

## **EXPLANATORY STATEMENT**

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

#### *Competition and Consumer Act 2010*

#### *Competition and Consumer (Industry Codes–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 that the regulations may prescribe an industry code, and declare the industry code to be a mandatory industry code or a voluntary industry code. 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 Codes–Franchising) Regulations 2024* (the Regulations) prescribe a mandatory industry code (set out in Chapter 2–Franchising Code of Conduct (the 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) Regulation 2014* (the old Regulations) that sunset on 1 April 2025 in accordance with the *Legislation Act 2003*. Schedule 1 to the old Regulations prescribed the Franchising Code of Conduct (the old Code) as a mandatory industry code.

On 15 August 2023, the Minister for Small Business announced the appointment of Dr Michael Schaper to lead the 2023 Independent Review of the Franchising Code of Conduct (Schaper Review). The Schaper Review evaluated previous reforms and brought several reviews together, including:

- a sunset review of the old Regulations (including the old Code);
- a statutory review of Part 5 of the old Code relating to new vehicle dealership agreements;
- a post implementation review of the 2021 amendments to Part 5 of the old Code relating to new vehicle dealership agreements; and
- a statutory review of the Franchise Disclosure Register.

The Schaper Review also considered the role of the Australian Competition and Consumer Commission and the Australian Small Business and Family Enterprise Ombudsman in supporting enforcement and dispute resolution under the franchising regulatory framework.

The Schaper Review involved broad consultation that included a public consultation paper which received 95 responses, more than 40 stakeholder roundtables and meetings, and 544 survey responses.

In February 2024, the Government tabled the *Independent Review of the Franchising Code of Conduct* (the Final Report to the Schaper Review) which made 23 formal recommendations, including that the old Regulations should be remade, largely in their current form (recommendation 2), subject to a number of improvements.<sup>1</sup> On 7 May 2024, the Government released the *Government response to the Independent Review of the Franchising Code of Conduct* (Government response) which agreed or agreed in principle to all 23 recommendations. The Government response included changes to the old Regulations to:

- ensure they remain fit for purpose;
- simplify and streamline existing obligations;
- extend key protections; and
- promote best behaviour.

An exposure draft of the Regulations and accompanying explanatory material were released for public consultation from 9 October 2024 to 29 October 2024. The Department of the Treasury (Treasury) received 27 submissions from franchising industry stakeholders. Stakeholders were broadly supportive of the Regulations and feedback was incorporated into the Regulations where appropriate.

The Regulations remake the old Regulations with drafting improvements and updates to implement the Government response to the recommendations of the Final Report to the Schaper Review. The old Regulations and the *Competition and Consumer (Industry Codes—Franchising) Repeal Regulation 2014* are repealed by Schedule 2 to the Regulations.

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 commenced on 1 April 2025.

The Office of Impact Analysis (OIA) has an alternative process for assessing the policy impact of sunseting legislative instruments that are being remade. Under that process, an agency may self-assess the performance of the instrument. If the assessment demonstrates the instrument is operating effectively and efficiently, no impact analysis is required.

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<sup>1</sup> The tabled *Independent Review of the Franchising Code of Conduct* is available here: [www.aph.gov.au/Parliamentary\\_Business/Tabled\\_Documents/5017](http://www.aph.gov.au/Parliamentary_Business/Tabled_Documents/5017).

The Schaper Review found the Franchising Code of Conduct was operating effectively and efficiently. Treasury was satisfied that sufficient stakeholder consultation had occurred during the Schaper Review and the regulatory burdens in the first year of transition would be offset by streamlining disclosure documentation and renewals of existing franchise agreements.

Treasury certified its assessment in a letter to the OIA. The certification letter will be published on the OIA's website.

Details of the Regulations are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights is at [Attachment B](#).

The finding table in [Attachment C](#) represents the numbering of the old Regulations compared with the new numbering in the Regulations.

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

This Attachment sets out the details of the *Competition and Consumer (Industry Code–Franchising) Regulations 2024* (the Regulations). The Regulations implement the Government response (set out in the *Government response to the Independent Review of the Franchising Code of Conduct*) to relevant recommendations of the *Independent Review of the Franchising Code of Conduct* (Final Report) of the 2023 Independent Review of the Franchising Code of Conduct (Schaper Review). All legislative references are to the Regulations unless otherwise stated.

**Chapter 1–Preliminary**

**Part 1–Preliminary**

Section 1 – Name

Section 1 provides that the name of the Regulations is the *Competition and Consumer (Industry Codes–Franchising) Regulations 2024*.

Section 2 – Commencement

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

Section 3 – Authority

Section 3 provides that 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 Regulations to note that it prescribes a mandatory industry code (that is, the Code under Chapter 2), containing requirements around the behaviour of franchisors, franchisees and prospective franchisees. The Code also includes requirements around terms of franchise agreements, requirements for new vehicle dealership agreements, requirements relating to the Franchise Disclosure Register, the Secretary’s role in administering this Register, the Australian Small Business and Family Enterprise Ombudsman’s (ASBFEO) 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 provides that the instruments specified in Schedule 2 will be repealed as set out in that Schedule. Schedule 2 repeals:

- the *Competition and Consumer (Industry Codes–Franchising) Regulation 2014* (the old Regulations). Schedule 1 to the old Regulations prescribed the Franchising Code of Conduct (the old Code) as a mandatory industry code; and

- the *Competition and Consumer (Industry Codes—Franchising) Repeal Regulation 2014*.

## **Part 2—Definitions**

### Section 6 – Definitions

Section 6 outlines the definitions for the Regulations (including the Code). This includes the following:

- **Code** – the Code is defined to mean the industry code set out in Chapter 2, also known as the Franchising Code of Conduct. The Code is a mandatory industry code prescribed for the purposes of Part IVB of the Act. A reference to the Code is a reference to Chapter 2 of the Regulations.
- **Extend** – in relation to the scope of a franchise agreement, extend has been defined to mean a material change to:
  - the terms and conditions of the agreement; or
  - the rights of a person under or in relation to the agreement; or
  - the liabilities that would be imposed on a person under or in relation to the agreement.

A material change is not defined. The Court is expected to have regard to all the circumstances of a case when determining whether a change is a material change.

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** – several 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 34; and new grounds for termination of a contract by a franchisor under section 57.
- **Financial year** – a financial year, in relation to a franchisor and a franchise, 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.
- **Fund administrator** – the fund administrator of a specific purpose fund refers to the franchisor, master franchisor, or authorised associate who controls or administers the fund. This definition has been moved up from clause 15 of the old Code.
- **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. This implements the Government response to recommendation 4 of the Final Report of the Schaper Review.

The definition of motor vehicle dealership is assumed to cover all aspects of the franchisee’s 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 remade to clarify its scope.

The new definition captures service and repair work conducted by businesses that also buy, sell, exchange or lease motor vehicles. ‘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 standalone service and repair businesses that do not also buy, sell, exchange or lease vehicles; that is businesses that only service and repair vehicles. The definition also does not cover separate service and/or repair arrangements that are not part of a dealer’s franchise business.

- **Renew** – renew in relation to a franchise agreement, occurs when the franchisee exercises an option during the term of the agreement to renew the agreement.

Whether or not a renewal has taken place, depends on whether or not the franchisee has exercised an option. The definition of renew does not exclude a conditional renewal or some level of negotiation between the franchisor and franchisee. Further, the franchise 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.

- **Specific purpose fund** – the Regulations include a new definition of specific purpose fund, to mean a fund:
  - that is controlled or administered by a franchisor or a master franchisor, or for a franchisor or master franchisor by an associate for the franchisor or master franchisor;
  - to which the franchisee must pay money under a franchise agreement; and
  - must be used for a specified common purpose relating to the operation of the franchised business under the agreement.

This clarifies, and expands on, the funds regulated under the old Code. Also see the explanation under section 31 below.

The note to section 6 makes clear that some definitions are not included in the Regulations as they are already defined in the Act.

### Section 7 – Meaning of franchise agreement

Section 7 replicates clause 5 of the old Code. Section 7 defines **franchise agreement** for the purposes of the Regulations. A franchise agreement is defined as a written, oral or implied agreement under which:

- one party (the **franchisor** (which as defined in section 6, includes a subfranchisor)) grants the right to another person (the **franchisee** (which as defined in section 6, includes a subfranchisee)) to carry on a business of offering, supplying or distributing

goods or services under a system or marketing plan that is substantially determined, controlled or suggested by the franchisor or an associate;

- the operation of the business will be substantially or materially 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, the franchisor or an associate a fee before starting or continuing the business.

A motor vehicle dealership agreement is specifically identified as a franchise agreement. The extension of the term or scope of a franchise agreement, and the transfer or renewal of a franchise agreement, are also specifically identified as franchise agreements.

Landlord/tenant relationships, employee/employer relationships, partnership relationships, mortgagor/mortgagee and lender/borrower relationships are not, in themselves, franchise agreements.

### **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 industry code set out in Chapter 2 is:

- prescribed for the purposes of Part IVB of the Act; and
- a mandatory industry code.

#### Section 9 – Acquisition of property

Section 9 provides that a provision of the Regulations has no effect to the extent, if any, to which the provision's operation would result in the acquisition of property (within the meaning of paragraph 51(xxxi) of the Constitution) other than on just terms.

#### Section 10 – Franchise agreements to which the Code does not apply

Section 10 provides that the Code does not apply to a franchise agreement:

- where another mandatory industry code prescribed under section 51AE of the Act, applies to the agreement, excluding an agreement to which the Food and Grocery Code (set out in Part 2 of the *Competition and Consumer (Industry Codes–Food and Grocery) Regulations 2024*) or the Unit Pricing Code (set out in Schedule 1 to the *Competition and Consumer (Industry Codes–Unit Pricing) Regulations 2021*) applies;
- 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, the Code does apply to a franchise agreement if sales provide more than 20% of the franchisee's gross turnover for the goods or services for three consecutive years and the franchisee notifies the franchisor in writing; or

- where the 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* (WA), as in force on 1 April 2025, or a member with voting rights of a mutual entity within the meaning of the *Corporations Act 2001*. A note to subsection 10(5) refers to subsection 6(1) in relation to the definition of Co-operatives National Law, and the *Corporations Act 2001* in relation to the definition of 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 Code in circumstances deemed unnecessary.

### Section 11 – Civil penalty provisions of the Code

Section 11 makes clear that a provision (that is, a subsection or section not divided into subsections) in the Code that states it is a ‘civil penalty’, is a civil penalty provision for the purposes of Part IVB and section 76 of the Act.

Subsection 76(1A) and subsection 51AE(2A) of Part IVB of the Act set the maximum civil penalty that may be prescribed in an industry code that relates to the industry of franchising. Subsection 51AE(2A) establishes a two-tier civil penalty system for an industry code that relates to franchising, whereby the higher tier maximum penalty may be prescribed, or a penalty up to the maximum lower tier penalty.

