needs to be further instruction on what is to be included and what (if any) documents need to be attached.
- The ACCC should provide guidance on what "personal information" includes in this context and what specific information is required to be redacted by the franchisor. Without this guidance, there is likely to be uncertainty, confusion and unnecessary additional financial burden placed on the franchisor, including the imposition of penalty units.
- There should be a requirement for someone searching the register to create a profile so as to capture who is accessing the Franchise Disclosure Register to assist in reviews of its function and performance.

The QLS supports the objective of the Franchise Disclosure Register and acknowledges that where the Franchise Disclosure Register is appropriately implemented and managed, it will provide certain benefits such as improving transparency and assisting prospective franchisees to make better-informed decisions. However, QLS has reservations as to the operation of the register and its capacity to achieve its stated objective under the current provisions contained in the Exposure Draft.

We respond as follows to the questions from the Supporting Guide.

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

The Exposure Draft inserts new sections 53C and 53D requiring franchisors to upload their disclosure document and related information to the Franchise Disclosure Register, including:

- The name of the franchisor;
- The name under which the franchisor carries on business in Australia relevant to the franchise;
- The address, or addresses, of the franchisor's registered office and principal place of business in Australia; and
- The ANZSIC division and subdivision codes that apply in relation to the industry in which the business operated under the franchise operates.

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Proposed new section 53D requires franchisors to upload their disclosure document at the end of each financial year, where the disclosure document has been updated.

Before a franchisor provides a copy of a disclosure document, proposed sections 53C(4) and 53D(4) require the franchisor to redact personal information relating to an individual included in the document and any information that relates to a particular franchisee, or a particular site being occupied by a franchisee.

The information and documents must be provided in a form and manner approved by the Secretary. Non-compliance with these proposed provisions attract a maximum civil pecuniary penalty of 600 penalty units.²

QLS is concerned that these provisions will produce a number of unintended consequences for franchisors and existing franchisees as they relate to personal information, the administration and use of the Franchise Disclosure Register, and the functionality of the register.

Redaction of information from disclosure document

QLS is concerned that the drafting of these provisions is uncertain and does not provide sufficient instruction as to what franchisors are expected to remove from the disclosure document. Notably, the words, 'any personal information', is drafted to potentially include a broad range of information contained in the disclosure document. The current drafting requires franchisors to comprehend the legal definition of 'personal information' in order to identify what information in the disclosure document should be redacted.

For example, the current proposal does not specifically require a franchisor's suppliers, listed in a disclosure document, to be redacted. However, this information may contain 'personal information'. The requirements as to redacting signatures have also not been addressed.

Franchisors may lack the technical skills and knowledge to comprehend what is meant by 'personal information'. As a result, franchisors may misidentify personal information and redact relevant information, or franchisors may fail to identify personal information, which is then retained in the disclosure document that is uploaded to the Franchise Disclosure Register. This may, in turn, lead to a civil penalty for that franchisor, which currently stands at 600 penalty units.

While franchisors may seek legal advice on the issues, this will present another financial burden for franchisors.

Moreover, the wide breadth of information that may potentially have to be redacted from the disclosure document is concerning and will place a significant administrative burden on franchisors.

To address these issues, the QLS recommends the following:

1. The ACCC should provide guidance on what is required to be redacted.
2. The exposure draft be amended to require the information from the key fact sheet and certain other pieces of information to be entered into fields by the franchisor, which can then be searchable. For example, information about the franchise's value, fees and

² 1 Ibid 5 – 7.

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royalties to be paid. We **enclose** an example of the type of information that would be useful for franchisees and able to be produced by franchisors.

3. The disclosure document can be uploaded to the portal, but should not be publicly available and searchable.

These recommendations are further supported below.

Administration of Franchise Disclosure Register

The information and documents uploaded to the Franchise Disclosure Register are not checked, vetted or otherwise assessed for quality or completeness.³ QLS is concerned that prospective franchisees and other interested parties, such as solicitors and other franchisors, will rely on the information and disclosure documents uploaded to the Franchise Disclosure Register as if they were assessed and verified by the Department. To ensure prospective franchisees and other interested parties are not misled, the QLS recommends:

4. the register include an upfront notice to those inspecting the information (and disclosure document if that requirement is retained) that the information and documents have not been checked, vetted or otherwise assessed for quality or completeness.
5. With that upfront notice, there should also be a recommendation to seek professional guidance from a solicitor with expertise in the franchising sector.