The higher tier maximum penalty for a contravention of a civil penalty provision by a body corporate is the greater of the following:

- \$10 million;
- if the Court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is attributable to the act or omission—3 times the value of that benefit; and
- if the Court cannot determine the value of that benefit—10 percent of the body corporate’s adjusted turnover during the 12-month period ending at the end of the month in which the act or omission occurred or started to occur.

The higher tier maximum penalty for a contravention of a civil penalty provision by a person who is not a body corporate is \$500,000.

The lower tier maximum pecuniary penalty for contravention of a civil penalty provision is 600 penalty units. Subsection 51AE(2A) of the Act was amended in the *Treasury Laws Amendment (2021 Measures No. 6) Act 2021* to implement this two-tier system and increase the maximum penalties available for the contravention of a civil penalty provision of an industry code that relates to the industry of franchising. This was part of the Government’s response to deterring misconduct and to improve compliance under the old Code, through promoting competition and fair trading in the franchising sector.

To ensure penalties in the Code are appropriate, they have been formulated in light of the Attorney-General’s Department’s *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The higher tier civil penalty only applies to the most serious breaches of the Code under subsections 34(1) and (2), 45(2), (3) and (5), 46(2), and section 64 (also see section 17 in relation to the higher tier maximum pecuniary



penalty for a body corporate). This is necessary to provide a strong deterrent against breach of these provisions and ensure that prospective franchisees and franchisees retain a robust level of protection against egregious conduct. Aside from these provisions, civil penalties have been updated to be uniform throughout the Code. A maximum pecuniary penalty of 600 penalty units applies for breach of all other substantive obligations imposed on a franchisor, to ensure that enforcement is consistent. This implements the Government response to recommendation 19 of the Final Report of the Schaper Review.

### Section 12 – Reviews

Section 12 requires the Minister to commence a review of the Regulations before 1 April 2030 to assess the role, impact and operation of the Regulations.

The Regulations will sunset no more than 10 years after registration in accordance with the *Legislation Act 2003*. It is anticipated that the second review, following the review commencing before 1 April 2030, would be conducted as part of the sunset process. Section 12, together with the anticipated second review, implements the Government response to recommendation 5 of the Final Report of the Schaper Review.

### Section 13 – Interaction with the *Privacy Act 1988*

Section 13 provides that the disclosure of personal information in accordance with subitem 6(5) of Schedule 1 is authorised for the purposes of the Australian Privacy Principles under the *Privacy Act 1988*.

Schedule 1 sets out information that must be included in a disclosure document. Subitem 6(5) of Schedule 1 requires a franchisor to supply the name, location, telephone number and email address of former franchisees in relation to the events set out in subitem 6(4) of Schedule 1, if the information is available. The events are limited to where a franchise was transferred, the franchise business ceased to operate or was bought back by the franchisor, or a franchise agreement was terminated (including when the franchise business is acquired by the franchisor) or not extended.

Disclosure of the above personal information is only permitted in relation to disclosure documents for prospective franchisees. Such information is not available for the general public. Further, pursuant to section 63, a franchisor must not disclose a former franchisee's personal information to a prospective franchisee unless:

- the franchisor informs the former franchisee, in writing, that the franchisee may request that their personal information not be disclosed; and
- the former franchisee has not made that request.

The purpose of this disclosure is to allow prospective franchisees the opportunity to seek information from former franchisees and make an informed decision when becoming a franchisee. In light of the above safeguards to protect the personal information, this is necessary and appropriate to protect franchisees seeking to enter into a franchise agreement. Current franchisees may be contacted through their publicly available business contact details.

## **Chapter 2–Franchising Code of Conduct**

### **Part 1–Preliminary**

## Section 14 – Purpose of Chapter

Section 14 provides that Chapter 2 contains the industry code for the industry of franchising.

## Section 15 – Purpose of the Code

Section 15 sets out the purpose of the Code. A number of updates are made in comparison to the old Code. This implements the Government response to recommendation 3 of the Final Report of the Schaper Review. 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 the Code or a franchise agreement.

This is intended 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 16 – Functions of Australian Small Business and Family Enterprise Ombudsman

Section 16 outlines the functions of ASBFEO under the Code, which are:

- keeping a list of people who can provide Alternative Dispute Resolution (ADR) services for the purposes of the Code or a franchise agreement;
- 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 16 operates with section 78 outlined below, which allows the ASBFEO to publicise the names of franchisors who do not meaningfully participate in ADR processes under the Code. Further information about this power is under section 78.

## Section 17 – Amount of civil penalty for certain contraventions by bodies corporate

Section 17 specifies the maximum pecuniary penalty that applies for contravention of certain civil penalty provisions of the Code by a body corporate.

The maximum civil penalty is the greatest 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); and
- 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). Adjusted turnover is defined under subsection 4(1) of the Act and was introduced under the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* to assist in calculating new maximum penalties under the Act.

This is authorised under subsection 51AE(2A) of the Act, which allows the Code to prescribe the higher tier pecuniary penalty set out above, or a lower tier pecuniary penalty not exceeding 600 penalty units for contraventions of civil penalty provisions.

The maximum penalty set out above only applies to body corporates and is only prescribed for the most serious contraventions of the Code under subsections 34(1) and (2), 45(2), (3) and (5), 46(2) and section 64. This is intended to provide a strong deterrent against breaches of these provisions and ensure that prospective franchisees and franchisees retain a robust level of protection against egregious conduct. The Court has discretion to consider the seriousness of the contravention and impose a penalty, up to the maximum penalty, that is appropriate in the circumstances of the case. Also see section 11 in relation to civil penalties provisions of the Code.

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

### Section 18 – Obligation to act in good faith

Section 18 replicates clause 6 of the old Code. This section provides that the parties to a franchise agreement ‘must act towards another party with good faith’. A party is liable to a civil penalty of up to 600 penalty units if they breach the obligation to act in good faith. A franchise agreement, or document incorporated into an agreement, cannot limit or exclude the obligation to act in good faith (subsections 18(4) and 18(5)). A franchisor is liable to a civil penalty of up to 600 penalty units if the franchisor breaches this obligation. This is necessary to promote compliance with this substantive obligation and deter parties from not acting in good faith. The maximum pecuniary penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Subsection 18(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 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 Code as at common law.

The obligation has not been defined, however, subsection 18(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 18(3) is to provide some guidance to assist franchise participants to understand the typical behaviours that the courts will likely consider are required to meet 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 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 18(6)). The 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 18(7)). A Court may consider whether or not a party has breached the obligation by 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 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.

In summary, section 18 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 19 – Application of Part—master franchisors

Section 19 replicates clause 7 of the old Code. It exempts a master franchisor from compliance with Part 3 of the Code 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 Code and provide disclosure to subfranchisors.

### *Division 2–Disclosure document*

#### Section 20 – Franchisor must create disclosure document

Section 20 requires a franchisor to create a disclosure document that gives prospective franchisees information about the franchise (as set out in Schedule 1), so that they can make an informed decision about whether to enter into the franchise agreement.

A franchisor that fails to create a disclosure document in accordance with section 20 is liable to a civil penalty of up to 600 penalty units. This is necessary to promote compliance with this substantive obligation and ensure prospective franchisees have access to relevant information when deciding whether to enter, transfer, extend or renew a franchise agreement. The maximum pecuniary penalty is consistent with the maximum penalty attached to other substantive obligations of the Code. A franchisor must give a prospective franchisee or franchisee a disclosure document in the circumstances set out in sections 23 and 24.

Section 20 is based on clause 8 of the old Code. However, section 20 requires a disclosure document to include additional information about whether a franchisor will require the franchisee to undertake significant capital expenditure, including the justification for the expenditure. The purpose of this update is to provide greater transparency between franchisor and franchisees in respect of capital expenditure in the franchised business. Section 60 sets out limitations around significant capital expenditure.

A note to subsection 20(5) clarifies that a disclosure document can be signed electronically in accordance with the *Electronic Transactions Act 1999*.

#### Section 21 – Updating disclosure document–general

Section 21 is based on subclause 8(6) of the old Code. Section 21 complements section 20 (which requires a franchisor to create a disclosure document) by requiring a franchisor to update a disclosure document every financial year.

Specially, section 21 requires franchisors to update a disclosure document within four months, starting on the first day of the **current financial year**. The ‘current financial year’ means a financial year the franchisor is a party to a franchise agreement.

The requirement to update a disclosure document applies if:

- on the first day of the current financial year, the franchisor is a party to a franchise agreement; and
- either the franchisor entered into 2 or more franchise agreements in the previous financial year; or the franchisor (or if the franchisor is a company, its directors), intend to enter into another franchise agreement in the current financial year.

The franchisor must update its disclosure document by reflecting the current position of the franchise and franchisor as at the date of the update, and any relevant changes made to the Code since the disclosure document was created or last updated.

A franchisor is liable to a civil penalty of up to 600 penalty units for contravention of the requirement to update a disclosure document. This is necessary to promote compliance with this substantive obligation and ensure prospective franchisees have access to up-to-date information when deciding whether to enter, transfer, extend or renew a franchise agreement. The maximum pecuniary penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

### *Division 3—Information statement*

#### Section 22 – Information statement to be given by franchisors

Section 22 replicates clause 11 of the old Code, with an added note to clarify that information can be provided in writing electronically.

Section 22 provides that a franchisor must give a prospective franchisee a copy of the information statement published on the Australian Consumer and Competition Commission's (ACCC) website, as soon as practicable (and no later than 7 days) after the prospective franchisee formally applies or expresses an interest in acquiring a franchised business. The franchisor must give the prospective franchisee the information statement before providing the franchise agreement and other documents mentioned in subsection 23(2).

The purpose of the information statement is to provide simple, easy to understand information to a prospective franchisee about the risks and rewards in franchising before it makes the commitment to the relevant franchised business. The requirement to provide an information statement does not apply to the renewal or extension of a franchise agreement.

A franchisor is liable to a civil penalty of up to 600 penalty units for contravention of the requirement to provide an information statement in accordance with subsection 22(1). This is necessary to promote compliance and ensure franchisees have the appropriate information to make an informed decision. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

### *Division 4—Considering documents*

#### Sections 23 and 24 – Entering into, renewing, extending and transferring franchise agreements

Section 23 and 24 remake clause 9 of the old Code, with several updates.

Under section 23, the franchisor must give the following document set to a prospective franchisee prior to entering into, renewing or extending a franchise agreement:

- a copy of the agreement;
- if premises are leased to the franchisor or an associate and that franchisor or associate proposes to sublet the premises to the prospective franchisee in certain circumstances—a copy of the lease (or summary of commercial terms if not available) and information relating to the lease if relevant under State or Territory law;
- a copy of the most recent disclosure document, which is:

- the disclosure document created under section 20 (if the disclosure document was created in the financial year in which the franchisor gives the prospective franchisee the document set is given); or
  - the disclosure document as most recently updated under sections 21 or 33; or
  - if neither of the above circumstances apply—the disclosure document updated to reflect the financial position of the franchise as at the end of the financial year before the financial year in which the document set is given; and
- a copy of the Code.

The franchisor must also provide the prospective franchisee with an updated copy of the franchise agreement if there are any changes to the agreement after the franchisor gives it to the prospective franchisee, but before the agreement is executed.

Similarly, under section 24, the franchisor must give a prospective franchisee the above document set if a person requests that the franchisor consent to the transfer of an existing franchising agreement to a prospective franchisee (pursuant to section 48), and the transfer does not involve entry into a new franchise agreement. However, under section 24, the relevant franchise agreement is the existing franchise agreement, and the franchisor must also provide any other document the franchisor requires the prospective franchisee to sign to give effect to the transfer.

Compared to the old Code, both sections 23 and 24 now allow prospective franchisees to opt out of receiving a copy of a disclosure document and the Code from the franchisor if the franchisee has, or has recently had, another franchise agreement with the franchisor that is the same or substantially the same as the new franchise agreement and the business that is the subject of the new franchise agreement is the same or substantially the same as under the other agreement. For example, in the case of a transfer under section 24, 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.

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 prospective franchisees, the opt out must be in writing and franchisees will still have the ability to request a disclosure document at any point under section 32.

Under subsection 23(6) a franchisor must not execute a franchise agreement (that is, to enter, renew or extend an agreement) with a prospective franchisee before the end of a 14 day ***consideration period***, which commences after the latest of:

- the document set being given;
- if the franchisor gives the prospective franchisee earnings information after the document set is given—the day earnings information is provided; and
- in the case of a franchise agreement proposed to be entered into, renewed or extended, if the franchise agreement is changed after the document set is given (subject to certain exceptions)—the day a changed agreement is given.

Under subsection 24(3), a franchisor must not consent to a transfer before the end of 14 days after the latest of:

- the document set being given;
- if the franchisor gives the prospective franchisee earnings information after the document set is given—the day earnings information is provided.

The franchisor is liable to a civil penalty of up to 600 penalty units if the franchisor executes or consents to transfer the franchise agreement within the time period described above. The civil penalty is necessary to ensure franchisors comply and give prospective franchisees appropriate time to consider the documents. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

In relation to a franchise agreement proposed to be entered into, renewed or extended, there is a new obligation on a franchisor under subsection 23(8) to repay any payments made by the prospective 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. A franchisor that fails to do so is liable to a civil penalty of up to 600 penalty units. 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. Under the old Code, 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. This implements the Government response to recommendation 6 of the Final Report of the Schaper Review.

#### Section 25 – Form of documents to be given under this Division

Section 25 ensures that a prospective franchisee can request that the documents mentioned in sections 23 and 24 be given in printed form, electronic form or both. The franchisor must comply with the request. This ensures accessibility for the prospective franchisee.

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

#### Section 26 – Statements with respect to disclosure document and this Code

Section 26 replicates subclause 10(1) of the old Code by providing that before a franchisor can enter into, renew or transfer a franchise agreement, or extend the term or the scope of a franchise agreement (or enter a preliminary agreement to do any of those things), the franchisor must:

- receive a written statement from the franchisee or prospective franchisee stating that the franchisee has received, read and had a reasonable opportunity to understand the disclosure document and the Code; or
- receive a written notice from the franchisee or prospective franchisee opting out of being given a copy of the disclosure document and the Code pursuant to subsection 23(4) or 24(4).

A franchisor is liable to a civil penalty of up to 600 penalty units for breach of this requirement. The civil penalty is necessary to ensure franchisors comply and take appropriate steps to protect franchisees prior to entering into a franchise agreement. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.



## Section 27 – Statements with respect to independent advice

Section 27 replicates subclause 10(2) of the old Code. Under section 27, a franchisor cannot enter into a franchise agreement until it receives the following information from a prospective franchisee:

- a signed statement from an independent legal adviser, independent business adviser and an independent accountant that that person has provided advice to the prospective franchisee about the proposed franchise agreement or franchise business; 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 franchisor is liable to a civil penalty of up to 600 penalty units for contravention of this requirement. The civil penalty is necessary to ensure franchisors comply and take appropriate steps to protect franchisees prior to entering into a franchise agreement. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Section 27 does not apply to a renewal or extension of a franchise agreement. However, the franchisor can still require the franchisee to obtain a signed statement from an independent legal adviser, independent business adviser and an independent accountant as outlined above.

## **Part 4–Franchise agreements**

### *Division 1–Application*

#### Section 28 – Application of Part–master franchisors

Section 28 ensures that a master franchisor is not subject to the obligations under Part 4 of the Code in relation to a subfranchisee unless the master franchisor is a party to the franchise agreement.

Similar to section 19, the effect of this section 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 Code in relation to a subfranchisor.

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

#### *Subdivision A–Disclosure obligations*

#### Section 29 – Copy of lease etc.

Section 29 replicates clause 13 of the old Code. It requires a franchisor or associate to provide a franchisee with certain information or documents when the franchisee leases premises from the franchisor or associate, or occupies premises leased by the franchisor or associate without a lease, for the purposes of the franchised business.

Subsection 29(1) requires a franchisor or associate of the franchisor (as relevant) to provide a franchisee with documents and information where the franchisee leases premises from the franchisor or an associate of the franchisor. Specifically, the franchisor or associate must provide:

- a copy of lease or agreement to lease; and
- and 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. This must include the name of the business providing the incentive or financial benefit (pursuant to subsection 29(9)).

A franchisor or associate that fails to comply with this requirement is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to deter misconduct and ensure franchisees receive appropriate information. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

A franchisor must provide the documents mentioned above within one month of the lease or agreement being signed by the parties (pursuant to subsection 29(2)). A franchisor or associate that fails to provide the required documents within that time period is liable to a civil penalty of up to 600 penalty units.

If the prospective franchisee makes a written request, the franchisor or associate must also provide information relating to the lease that the lessor might provide due to State or Territory legal requirements (pursuant to subsection 29(3)). A franchisor or associate that fails to do so is liable to a civil penalty of up to 600 penalty units. The franchisor must provide that information as soon as reasonably practicable and no later than 7 days after the request is made (pursuant to subsection 29(4)). A franchisor or associate that fails to provide the required information within that time period is liable to a civil penalty of up to 600 penalty units. The civil penalties mentioned above are necessary to promote timely compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

A franchisor or relevant associate has a similar obligation where the franchisee occupies premises that are leased by the franchisor or an associate of the franchisor, without a lease (pursuant to subsections 29(5) to (8)). A franchisor or associate that fails to provide required documents or to provide them within the time period specified is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote timely compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

### Section 30 – Copies of other agreements

Section 30 replicates clause 14 of the old Code but has now been remade to include a civil penalty. Subsection 30(1) provides that where a franchise agreement requires the franchisee, or directors, shareholders, beneficiaries, owners or partners of the franchisee to enter into other agreements (as set out in subsection 30(2)), such as a confidentiality agreement or hire purchase agreement, the franchisor must give the franchisee a copy of those agreements within the time frame provided for in subsection 30(3).

Subsection 30(3) provides that the relevant agreements 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.

A franchisor that fails to provide the required agreements in accordance with subsection 30(1) is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote timely compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

### Section 31 – Financial statements for specific purpose funds

Section 31 builds upon clause 15 of the old Code. Section 31 applies if a franchise agreement requires a franchisee to pay money to a specific purpose fund. It imposes certain obligations on the fund administrator in such circumstances.

A franchise agreement 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. Subclauses 15(2) and 15(4) of the old Code applied financial administrative obligations on the franchisor if a franchise agreement required a 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 included marketing and advertising funds, clause 15 of the old Code did not provide a definition for ‘cooperative fund’, leaving some uncertainty as to when these obligations applied.

To increase clarity, the Code introduces the new term ‘specific purpose fund’ which is defined in section 6 as a fund:

- that is controlled or administered by a franchisor or a master franchisor; or for a franchisor or a master franchisor by an associate for the franchisor or master franchisor; and
- to which, under a franchise agreement, a franchisee is required to pay money (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor); and
- that, under the franchise agreement, must be used for a specified common purpose relating to the operation of the franchised business.

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 31 apply, regardless of what the money is used for, so long as it is for a specified common purpose relating to the operation of the franchised business.

Under subsection 31(2), a fund administrator must, within 4 months after the end of financial year, prepare an annual financial statement for the fund in that financial year and provide a copy of this to franchisees within 30 days of preparing it. Under subsection 31(3), the financial statement should include meaningful information about sources of income and expenses, particularly regarding the specified common purpose. It should also include information about the percentage of total income spent on expenses listed in paragraph 61(4)(a) and expenses relating to reasonable costs of administering and auditing the fund as listed in paragraph 61(4)(b).

The fund administrator is required to ensure that the financial statement is audited by a registered company auditor within 4 months after the end of the financial year and a copy given to the franchisee within 30 days of receiving it, unless, under subsection 31(4), 75%

of franchisees that paid money to the fund in the financial year vote to agree (within 3-months after the end of the financial year) that an audit is not necessary.

A fund administrator that fails to comply with the requirements in subsection 31(2) is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote timely compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Item 15 of Schedule 1 (which sets out information to be included in a disclosure document, as required by section 20) has also been changed to require the franchisor to disclose whether the franchisor must spend part of the funds collected on the franchisee's specific business each financial year.

The intention is to ensure that franchisees know what they will receive from the funds 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 that if a franchisee must contribute money to a fund, they should be told meaningful information about how it is used and whether they see personal benefit from it.

#### Sections 32 and 33 – Updated disclosure documents

Sections 32 and 33 update clause 16 of the old Code. These sections allow a franchisee to request updated disclosure documents from a franchisor and require a franchisor to provide such documents.

Section 32 provides that a franchisee may make a request to a franchisor in writing, once every 12 months, to provide a copy of the disclosure document relating to the franchise. A request can be hardcopy, electronic or both.

Section 33 provides that if a franchisor receives a request under section 32 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 financial year before the financial year in which the request is made. The franchisor must provide a copy of the updated disclosure document within two months of the date of the request in the form (if any) requested. There is nothing that prevents a franchisor from updating a disclosure document on a regular basis outside of this process.

This requirement is particularly relevant for franchisees that may have opted out of receiving a disclosure document under section 26. To ensure adequate protections for franchisees remain, franchisees have the ability to request a disclosure document at any point under section 32.

A franchisor that fails to provide a disclosure document in accordance with the requirements of section 33 is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to deter misconduct and ensure that franchisees have access to updated information to inform decisions. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

The prohibitions on misleading or deceptive conduct in the Australian Consumer Law continue to apply in relation to disclosure documents.

#### Section 34 – Disclosure of materially relevant facts

Section 34 updates clause 17 of the old Code. It requires a franchisor to provide a franchisee or prospective franchisee with materially relevant facts that are not included in the disclosure document.