Use of the Franchise Disclosure Register

QLS queries whether the Franchise Disclosure Register will be accessed as intended. As stated above, the purpose of the Exposure Draft is to assist prospective franchisees to make an informed decision before entering into a franchise agreement. Accordingly, it is understood that the Franchise Disclosure Register is intended to be used primarily by franchisees.

However, there is nothing in the Exposure Draft that prevents other interested parties, such as competitors (i.e. other franchisors), solicitors or journalists from accessing the information contained on the Franchise Disclosure Register and in fact, we consider these people will be the primary users. The potential impact of this is that the requirement to upload a publicly searchable disclosure document will create issues for franchisors, relating to their competitors and/or suppliers as well as for existing franchisees who are part of a network and thus would normally have exclusive benefit to a lot of this information. Part of the business value for existing franchises relates to this confidential and/or exclusive information. This is addressed in the Explanatory Statement to the Exposure Draft, where it is stated that:

‘Information on rebates is important for prospective franchisees, as it may help them understand a franchisor’s incentives in relation to supply decisions. It is, however, recognised that the public disclosure of such information may, in some cases, risk putting franchise systems at relative competitive disadvantages in relation to supply’.

Furthermore, the information that is currently required to be uploaded to the Franchise Disclosure Register, including the disclosure document, goes above and beyond what a

³ 2 Ibid 5.

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franchisee would normally have access to before entering into an agreement. In our members' experience many prospective franchisees will not read the disclosure document in detail, or at all, and will not seek legal advice before entering into an agreement.

Accordingly, our view is that the Franchise Disclosure Register will likely to be used for purposes other than what is intended, which makes the burdens and consequences highlighted difficult to justify.

As such, QLS recommends that:

6. As stated in the above recommendations, only certain information should be uploaded and searchable. The information should be limited to specified questions and answers that would practically benefit a prospective franchisee.
7. There should be a requirement for someone searching the register to create a profile so as to capture who is accessing the Franchise Disclosure Register. This will assist in reviews of its function and performance.

Comparison between Franchisors

QLS is concerned that the current proposed functionality of the Franchise Disclosure Register, combined with the uploading requirement, will not allow franchisees to compare different franchisors in an effective way. As stated above, disclosure documents are comprehensive and include information that will not be necessarily relevant to a prospective franchisee at this stage of the investigative process. Requiring a prospective franchisee to review this type of document will make it difficult for those who may lack the technical skills and knowledge, to assess and analyse the information provided on the Franchise Disclosure Register.

As such, the QLS recommends the following:

8. The type of information that is to be uploaded be changed to what we have recommended above, such as the information from the key fact statement along with some other tailored information.
9. The register should enable a comparison between franchisors to enable franchisees to make informed decisions.

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

The Exposure Draft will need to be amended to include guidance on what personal information means, and what information is to be redacted by franchisors.

The Exposure Draft should provide clarity on what is to be included in a disclosure document. In particular, the QLS would like to see clarity on what is required (if at all) to be attached to a disclosure document. For example, disclosure documents refer to the franchise agreement. In certain instances, the disclosure document may not provide much use if the franchise agreement is not provided. The disclosure document could potentially contain some other attachments which franchisors will not wish to disclose, such as supplier contracts which might be commercial-in-confidence.

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Accordingly, QLS recommends further advice be given as to what is to be included in the disclosure document and what (if any) documents need to be attached to the disclosure document.

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

We refer to our comments above.

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

To be effective, the register will need to include information to allow franchisees to conduct a comparison of different franchisors. This should include frequently asked questions by franchisees, such as fee structure, lease arrangements, etc.

An example of a searchable registration sheet has been **enclosed** with this submission. The sheet contains a number of items, such as item 12 'Key Industry Licenses and regulatory requirements' and item 15 'Guarantee and Indemnity or other security documents', that are not necessarily contained in a key fact sheet or a disclosure document which would be useful to prospective franchisees and their legal representatives. A searchable registration sheet of this nature will also assist franchisees to compare between different franchise sectors.

Other information such as Director Identification Numbers (as required by ASIC and the Corporations Act)⁴, information as to solvency and related financial information would also be beneficial.

As stated above, there should be a clear notice to prospective franchisees about the need to seek independent legal advice on this information.

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

As stated above, there is a fundamental issue with the current drafting in relation to what information a franchisor is required to disclose. We reiterate our recommendations about what information is appropriate for the register.

6. Are the transitional arrangements appropriate?

This will largely depend on what information is required to be uploaded to the register. The Department should ensure there is sufficient education and guidance, particularly for franchisors, before the register is operational.