Subsection 34(1) provides that if an updated financial document is made or comes into existence (that is, a statement or declaration in item 21 of Schedule 1 that is made, such as a statement of the franchisor's solvency, or a document referred to in item 21 of Schedule 1 that comes into existence, such as a financial report) and it is not reflected in, or not provided together with, a disclosure document that has been updated under section 21 or 33, then the franchisor must give a copy of the financial document to the prospective franchisee or franchisee as soon as reasonably practicable, and in relation to a prospective franchisee, before the franchise agreement is entered into.

A franchisor that fails to provide a prospective franchisee or franchisee with a copy of the updated financial document as detailed above is liable to a civil penalty of up to \$500,000 if the franchisor is not a body corporate, and up to the amount prescribed in section 17 if the franchisor is a body corporate. Further information about the penalty for a body corporate can be found under section 17.

The higher tier maximum civil penalty is prescribed in this section as opposed to the standard lower tier maximum civil penalty of 600 penalty units prescribed throughout the Code, to reflect the seriousness of this obligation on franchisors and provide a strong deterrent against breach of section 34. This is because the information mentioned in section 34 is critical for a prospective franchisee or franchisee to make an informed decision about the franchise agreement and failure on the part of the franchisor to disclose this information can have a significant impact on a franchisee. For example, in the case of a prospective franchisee, 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. In the case of prospective franchisees, 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 34(2) requires a franchisor to tell a franchisee about the matters set out in subsection 34(3), such as a change in majority ownership or control of the franchise system, if the matter is not mentioned in a disclosure document. Subsection 34(3) replicates the list of matters a franchisor should disclose in clause 17 of the old Code. However, it 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* were not expressly included in disclosure requirements however, this has been changed as they are of relevance for someone seeking to enter a franchise agreement.

The franchisor must tell a prospective franchisee about the matter within 14 days of becoming aware of it. A franchisor that fails to disclose the matters as required by subsection 34(2) is liable to a civil penalty of up to \$500,000 for a franchisor that is not a body corporate, and up to the amount in section 17 for a franchisor that is a body corporate. As above, the higher tier civil penalty reflects the seriousness of this obligation on franchisors and is appropriate to deter misconduct. The information mentioned in subsection 34(3) is critical for a prospective franchisee or franchisee to make an informed

decision about the franchise agreement and failure on the part of the franchisor to disclose this information can have a significant impact on a franchisee.

For contraventions of subsection 34(1) and (2), the Court has discretion to consider the seriousness of the contravention and impose a penalty, up to the maximum penalty, that is appropriate in the circumstances of the case. Also see section 11 in relation to civil penalties provisions of the Code.

Section 34 must be read in conjunction with item 22 of Schedule 1. Item 22 of Schedule 1 (together with sections 20 or 21) requires a franchisor to update any information given under section 34 if this has changed between the date of preparation of the disclosure document and the date when this was provided under the Code.

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

#### Section 35 – Application of Subdivision

Section 35 replicates clause 17A of the old Code. It provides that Subdivision B of Division 2 of Part 4 of the Code does not apply to a new vehicle dealership agreement.

#### Section 36 – End of term arrangements

Section 36 updates clause 18 of the old Code 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 at least 6 months before the end of the term of the agreement (or at least one month before if the agreement is less than 6 months).

This is in addition to the franchisor's written notification requirements under the old Code to advise whether they intend to extend the franchise 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 of less than 6 months).

Under subsection 36(3), if the franchisor intends to extend the franchise agreement, the notice described above must include a statement advising the franchisee that it can request a disclosure document under section 32, subject to subsection 32(2), which only allows a franchisee to request disclosure documents once every 12 months.

A franchisor is liable to a civil penalty of up to 600 penalty units for not providing notice of the franchisor's intentions or not advising the franchisee it can request a disclosure document if the franchise agreement is to be extended. The civil penalty is necessary to deter misconduct and ensure a franchisee has advance notice of a franchisor's intentions in relation to a franchise agreement. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

*Subdivision C – Record keeping obligations*

#### Section 37 – Keeping certain information and documents

Section 37 updates clause 19 of the old Code. It sets out requirements for franchisors to keep certain information and documents, but includes updates to improve readability and to introduce civil penalty provisions to ensure compliance with requirements.

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

Section 37 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 Code for a period of at least 6 years after the franchisor receives it;
- any document that supports a statement made in the franchisor’s disclosure document (a **supporting document**) for a period of at least 6 years after the document was most recently provided to the franchisee or prospective franchisee; and
- any document provided by the franchisor to the franchisee or prospective franchisee as required or permitted by the Code.

Section 37 does not affect a provision in any other legislation that requires a franchisor to keep a document for a longer period.

A franchisor that fails to meet any of the record-keeping requirements in this provision is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to deter misconduct and ensure information and documents are retained for an appropriate period. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

The *Electronic Transactions Act 1999* (Cth) applies to any requirement to provide a document under the Regulations (including the Code). Under section 37, 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 this provision is to allow the ACCC to access necessary documents to conduct its audit and enforcement functions in relation to the 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, so should not significantly increase the administrative burden placed on franchisors.

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

#### Section 38 – Franchisor’s legal costs relating to franchise agreement

Section 38 updates clause 19A of the old Code. It restricts a franchisor from entering into a franchise agreement that requires franchisees to pay certain legal costs, but includes an update under paragraph 38(2)(c) to provide that in exceptional circumstances where a franchisor and franchisee agree that the franchisor can pass on the legal costs of preparing the franchise agreement, the fixed sum of costs must not exceed reasonable and genuine legal costs.

Subsection 38(1) replicates subclause 19A(1) of the old Code. It prohibits franchisors from entering into franchise 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. A franchisor that breaches the requirement in subsection 38(1) is liable to a civil penalty of 600 penalty units. The civil penalty is necessary to deter misconduct by a franchisor and ensure franchisors adhere to these requirements prior to entering into a franchise agreement. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Subsection 38(2) replicates subclause 19A(2) of the old Code. It provides an exception to the above prohibition whereby a franchise agreement may require a franchisee to make a payment, before the franchisee starts the franchised business, of a fixed sum that is for the franchisor's legal costs relating to the preparation, negotiation or execution of the franchise agreement. This does not include any legal costs that will, or may be, incurred after the franchise agreement is entered into. Paragraph 38(2)(c) has been added to ensure that the fixed sum does not exceed reasonable or genuine legal costs.

Section 38 complements section 65, which 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.

#### Section 39 – Prohibition on release from liability etc.

Section 39 replicates clause 20 of the old Code. It prohibits a franchisor from entering into a franchise agreement that requires a franchisee to sign a general release from liability or a waiver of any representations made by the franchisor. Franchisees can still settle claims against a franchisor after entering into a franchise agreement.

As this section imposes a substantive obligation on the franchisor, it has been updated to ensure that a franchisor is liable to a civil penalty of up to 600 penalty units for breach of subsection 39(1), to ensure enforcement is consistent across the Code. This civil penalty is necessary as it deters misconduct by franchisors and adds further protection for franchisees.

#### Section 40 – Jurisdiction for settling disputes

Section 40 replicates clause 21 of the old Code. Subsection 40(2) prohibits a franchisor from entering into a franchise agreement that includes a clause that requires a party to bring an action or proceedings, or requires an ADR process, for 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 ensure that a franchisor is liable to a civil penalty of up to 600 penalty units for breach of subsection 40(2), to ensure enforcement is consistent across the Code. This civil penalty is necessary as it deters misconduct by the franchisor and adds further protection for the franchisee.

#### Section 41 – Costs of settling disputes

Section 41 updates clause 22 of the old Code. Section 41 provides that a franchisor must not enter into a franchise agreement that includes a provision that requires the franchisee to pay costs included by the franchisor in relation to settling a dispute. A franchisor that breaches this requirement is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to ensure franchisors adhere to these requirements prior to entering into a franchise agreement. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Any clause in a franchise agreement that requires the franchisee to pay costs included by the franchisor in relation to settling a dispute will have no effect. The provision has been updated to make clear that this covers dispute resolution processes both under the Code and 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 42 – Restraint of trade clause if franchise agreement not renewed or extended

Section 42 updates clause 23 of the old Code to improve readability and reframe the rule on restraint of trade clauses.

Under the old Code, a restraint of trade clause had no effect and was not enforceable. Section 42 now expressly prohibits a franchisor from entering into a franchise agreement that includes a restraint of trade clause that would apply if:

- a franchise agreement expires;
- the franchise agreement contained an option for the franchisee to renew or extend;
- before expiry, the franchisee had given written notice to the franchisor seeking to extend or renew on substantially the same terms (as under the current franchise agreement and that apply to other franchisees or would apply to a prospective franchisee);
- the franchisee met any required conditions;
- the franchisee had not seriously breached the franchise agreement or a related agreement;
- the franchisee has not infringed upon intellectual property or a confidentiality agreement with the franchisor;
- the franchisor did not renew or extend the agreement; and
- either the franchisee claimed compensation for goodwill because the agreement was not renewed or extended, but the amount did not provide genuine compensation, or the agreement did not allow for goodwill compensation in the event of the agreement not being extended or renewed.

This aligns with the broader approach in the Code of protecting franchisees by providing that franchisors must not include certain content in a franchise agreement. The circumstances listed above are largely maintained as they appear in the old Code, except that section 42 now includes circumstances where a franchisee has sought to renew a franchise agreement. Section 67 also prohibits a franchisor from relying on, or purporting to rely on, a restraint of trade clause that would apply in the above circumstances.

As this section imposes a substantive obligation on the franchisor, it has been updated (in comparison to the old Code), to ensure enforcement is consistent across the Code. A franchisor that breaches the requirements in section 42 is liable to a civil penalty of up to 600 penalty units. This civil penalty is necessary as it deters misconduct by franchisors and adds further protection for franchisees.

This section does not preclude the application of requirements relating to restraint of trade clauses under the Unfair Contract Terms regime in the Australian Consumer Law.

## Section 43 – Franchise agreement must provide for compensation for early termination— general

Section 43 broadly replicates clause 46A of the old Code. However, section 43 applies specifically to franchise agreements that are not new vehicle dealership agreements and includes a number of updates in comparison to clause 46A of the old Code. This implements the Government response to recommendation 9 of the Final Report of the Schaper Review (that the requirement that new vehicle dealership agreements must include provisions for compensation for franchisees in the event of early termination should be extended to all franchise agreements). Section 45 is the equivalent provision in relation to franchise agreements that *are* new vehicle dealership agreements.

Under subsection 43(2), a franchisor must not enter a franchise agreement (that is not a new vehicle dealership agreement) unless it includes provision for the franchisee to be compensated for early termination of the agreement in circumstances where the franchisor:

- withdraws from the Australian market;
- rationalises its networks in Australia; or
- changes its distribution models in Australia.

This is intended to cover circumstances where the franchisor is the party that terminates the franchise agreement.

In addition, a franchisor must not enter a franchise agreement (that is not a new vehicle dealership agreement) unless it specifies how the compensation is to be determined, with specific reference to:

- lost profit from direct and indirect revenue;
- unamortised capital expenditure requested by the franchisor;
- loss of opportunity in selling established goodwill; and
- costs of winding up the franchised business.

A franchisor is liable to a civil penalty of up to 600 penalty units for breach of subsection 43(2). The civil penalty is necessary to deter misconduct from franchisors, and ensure provision is made for franchisors to be compensated where appropriate. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Under subsection 43(3) a franchisor must not enter a franchise agreement (that is not a new vehicle dealership agreement) unless it includes provision for the franchisor to buy back or compensate the franchisee in relation to things mentioned in subsection 43(4) if the agreement is terminated because the franchisor withdraws from Australia, rationalises its network in Australia or changes its distribution model in Australia. The relevant things outlined subsection 43(4) are:

- 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 accordance with the franchise agreement or any operations manual; and

- all essential specialty equipment, branded product or merchandise purchased by the franchisee that was specified by the franchisor and required in order to operate the franchise, in accordance with the franchise agreement or any operations manual, that could not be repurposed for a similar business.

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 franchise agreement must provide for how the franchisor will buy back or compensate the franchisee 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 could be repurposed for another business.

Finally, subsection 43(5) prohibits a franchisor from entering into a franchise agreement (that is not a new vehicle dealership agreements) if it has a clause excluding any compensation that the franchisee may be entitled to outside of the agreement if the agreement is terminated early. This does not apply if the franchisee has breached the agreement.

A franchisor that breaches the requirements under subsections 43(3) and 43(5) is liable to a civil penalty of up to 600 penalty units, consistent with other penalty provisions in the Code. These civil penalties are necessary to deter misconduct by franchisors and add further protection for franchisees.

#### Section 44 – Franchise agreement must provide reasonable opportunity for return on franchisee’s investment–general

Section 44 replicates clause 46B of the old Code but only applies to franchise agreements that are not new vehicle dealership agreements. This implements the Government response to recommendation 8 of the Final Report of the Schaper Review (that the requirement that new vehicle dealership agreements must provide a reasonable opportunity to make a return on investment be extended to all franchise agreements). Section 46 replicates clause 46B of the old Code for franchise agreements that *are* new vehicle dealership agreements.

Under this section, franchisees must have a reasonable opportunity to make a return on any investment required by the franchisor as part of entering into, or under, a franchise agreement. Franchisors must not enter into a franchise agreement unless it provides for this. A franchisor that fails to comply with this requirement is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to ensure franchisors adhere to this requirement prior to entering into a franchise agreement. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

What is considered a ‘reasonable opportunity’ would be specific to the terms of each franchise 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 investment required.

#### Section 45 – Franchise agreement must provide for compensation for early termination–new vehicle dealership agreements

Section 45 replicates clause 46A of the old Code. Under subsection 45(2), a franchisor must not enter a franchise agreement that is a new vehicle dealership agreement unless it

includes provisions for the franchisee to be compensated for early termination of the franchise agreement in circumstances where the franchisor:

- withdraws from the Australian market;
- rationalises its networks in Australia; or
- changes its distribution models in Australia.

This is intended to cover circumstances where the franchisor is the party that terminates the new vehicle dealership agreement.

In addition, a franchisor must not enter a new vehicle dealership agreement unless it specifies how the compensation is to be determined, with specific reference to:

- lost profit from direct and indirect revenue;
- unamortised capital expenditure requested by the franchisor;
- loss of opportunity in selling established goodwill; and
- costs of winding up the franchised business.

A franchisor that is a body corporate is liable to the maximum civil penalty prescribed in section 17, and a franchisor that is not a body corporate is liable to a maximum civil penalty of \$500,000, for breach of the requirements under subsection 45(2). Further information about the penalty for body corporates can be found under section 17.

Subsection 45(3) requires a new vehicle dealership agreement to include provision for the franchisor to buy back or compensate the franchisee in relation to new road vehicles, spare parts and special tools as mentioned in subsection 45(4) in the event of early termination or non-renewal. This differs from equivalent subsection 43(3) in relation to franchise agreements that are not new vehicle dealership agreements, as buy back or compensation is not available in the event of non-renewal for such agreements.

Subsection 45(5) prohibits a franchisor from entering into a new vehicle dealership agreement if it excludes any compensation to which the franchisee may be entitled, other than under the agreement, if the agreement is terminated before it expires other than because the franchisee has breached the agreement. This does not apply if the franchisee has breached the new vehicle dealership agreement.

A franchisor that is a body corporate is liable to the maximum civil penalty prescribed in section 17, and a franchisor that is not a body corporate is liable to a maximum civil penalty of \$500,000, for breach of subsections 45(4) or 45(5).

As was the case in the old Code, the higher tier maximum civil penalties in section 45 in relation to new vehicle dealership agreements are due to the substantial imbalance in bargaining power between vehicle manufacturers and dealers. The intention is to provide an effective deterrent to franchisors that are manufacturers abusing their position by including terms which are substantially unfavourable and uncommercial in their agreements. The risks of considerable harm being done to small business dealers is particularly pronounced in situations where a manufacturer withdraws from Australia or reduces their market presence.

The Court has discretion to consider the seriousness of the contravention and impose a penalty, up to the maximum penalty, that is appropriate in the circumstances of the case. Also see section 11 in relation to civil penalties provisions of the Code.

#### Section 46 – Franchise agreement must provide reasonable opportunity for return on franchisee’s investment–new vehicle dealership agreements

Section 46 replicates clause 46B of the old Code. Under section 46, franchisees must have a reasonable opportunity to make a return on any investment required by the franchisor upon entering into a new vehicle dealership agreement. Franchisors must not enter into a franchise agreement unless it provides for this.

A franchisor that does not comply with this requirement is liable to a civil penalty of up to the amount prescribed in section 17 if they are a body corporate, or up to \$500,000 if they are not a body corporate. Further information about the penalty for body corporates can be found under section 17.

The higher tier maximum penalty is appropriate because, as mentioned under section 45, there is a substantial imbalance in bargaining power between vehicle manufacturers and dealers. The intention is to provide an effective deterrent to manufacturers from abusing their position by including terms which are substantially unfavourable and uncommercial in their new vehicle dealership agreements.

The Court has discretion to consider the seriousness of the contravention and impose a penalty, up to the maximum penalty, that is appropriate in the circumstances of the case. Also see section 11 in relation to civil penalties provisions of the Code.

Section 46 mirrors section 44 but only applies to new vehicle dealership agreements.

#### Section 47 – Discussion about significant capital expenditure disclosed in disclosure document

Section 47 updates clause 30A of the old Code. Under section 47, the franchisor has an obligation to discuss with the franchisee or prospective franchisee any significant capital expenditure disclosed in the disclosure document (as required in subsection 20(4)) and the circumstances in which the franchisor considers that the franchisee or prospective franchisee is likely to recoup the expenditure. A franchisor must not enter into, renew or extend a franchise agreement unless they have discussed this with the prospective franchisee or franchisee.

The information previously listed in subclause 30A(2) of the old Code as relevant information about significant capital expenditure is now located in subsection 20(4).

A franchisor that fails to comply with the requirements in section 47 is liable to a civil penalty of up to 600 penalty units. This is necessary to deter misconduct by franchisors and ensure franchisees have access to appropriate information. 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. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

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

#### Sections 48 and 49 – Franchisor’s consent to transfer

Sections 48 and 49 largely replicate clauses 24 and 25 of the old Code with some structural changes covering situations where a franchisee can request the franchisor's consent to transfer a franchise agreement and where the franchisor can consent to a transfer.

Under section 48, a person may request, in writing, that a franchisor consent to the transfer of a franchise agreement. The request must be accompanied by all information the franchisor would reasonably require to make an informed decision. The franchisor may request, in writing, the person provide additional specified information if required to make the decision.

Under section 49, a franchisor must advise, in writing, the person who made the consent to transfer request, whether they provide consent. If the franchisor does not provide consent, they must provide the reasons. If they do provide consent, they must advise of whether consent is subject to any conditions.

If the franchisor does not advise the person, in writing, that they do not consent to the transfer within 42 days of the request being made, or date information is provided (if the franchisor makes a request for additional information), then the franchisor is taken to have given consent, and it cannot be revoked.

Within 14 days of giving consent, the franchisor may revoke it by advising the person, in writing, that the franchisor's consent is revoked and the reasons why consent has been revoked (excluding circumstances where the franchisor has not responded within 42 days, as detailed above).

A franchisor must not:

- unreasonably withhold consent to the transfer of a franchise agreement; or
- unreasonably revoke consent to the transfer of a franchise agreement.

A franchisor is liable to a civil penalty of up to 600 penalty units if the franchisor unreasonably withholds or revokes consent to transfer a franchise agreement under subsection 49(2) and 49(5) respectively. This is necessary to deter misconduct by franchisors. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

Subsection 49(6) provides examples of when consent may be reasonably withheld or revoked, such as when the prospective franchisee does not meet the selection criteria or the franchisor.

In comparison to the old Code, the definition of transferee has now been removed and included as part of the definition of prospective franchisee in section 6.

The list of circumstances where a franchisor's consent may be reasonably withheld or revoked in subsection 49(6) is not exhaustive and subsection 49(6) could apply in circumstances that are not listed. Furthermore, this provision should be read in conjunction with section 26 which outlines the situations where a franchisor *must not* transfer a franchise agreement (as well as enter into, renew or extend an agreement).

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

#### Sections 50 to 53 – Termination of franchise agreement agreements in cooling off periods

Sections 50 to 53 simplify obligations under the Code in relation to termination of franchise agreements in cooling off periods. This implements the Government response to recommendation 7 of the Final Report of the Schaper Review.

Section 50 updates clause 26 of the old Code to grant franchisees the ability to opt out of the 14 day cooling off period in certain circumstances. This may allow a franchisee to operate the business immediately. This new option does not automatically apply, rather, the franchisee would be required to opt out in writing.

In accordance with subsection 50(7), a franchisee can only opt out of the cooling off period for a franchise agreement if the franchisee has, or has recently had, another franchise agreement (the *other agreement*) with the franchisor that is the same or substantially the same, and the business is the same or substantially the same. This opt out provision would not apply in relation to a new franchise agreement for 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 would apply. This opt out provision may also apply when a franchise agreement comes to an end and is not renewed or extended, but a franchisor offers the franchisee a new agreement for the same franchise business.

If the franchisee has not provided a written notice to opt out of the cooling off period in accordance with subsection 50(7), subsections 50(1), (3), and/or (4) apply as follows.