⁴ <https://www.abrs.gov.au/director-identification-number/about-dir> It is not currently covered as a prospective disclosure item under the Franchising Code of Conduct disclosure for items 2.6 or 2.8 and may be in the future.

7. Is the proposed portal functionality fit-for-purpose?

We do not have any specific feedback on the portal. However, we strongly recommend that there be user-testing of the register including by franchisors uploading information, and by people accessing it, before the register goes live.

8. Do you have any other suggestions on how to ensure franchisees and users of the portal understand that information on the Franchise Disclosure Register is not endorsed or checked by Government?

As stated, we recommend a warning statement which conveys the above and a requirement for a person to create a profile in order to conduct search.

Elizabeth Shearer
President

Example Franchisor Registration Searchable Details

1.	Franchise Registration Number:	##allocated by registry##	
2.	Registration Date:	1 July 2022	
3.	ANZSIC Industry group:	E 30	
4.	Industry Codes:	301 Residential Building Construction 302 Non-residential Building Construction	
5.	Franchisor:	Name:	Bob the Builder Franchising Pty Ltd as trustee for the Bob the Builder Unit Trust
		ACN:	999 999 999
		ABN/ ARBN:	ABN 01 999 998 888
6.	Franchise System Name:	Bob's Builders	
7.	Franchisor's Financial Year:	1 July to 30 June	
8.	Offering franchises since:	1985	
9.	Number of current franchisees in Australia as at date of last filing:	100 as at 1 July 2022	
10.	Master Franchise:	No	
		If Yes, Name, ACN, ABN, ARBN or foreign equivalent of Master Franchisor	Not applicable
11.	Business model:	Franchise involves the franchisee operating a construction business under which the franchisee constructs commercial and residential buildings, and provides other services including renovations and remediation construction work.	
12.	Key Industry Licenses and regulatory requirements:	Registered Qld builders licence Approved insurance to conduct building work up to \$20,000,000	

Example Franchisor Registration Searchable Details

13.	Details of core amounts payable to the Franchisor or associate:	<p>Initial Franchise Fee: <i>Amount:</i> Range High \$100,000 Low \$50,000 depending on size of territory <i>Payable:</i> on signing Franchise Agreement</p> <p>Monthly Franchise Fee: <i>Amount:</i> 5% of Gross Sales discounted to 4% of Gross Sales if prompt payment compliance discount of 1%. <i>Payable:</i> Monthly on 7th day of the Month by EFT</p> <p>Marketing Levy: <i>Amount:</i> 2% of Gross Sales <i>Payable:</i> Monthly on 7th day of the Month by EFT</p> <p>Transfer Fee:</p>
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		<p><i>Amount:</i> Greater of 10% of total sale price or \$10,000 (plus GST) <i>Payable:</i> On transfer</p> <p>Renewal Fee: <i>Amount:</i> \$5,000 (plus GST) <i>Payable:</i> On or before Renewal</p> <p>Licence Fee: Payable to Bob the Builders Leasing Pty Ltd <i>Amount:</i> If Bob the Builders leasing Pty Ltd holds the head lease and subleases or licences the premises or display home to the franchisee then the Licence Fee equal to the amount of rent and outgoings and other payments payable under the Lease <i>Payable:</i> In accordance with Licence to Occupy 7 days before the amounts are payable by Bob the Builders Leasing Pty Ltd to the landlord under the lease</p> <p>Interest: <i>Amount:</i> 6 % of amount outstanding calculated daily <i>Payable:</i> Monthly until outstanding amount paid in full</p> <p>Reimburse franchisor's legal costs for preparing documents for new grant documentation: <i>Amount:</i> \$5,000 plus GST and disbursements <i>Payable:</i> Once cooling off period commences</p>
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Example Franchisor Registration Searchable Details