- Generally, a franchisee may terminate a franchise agreement within 14 days of entering into it.
- If there is a proposal for the franchisee to lease or occupy premises from the franchisor, but this arrangement is not yet in force, the cooling off period of 14 days starts from the day the franchisee receives documents setting out terms of the proposed lease or occupancy. The franchisee may terminate the franchise agreement within these 14 days.
- If the franchisee has entered into an agreement to lease or occupy premises from the franchisor, the cooling off period of 14 days starts from the day the agreement was entered into, only if the franchisee was not given the documentation listed in paragraph 50(4)(a). The franchisee may terminate the franchise agreement within these 14 days.

The above points do not apply to the renewal, extension or transfer of a franchise agreement.

If a franchisee terminates a franchise agreement in accordance with subsection 50(1), (3) or (4), subsection 51(1) 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, within 14 days. The franchisor can deduct reasonable expenses if the method for calculating them is set out in the franchise agreement. A franchisor that fails to comply with subsection 51(1) is liable to a civil penalty of up to 600 penalty units. This is necessary to deter misconduct by franchisors. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

Section 52 updates clause 26A of the old Code. It sets out cooling off periods that apply when a franchise agreement is transferred.

If a franchise agreement is transferred between a person (the *old franchisee*) who was the franchisee under the agreement and a person (the *new franchisee*) who becomes the

franchisee for the purposes of the agreement; and the transfer does not involve a new franchise agreement being entered into by the new franchisee and the franchisor, the new franchisee may:

- terminate the *transfer agreement* if one exists;
- cause the old franchisee to be the franchisee again if possible; or
- cease to be the new franchisee if the transfer does not involve a new franchise agreement being entered into.

This must occur before the earlier of:

- the end of the period of 14 days starting on the day after the new franchisee becomes the franchisee; or
- the day the new franchisee takes possession and control of the franchised business.

However, the new franchisee may opt out of being able to do the things listed above, in writing, if:

- the franchisee has a current franchising agreement (the *other agreement*) with a franchisor that is the same or substantially the same as the franchise agreement that is transferred; and
- the transferred franchise business is the same or substantially the same as the franchise business the franchisee owns (that is, the business that is the subject of the other agreement).

This is intended to capture circumstances where the franchisee is the transferee of a second (or third or fourth etc.) franchise from the same franchisor. 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 53 mirrors section 51 except it provides for a similar repayment obligation on the old franchisee to the new franchisee, if provided for in the transfer agreement.

Specifically, in circumstances where a new franchisee ceases to be the franchisee for the purposes of a franchise agreement (in accordance with a written notice given under subsection 52(2) as described above):

- the franchisor must, within the period of 14 days starting on the day after the notice was given, repay all payments made by the new franchisee to the franchisor under the franchise agreement. This is less any amount that is equal to the franchisor's reasonable expenses relating to the new franchisee ceasing to be the franchisee if those expenses or their method of calculation are set out in the agreement; and
- the old franchisee must, within the period of 14 days starting on the day after the notice was given, repay all payments made by the new franchisee to the old franchisee under the transfer agreement, less any amount equal to the old franchisee's reasonable expenses relating to the termination of the transfer agreement if those expenses or their method of calculation are set out in the transfer agreement.

A franchisor or old franchisee that fails to comply with the obligation to repay all payments as described above is subject to a civil penalty of up to 600 penalty units. This is



necessary to deter misconduct. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

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

##### Section 54 – Franchisee may propose termination at any time

Section 54 replicates clause 26B of the old Code with some structural changes. It allows a franchisee to give the franchisor a written proposal for the termination of the franchise agreement, including reasons and proposed terms, at any time. The franchisor must give a substantive written response to the proposal within 28 days. Subsequent proposals do not require responses from the franchisor unless the termination is due to a different reason.

Consistent with the policy to impose a civil penalty for all substantive obligations under the Code, a franchisor is now liable to a civil penalty of up to 600 penalty units if the franchisor refuses to terminate the franchise agreement on the terms proposed or does not provide reasons for the refusal. This is necessary to promote compliance and deter misconduct by franchisors. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

##### Section 55 – Termination by franchisor—breach by franchisee

Section 55 sets out the procedure for termination of a franchise agreement by the franchisor where the franchisee is in breach of the agreement, the breach is not a ground for termination listed under subsection 57(1) or 58(1), the franchisor proposes to terminate the agreement because of that breach, and the franchisee does not agree to the termination. In such circumstances, the franchisor must give the franchisee written notice that it proposes to terminate the franchise agreement, advise what must be done to remedy the breach and give the franchisee reasonable time to remedy the breach.

A franchisor that fails to give the required notice is liable to a civil penalty of up to 600 penalty units. The franchisor must not terminate the franchise agreement if the franchisee has remedied the breach after receiving the notice. If the franchisor terminates the franchise agreement in this scenario, the franchisor is liable to a civil penalty of up to 600 penalty units. The civil penalties detailed above are necessary to promote compliance and deter misconduct by franchisors. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

Section 55 replicates clause 27 of the old Code with some structural changes and the added clarification that it applies in situations where a ground for termination listed under subsection 57(1) or 58(1) does not apply.

##### Section 56 – Termination by franchisor—no breach by franchisee

Section 56 replicates clause 28 of the old Code, with the added clarification that it applies in situations where a ground for termination listed under subsection 57(1) or 58(1) does not apply.

Section 56 sets out the procedure for termination of a franchise agreement where there is no breach by the franchisee. This section applies if the franchisor proposes to terminate the franchise agreement in accordance with the agreement, other than on a ground mentioned in subsection 57(1) or 58(1), before it expires and without the consent of the franchisee, in circumstances where the franchisee has not breached the agreement.

Under subsection 56(3) the franchisor must not terminate the franchise agreement unless they have given the franchisee reasonable written notice of the decision to terminate the agreement and the reasons for it. 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. A Court may consider what is ‘reasonable’ by having regard to all the circumstances of the case. A franchisor that terminates a franchise agreement without giving the franchisee notice of the termination and the reasons for it, is liable to a civil penalty of up to 600 penalty units. This is necessary to promote compliance and deter misconduct by franchisors. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

Section 57 – Termination by franchisor with 7 days’ notice on grounds for which franchisee may not notify dispute

Section 57 replicates part of clause 29 in the old Code and implements a more streamlined approach to termination for ‘serious breaches’ of the franchise agreement, as represented by the grounds set out in subsection 57(1). This implements the Government response to recommendation 13 of the Final Report of the Schaper Review. 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 57 provides that the franchisor must not terminate the franchise agreement on any of the grounds listed unless they have provided the franchisee 7 days’ written notice of the proposed termination and ground. A franchisor that does not comply with this obligation is liable to a civil penalty of up to 600 penalty units. This is necessary to promote compliance and deter misconduct by franchisors. The maximum civil penalty is consistent with the penalty attached to other substantive obligations of the Code.

The full list of grounds are:

- 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 a company that 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 Fair Work civil remedy provision;
- the franchisee is liable to 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 (as defined in section 6).

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). Where there is already a relevant decision made by an external decision-maker, franchisors will be able to terminate a franchise agreement after they have

provided 7 days' notice. However, 7 days is the minimum notice period. This section does not prevent a franchisor providing a franchisee with more time to address a ground for termination.

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 grounds listed in subsection 57(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 a franchisee from accessing justice if they feel the franchisor should not be terminating their franchise agreement, as they can still apply to a court to stop the termination.

#### Section 58 – Termination by franchisor on grounds for which franchisee may notify dispute

Section 58 maintains the termination requirements and dispute resolution process as set out in clause 29 of the old Code but for the grounds specified in subsection 58(1). The franchisor must give the franchisee written notice of the proposed termination and the ground for it (the **termination notice**) if any of the following grounds apply:

- 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 a franchise agreement on one of the relevant grounds without adherence to the prescribed notice timeframes set out in subsection 58(3). Specifically, a franchisor must not terminate the franchise agreement before:

- if within 7 days after the day the termination notice is given (the **notice period**) the franchisee does not give the franchisor written notice (a **dispute notice**) under subsection 72(1) or the franchise agreement—the end of the notice period; or
- if within the notice period, the franchisee gives the franchisor a dispute notice—the end of 28 days after the day the dispute notice is given.

A franchisor is liable to a civil penalty of up to 600 penalty units if the franchisor breaches these requirements. The civil penalty is necessary to promote compliance and deter misconduct by a franchisor. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

If the franchisee gives the franchisor a dispute notice relating to the proposed termination within 7 days after receiving the termination notice, then despite subsections 72(3) to (5) or corresponding provisions of the franchise agreement:

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

This means the time periods set out in subsections 72(3) to (5) do not apply, providing for an expedited process.

The parties can also request an expedited arbitration process. Despite the time period set out in paragraph 80(4)(a) for the appointment of an arbitrator, the Ombudsman must appoint an arbitrator as soon as practicable after receiving a request.

#### Section 59 – Requiring franchisee to cease operating franchised business on termination grounds

Under section 59, if the franchise agreement allows a franchisor to take action to cause the franchisee not to operate the business or part of the business because of a ground mentioned in subsections 57(1) or 58(1), the action involves termination, and the franchisor proposes to take that action, then the franchisor may, by written notice, require the franchisee not to operate the business or the part of the business because of that ground. This would allow the franchisor to require the franchisee not to operate before the franchise agreement can be formally terminated.

This is intended to ensure that a franchisor can 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 60 – Franchisor may require only certain significant capital expenditure

Section 60 replicates clause 30 of the old Code, however, it now includes a reference to the significant capital expenditure requirements that must be outlined in the disclosure document in accordance with subsection 20(4).

Section 60 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 60(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 a franchise 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.

If the franchisor requires the franchisee to undertake significant capital expenditure in any other situation, the franchisor is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote compliance and deter misconduct by franchisors. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

#### Section 61 – Payments to and from specific purpose funds

Section 61 is largely the same as clause 31 of the old Code, however, it now includes a reference to a specific purpose fund (as defined in section 6) rather than marketing funds.

Section 61 sets out procedures relating to the management of fees paid by franchisees, in circumstances where a franchise agreement requires the franchisee to pay money to a specific purpose fund.

If the franchisor or master franchisor operates one or more units of a franchised business, the franchisor or master franchisor must make payments to the fund on behalf of each of those units on the same basis as franchisees of other units of the franchised business. A franchisor or master franchisor that fails to do so is liable to a civil penalty of up to 600 penalty units.

The fund administrator must maintain a separate account for payments to the fund. A fund administrator that fails to do so is liable to a civil penalty of up to 600 penalty units.

In conjunction with section 31, section 61 seeks to maintain a high-level of transparency about the management of specific purpose funds. Subsection 61(4) provides that despite any terms of a franchise agreement, the fund administrator must only use fund moneys 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. A fund administrator is liable to a civil penalty of up to 600 penalty units if they use the fund for any other purpose.

The civil penalties under section 61 are necessary to deter misconduct and ensure specific purpose funds are appropriately managed. The maximum penalties are consistent with the maximum penalty attached to other substantive obligations of the Code.

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 62 – Franchisor not to vary franchise agreement retrospectively without franchisee’s consent

Section 62 replicates clause 31A of the old Code and now includes a civil penalty, consistent with other substantive obligations on franchisors in the Code. Section 62 provides that a franchisor must not vary a franchise agreement with retrospective effect, without the consent of the franchisee. If the franchisor does this, the franchisor is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote compliance and deter misconduct by franchisors. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

This section does not preclude the application of requirements relating under the Unfair Contract Terms regime in the Australian Consumer Law.

### Section 63 – Disclosure of personal information of former franchisees

Section 63 expands on clause 32 of the old Code. Subsection 63(1) provides that a franchisor must not disclose a former franchisee's personal information to a prospective franchisee (for the purposes of subitem 6(5) of Schedule 1), unless at least 14 days before doing so the franchisor has informed the former franchisee, in writing, of the former franchisee's right to make a written request that their information not be disclosed in accordance with subsection 63(2), and the former franchisee has not made such a request.

Subsection 63(2) provides that a former franchisee may make a written request to a franchisor not to disclose their personal information to a prospective franchisee, and the franchisor must not disclose that information.

Fourteen days is the minimum period for the franchisor to inform the franchisee. A franchisor could inform a former franchisee about their right to make a written request that their information not be disclosed when the franchisor is collecting their information, or at some other point before the information is disclosed.

A franchisor that fails to comply with the requirement in subsection 63(1) is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote compliance and deter misconduct by franchisors. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

This is a new requirement in comparison to the old Code. This requirement is intended to protect the privacy of former franchisees by giving former franchisees notice of the potential disclosure of personal information and providing an opportunity for former franchisees to prevent this information from being shared. This gives former franchisees more control over how their information is used. Further information about this provision can be found under section 13.

Subsection 63(3) provides that a franchisor must not engage in conduct with the intention of influencing a former franchisee to make, or not make, a request under subsection 63(2). If a franchisor engages in any such conduct, the franchisor is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to deter franchisors from attempting to influence former franchisees in relation to the disclosure of their personal information. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

### Section 64 – Association of franchisees or prospective franchisees

Section 64 replicates clause 33 of the old Code. Section 64 prohibits a franchisor from engaging in conduct that would restrict or impair franchisees or prospective franchisees from forming an association or associating with other franchisees or prospective franchisees for a lawful purpose.

A franchisor that is a body corporate is liable to the maximum civil penalty prescribed in section 17, and a franchisor that is not a body corporate is liable to a maximum civil penalty of \$500,000, for breach of section 64. Further information about the penalty for body corporates can be found under section 17.

This provision attracts the higher tier maximum civil penalty due to the serious implications of restricting a franchisee's freedom in such a manner. Ensuring franchisees and prospective franchisees can form associations is particularly important in the context of dispute resolution, where disparity of their resources compared to franchisors is acutely felt. Associations of franchisees or prospective franchisees in this context increase access to justice and reduce the potential power imbalance in dispute resolution and fear of retribution which could otherwise deter franchisees from enforcing their rights. The higher penalty reflects the importance of this freedom and is designed to deter franchisors seeking to prevent associations among franchisees and potential franchisees.

The Court has discretion to consider the seriousness of the contravention and impose a penalty, up to the maximum penalty, that is appropriate in the circumstances of the case. Also see section 11 in relation to civil penalties provisions of the Code.

#### Section 65 – Franchisor not to require franchisee to pay franchisor's legal costs relating to franchise agreement

Section 65 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 preparing, negotiating or executing the franchise agreement except in the circumstances outlined in subsection 65(2). If the franchisor or associate does require the franchisor to pay legal costs in this way, they are liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Subsection 65(2) specifies that a franchisor could require a franchisee to make a payment, of a fixed amount, prior to the franchisee starting the franchised business if the franchise agreement:

- specifies the fixed amount of dollars;
- specifies that the amount will be for the purpose of paying the franchisor's legal costs associated with preparing, negotiating or executing the agreement;
- does not exceed reasonable and genuine costs; and
- specifies that the amount will not include any legal costs for the franchisor *after* the agreement is entered into, relating to preparing, negotiating or executing *other* documents.

Section 65 complements section 38, which prohibits a franchisor from entering into an agreement that requires a franchisee to pay legal costs.

#### Section 66 – Franchisor not to require franchisee to pay costs of settling disputes

Section 66 provides that a franchisor must not require a franchisee to pay costs incurred by the franchisor in relation to settling a dispute. A franchisor that does require costs to be incurred is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

This is intended to complement section 41 which prohibits a franchisor from *entering into a franchise agreement* that requires a franchisee to pay costs incurred by the franchisor

when settling a dispute. Similar to section 41, this covers disputes under Part 5 of the Code and otherwise, however, it is not intended to cover situations where both parties agree on costs for situations outside of the franchise agreement.

#### Section 67 – Franchisor not to rely on restraint of trade clause if franchise agreement not renewed or extended

Section 67 complements section 42 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 42.

Section 42 prohibits a franchisor from entering a franchise agreement that includes a restraint of trade clause in certain circumstances.

In accordance with section 97, the Regulations only apply to franchise agreements entered into, transferred, renewed or extended on or after 1 April 2025. Therefore, sections 42 and 67 do not apply in relation to a franchise agreement that was not entered into, transferred, renewed or extended on or after 1 April 2025 and do not apply retrospectively.

A franchisor that fails to comply with section 67 is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to promote compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

### **Part 5 – Resolving disputes**

#### *Division 1 – General*

#### Section 68 – Right to bring proceedings unaffected by this Part

Section 68 replicates clause 37 of the old Code. Section 68 specifies that Part 5 of the Code does not affect a party's right to bring legal action under the franchise agreement or otherwise.

#### Section 69 – Internal complaint handling procedure

Section 69 replicates clause 34 of the old Code. Section 69 requires a franchise agreement to include a complaint handling procedure, which contains the obligations set out in subsections 72(1) to (4) and section 74. These are the minimum standards which must apply to the franchisor's internal complaint handling procedure.

#### Section 70 – Resolving disputes

Section 70 replicates clause 35 of the old Code. Section 70 allows a party to a franchise agreement (the **complainant**) who has a dispute with another party to the agreement (the **respondent**) 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 of the Code.

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 Code.

#### Section 71 – When a party is taken to be trying to resolve a dispute



Section 71 replicates clause 36 of the Code. Section 71 provides that a party is taken to be trying to resolve a dispute, if they approach the resolution of a dispute in a reconciliatory manner. This includes:

- attending and participating in meetings at reasonable times;
- not taking any action that would damage the reputation of the franchise system; and
- for ADR processes—doing all of the above as well as making the party’s intention clear as to goals at the start of the process and observing confidentiality obligations.

### *Division 2—Code complaint handling procedure*

#### *Subdivision A—Notification of dispute*

#### Section 72 – Notification of dispute

Section 72 replicates clause 40A of the old Code. It sets out the requirements for a dispute notification and steps for how the parties should try to resolve the dispute. The complainant must notify the respondent in writing of the nature of the dispute, the outcome sought and potential actions to be taken. If the dispute is not resolved within 21 days, it can be referred to an ADR practitioner under the franchise agreement or the Code.

Section 72 requires ASBFEO to appoint an ADR practitioner 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 73 – Similar disputes between 2 or more franchisees and one franchisor

Section 73 replicates clause 40B of the old Code. Section 73 provides a procedural framework for dispute resolution processes involving multiple franchisees that have a corresponding dispute with a franchisor. In particular, franchisees may agree to resolve their disputes in the same way, and may discuss disputes for the purpose of deciding whether to agree to resolve their disputes in the same way, despite any confidentiality requirements in their franchise agreements. If the dispute cannot be resolved, this section also 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 ASBFEO.

#### *Subdivision B—ADR process*

#### Sections 74 to 78 – ADR process

Subdivision B of Division 2 of Part 5 of the Code broadly replicates the ADR process from the old Code but now includes section 78 which provides the Ombudsman (defined as ASBFEO in section 6) with the power to publicise the names of franchisors that refuse to engage in the ADR process.

Under section 78, ASBFEO may publicise the names of franchisors that refuse to engage in or withdraw from the ADR process. This implements the Government response to recommendation 18 of the Final Report of the Schaper Review. ASBFEO 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.

ASBFEO can publish the name of a franchisor in any way that it thinks appropriate to draw attention to the behaviour of the franchisor. This is intended to encourage franchisors to meaningfully participate in the ADR process. This power is best placed with ASBFEO as they are already able to be involved in the dispute resolution process under Part 5 of the Code. As outlined in subsection 78(2), section 78 does not:

- limit the power of ASBFEO or anyone else to publicise a matter or a person's name;
- prevent anyone else from publicising a matter or a person's name; or
- affect any obligation (however imposed) on anyone else to publicise a matter or a person's name.

Sections 74 and 75 replicate clause 41A of the old Code, restructured into two sections. Section 74 sets out requirements relating to the ADR process. Subsection 74(3) provides that each party to a dispute must attend the ADR process. A party that fails to attend the ADR process is liable to a civil penalty of up to 600 penalty units. This is necessary to promote compliance and ensure all parties to a dispute engage in the ADR process. Section 75 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 Code. Section 76 replicates clause 41B of the old Code covering when and how an ADR practitioner can terminate the ADR process. Section 77 replicates clause 41C of the old Code which covers costs of an ADR process.

### *Subdivision C—Arbitration*

#### Sections 79 to 82 – Arbitration process

Section 79 replicates clause 43A of the old Code. Section 79 allows for a complainant and respondent to agree in writing to resolve disputes by arbitration, either through the franchise agreement or some other agreement. 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 80 replicates clause 43B of the old Code. The object of this provision is to ensure that minimum standards of conduct are observed throughout the process. If both the complainant and respondent have agreed to resolve their dispute by arbitration under Subdivision C of Division 2 of Part 5 of the Code:

- the parties must request ASBFEO to appoint an arbitrator, although they may request ASBFEO to appoint a particular arbitrator that they agree on;
- ASBFEO must appoint an arbitrator within 14 days and provide details of the arbitrator appointed in writing, unless they are satisfied the complaint is frivolous, vexatious or subject of another arbitration; and
- the arbitrator must decide how to conduct the arbitration, the time and place (which must be in Australia) and the day it commences.

The section requires all parties to attend an arbitration. This is to ensure certainty for parties to a dispute who agree to have the dispute resolved by arbitration. If a party does not attend arbitration the party is liable to a civil penalty of up to 600 penalty units. A party

is taken to attend arbitration if a person who has authority to enter into an agreement to settle the dispute on the party's behalf has attended the arbitration. The civil penalty is necessary to deter misconduct and ensure parties meaningfully engage in arbitration. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Section 80 also prescribes procedural requirements for an arbitrator, to provide certainty and ensure transparency regarding the arbitration process. For example, an arbitrator is required to give ASBFEO notice of the commencement of arbitration and nature of the dispute. If the dispute is resolved, the arbitrator must set out in writing the terms of the resolution, give a copy of the terms to each party and notify ASBFEO that the dispute has been resolved.