14.	Marketing or Other Cooperative Fund	<p>Yes /No: Yes</p> <p>General Purpose of the Fund: Marketing Fund to maximise general public recognition and patronage of the brand, products and services offered for the benefit of the Franchisor's and franchisees overall.</p> <p>Who contributes to the fund: Franchisor in respect to its corporate offices and the Franchisees.</p> <p>Relevant Rate: <i>Marketing Levy Amount: 2% of Gross Sales</i> <i>Payable: Monthly on 7th day of the Month by EFT</i></p> <p>Audited: Yes</p>
15.	Establishment costs:	
	<p>Acquire or lease approved commercial premises: Fit out of Commercial Office: Landlords Works: High \$50,000 Low \$35,000 Lessees Works: High \$175,000 Low \$50,000 Fixtures and fittings: High \$350,000 Low \$250,000 Vehicles: High \$100,000 Low \$25,000 Stock: Initial tools and construction supplies up to \$150,000, ongoing monthly cost High \$75,000 Low \$45,000</p>	
16.	Guarantee and Indemnity or other	
	security documents:	
	Does the agreement require someone to sign a personal guarantee and indemnity:	Yes Details: The directors and Shareholders of the franchisee must guarantee the obligations of the franchisee and indemnify the franchisor
	Does the agreement require someone to sign a security agreement that will be registered on the PPSA:	Yes Details: The franchisee must grant a security interest over the personal property of the franchisee in the form of the general security agreement to secure the obligations of the franchisee
17.	Term and Renewal:	
	At the end of initial term does the franchisor have to offer or negotiate a new agreement:	Only if the franchisee exercises its conditional right to renew

Example Franchisor Registration Searchable Details

	At the end of initial term and any renewal does the franchisor have to negotiate a new agreement or extend the term:	No	
	Typical Initial Term:	10 years	
	Does the franchisee have a right or option to renew (whether conditional or otherwise)	Yes. A conditional option or right to enter into a new agreement to renew the franchise	
	Typical Renewal Term	<i>New Grant:</i> 1 renewal term of 10 years	
		<i>Transfer:</i> Only if existing agreement contains an option to renew	
	Are there conditions attaching to exercising the right to renew	Yes	
	How much written notice must be given to exercise the right or option to renew:	Not more than 9 months nor less than 6 months	
	Form of agreement to sign on renewal:	Exactly same commercial terms	No
		A new agreement on the franchisor's then current terms	Yes
18.	Training:		
	Initial:	Yes: <i>Details:</i> Training Fee of \$10,000 plus GST per person 2 weeks in head office before commencement 1 Week in Bob the Builders training facility, All costs of travel and accommodation, food and meals payable by franchisee	
	Ongoing	Yes. <i>Details:</i> Refresher training if required all costs of travel and accommodation, food and meals payable by franchisee	
19.	Site, Territory or Prime Marketing Area:		
	Office: Must operate from 1 approved commercial premises within a specified Territory and to provide goods and services to customers within the Territory Other premises: Must construct and use a Display Home within the territory at approved location Local Area Marketing: Must conduct local area marketing within the Territory Exclusivity: Yes conditional exclusivity Territory: Yes Determined by Map and Postcodes PMA: Yes PMA is the Territory Franchisee must conduct local area marketing within the Territory		
20.	Premises		
	Does the franchisor have an interest in the lease of the franchisee?:	Yes;	<i>If Yes, Details:</i> An associate of the premises occupied by the franchisor , Bob the Builder Leasing Pty Ltd will usually hold the head lease of the

		Example Franchisor Registration Searchable Details	
		premises and any Display Home and sublease or licence the occupancy right to the franchisee.	
		What sort of interest is offered to the franchisee	
		A sublease or licence the occupancy right	
21.	Supply arrangements:		
	Does the franchisee have to acquire goods and services from the franchisor or associate?	Yes	
	Does the franchisee have to acquire goods or services from suppliers nominated or approved by the franchisor?	Yes	
	Can the franchisee acquire goods and services from suppliers of its choosing without the consent of the franchisor?	Yes	
		Rebates and Financial Benefits:	
	Does the franchisor or its associate receive a rebate or financial benefit from suppliers to the franchise network	Yes	
	Is the rebate or financial benefit shared with franchisees	Yes	
21.	Is the franchisee required to sell the entire range of goods and services if the franchise:	Yes	
22..	Internet and social media:	Franchisee must use franchisor's webpage and not set up its own website Franchisee can accept orders over the internet directed from franchisors webpage There are restrictions on the use of the brand and trade marks on the internet and social media platforms	
23..	Who owns the Intellectual Property:	All intellectual property is owned by Bob the Builder, LLC (USA) which licenses it to the franchisor	
24.	Restraint of trade:		
		Is there a restraint of trade or Yes similar covenant:	
		Who has to provide the restraint:	All directors, shareholders and guarantors
		What is the nature of the restraint:	Covenant to protect franchisor's goodwill
		During Term:	Yes
		<i>Details:</i> Must not during the Term directly or indirectly own, operate or have an interest in, (in any relevant capacity) another similar business offering the same or similar goods or services in the Territory	
		Post termination or expiration:	Yes

Example Franchisor Registration Searchable Details

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