Section 81 replicates clause 43C of the old Code. Section 81 states that the arbitrator must terminate the arbitration if the parties mutually request the arbitrator to do so. The arbitrator must then issue a certificate relating to the termination of the process (including names of the parties, nature of the dispute and that the arbitration was terminated without resolving the dispute) to the parties and the ASBFEO as a record of the attempt to resolve the dispute.

Section 82 replicates clause 43D of the old Code. Section 82 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 83 – Confidentiality requirements

Section 83 replicates clause 44A the old Code. Section 83 requires parties to a dispute arising under the Code to observe confidentiality requirements relating to 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 of the old Code. Clauses 46A and 46B of the old Code are now sections 45 and 46 and are now located in Part 4 of the Code to be grouped with other provisions dealing with compensation for early termination.

#### *Division 1—Preliminary*

##### Section 84 – Application of Part

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

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

##### Section 85 – Notification obligation—franchisor

This section replicates clause 47 of the old Code. It requires a franchisor to notify a franchisee of whether they intend to extend or enter into a new vehicle dealership agreement or will do neither and the timeframes that apply to the notification.

A franchisor is liable to a civil penalty of up to 600 penalty units if the franchisor does not:

- provide notice in accordance with the timeframes listed in subsections 85(2) or (3);
- include a statement that the franchisee may request a disclosure document; or
- provide reasons for neither extending nor entering into a new vehicle dealership agreement.

The civil penalty is necessary to promote compliance and deter misconduct by a franchisor. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

#### Section 86 – Notification obligation–franchisee

This section replicates clause 48 of the old Code. It requires a franchisee to notify a franchisor of whether or not they intend to renew or enter into a new vehicle dealership agreement with the franchisor and the timeframes that apply to the notification. The franchisee must give notice within the timeframes specified in subsections 86(2) or (3).

Subsection 86(4) provides that where the franchisee does not intend to renew or enter into a new franchise agreement that is a new vehicle dealership agreement, the notice must include reasons.

#### Section 87 – Obligation to manage winding down of agreement

Section 87 largely replicates clause 49 of the old Code, except that a note refers to the good faith obligations of the parties under section 18, instead of a requirement to cooperate as set out in subclause 49(3) of the old Code.

A franchisor and franchisee are required to cooperate to develop and implement a written plan for winding down the dealership, including management of the franchisee's stock, if:

- the franchisor gives the franchisee a notice that the franchisor intends to neither extend the new vehicle dealership agreement nor enter into a new agreement with the franchisee under section 85; or
- the franchisee gives the franchisor a notice that the franchisee intends to neither renew the new vehicle dealership agreement nor enter into a new agreement with the franchisor under section 86.

Both the franchisor and the franchisee are liable to a civil penalty of up to 600 penalty units if this obligation is not met. The obligation is on both parties because a written plan cannot be agreed to without both parties' cooperation and engagement. The civil penalty is necessary to promote compliance and deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

#### *Division 3–Resolving disputes*

## Section 88 – Franchisees may request multi-franchisee dispute resolution

This section replicates clause 52 of the old Code. It provides that if a franchisor has a new vehicle dealership agreement with two or more franchisees, and two or more franchisees have a dispute of the same nature with a franchisor, they may ask the franchisor to deal with the franchisees together about the dispute.

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

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

Part 5A of the old Code established the Franchise Disclosure Register to facilitate free and easy access to pertinent information about franchised businesses in Australia for prospective franchisees. This continues under the Code subject to a number of updates.

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

## Section 89 – Secretary to keep Register

Section 89 requires the Secretary to keep the Register by electronic means and available for public inspection on the internet without charge.

Section 89 has been drawn from clause 53 of the old Code and does not remake subclause 53(2) as it is redundant. Subclause 53(2) of the old Code previously specified that the Register, established by the Secretary, was 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 90 – Contents of Register

Section 90 outlines the content that must, or that may, be included in the Register with respect to each franchise.

This section mostly replicates clause 53A of the old Code, subject to structural changes to subsections 90(2) and (3).

Subsection 90(4) remakes subclause 53A(3) of the old Code. It specifies the documents that are provided by a franchisor that can be included on the Register. However, while subclause 53A(3) of the old Code allows the key facts sheet and disclosure document created and maintained by the franchisor to be included on the Register, subsection 90(4) no longer allows those documents to be included on the Register.

## Section 91 – Secretary may correct clerical errors and remove, update and replace certain information and documents

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

Subsection 91(4) allows the Secretary to remove a document or information included in the Register by a franchisee if the document contains, or the information is:

- information mentioned in subsection 90(3) (such as the personal information of an individual other than the franchisor); or
- information of a kind determined by subsection 91(5).

Subsection 91(5) allows the Secretary to determine, by legislative instrument, additional kinds of information that, when contained in a document (or as information), permit the Secretary to remove that document or information from the Register. This power is necessary to ensure the Register can be maintained. The legislative instrument would be subject to disallowance and sunset after no more than 10 years and would therefore be subject to appropriate parliamentary scrutiny.

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

#### Section 92 – Initial obligation to provide information for inclusion in Register

This section replicates clause 53D of the old Code. It requires franchisors to provide certain information for inclusion in the Register. Section 92 only applies if the franchisor has not previously provided the relevant information under section 92 or clause 53C or 53D of the old Code. Franchisors must provide the relevant information in a form and manner approved by the Secretary at least 14 days before the franchisor enters into a franchise agreement with a prospective franchisee.

A franchisor is liable to a civil penalty of up to 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 substantive obligation and to deter misconduct. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Clause 53C of the old Code has been omitted as it was a transitional provision for franchisors that gave a disclosure document on or before 31 October 2022 and is redundant.

Subsection 92(4) allows the Secretary to determine, by legislative instrument, that each franchisor, or a specified franchisor, must provide the Secretary with information required to be included in a disclosure document, for inclusion on the Register (also see paragraph 92(2)(g)). This is in addition to the core information that must, or may, be included in the Register. The additional information that the Secretary can require is limited to information that is already required to be provided in the disclosure document relating to the franchise. The information cannot be personal information that relates to an individual other than the franchisor or information that relates to a particular franchisee or a particular site being occupied by a franchisee (as listed in subsection 90(3)).

This power is necessary to ensure the Secretary can expand the scope of information available on the Register where appropriate. This may be necessary to enhance the ability of prospective franchisees to make informed decisions about a franchise business that they are considering purchasing by enabling them to easily compare information about different franchise businesses. The legislative instrument would be subject to disallowance and sunset after no more than 10 years and will therefore be subject to appropriate parliamentary scrutiny. The power under subsection 92(4) complements the Secretary's power to determine, by legislative instrument, that each franchisor, or a specified franchisor, must provide the Secretary with information required to be included in a

disclosure document, for inclusion on the Register on an ongoing basis under subsection 93(4).

Subsection 92(4) is based on subclauses 53C(4) and 53D(4) of the old Code. Section 101 ensures that the *Competition and Consumer (Industry Codes–Franchising) (Additional Information Required by the Secretary) Determination 2022*, made for the purpose of subclause 53C(4) and 53D(4) of the old Code, remains in force and has effect for the purposes of section 92, even after the old Regulations are repealed.

### Section 93 – Obligation to annually update or confirm information included in Register

Section 93 updates clause 53E of the old Code. It requires franchisors to:

- if information included on the Register is current—confirm information on the Register is correct;
- provide or update the information listed in subsection 92(2), to the extent that the information is incorrect, out-of-date or has not previously been provided for inclusion on the Register; and
- provide any information required to be provided to the Secretary under a determination made pursuant to subsection 93(4).

The section applies to a franchisor if information is included, or was required to be included, on the Register under section 92 or clause 53C or 53D of the old Code and if the franchisor is the master franchisor in a master franchise system, the master franchise system has two or more subfranchisors.

Under subsection 93(3), the information must be provided in writing and in the form and manner approved by the Secretary. If the information was required to be provided under section 92, it must be provided at least once for each financial year that ends after the day the franchisor enters into the franchise agreement, on or before the 14th day of the fifth month following the end of the financial year. If the information was required to be provided by other means, for example under clause 53C or 53D of the old Code, it should be provided at least once each financial year on or before the 14th day of the fifth month following the end of the financial year.

A franchisor is liable to a civil penalty of up to 600 penalty units for failing to provide or update the relevant information. The civil penalty is necessary to promote timely compliance and deter misconduct by franchisors. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Under subsection 93(4), the Secretary may determine, by legislative instrument, that each franchisor, or a specified franchisor, must provide the Secretary with information that is required to be included in a disclosure document. This will generally cover information needed to update the Register. A franchisor must provide this information pursuant to paragraph 93(2)(c).

The additional information that the Secretary can require is limited to information that is already required to be provided in the disclosure document relating to the franchise. The information cannot be personal information that relates to an individual other than the franchisor or information that relates to a particular franchisee or a particular site being occupied by a franchisee (as listed in subsection 90(3)). In practice, subsection 93(4) is

intended to allow the Secretary to request further information from franchisors that are already required to update their disclosure documents under section 21. The legislative instrument would be subject to disallowance and sunset after no more than 10 years and will therefore be subject to appropriate parliamentary scrutiny. The power under subsection 93(4) complements the Secretary's power to determine, by legislative instrument, that each franchisor, or a specified franchisor, must provide the Secretary with information required to be included in a disclosure document, for initial inclusion on the Register under subsection 92(4).

The obligations under section 93 ensure 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 94 – Redacting certain information from documents

Section 94 replicates clause 53F of the old Code and sets out a requirement for the franchisor to redact the information mentioned in subsection 90(3), including personal information, from a document to be included in the Register (as described in subsection 90(4)) or a document accessible at a link included in the Register. A franchisor that fails to do so is liable to a civil penalty of up to 600 penalty units. The civil penalty is necessary to deter misconduct by franchisors. The maximum penalty is consistent with the maximum penalty attached to other substantive obligations of the Code.

Subsection 94(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 of information by agents*

#### Section 95 – Agents may provide or give information

Section 95 replicates clause 53G of the old Code. Section 95 provides that a franchisor's obligations to provide or give information under Division 2 of Part 7 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 the use of agents 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 96 – Delegations by Secretary

Section 96 replicates clause 53H of the old Code. Section 96 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. It is intended to ensure that functions and powers of the Secretary in Part 7 are carried out efficiently and effectively in an operational environment where the Secretary may not have the capacity to undertake all functions and powers personally.

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

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

#### Section 97 – Application of this instrument–agreements entered into etc. on or after 1 April 2025

Section 97 provides that the Regulations apply to franchise agreements entered into, transferred, renewed, or extended on or after 1 April 2025 and all conduct engaged in on or after 1 April 2025 in relation to the agreements, subject to the five exceptions set out below.

First, section 78, which relates to the Ombudsman’s power to publish a franchisor’s refusal to engage in ADR, applies to conduct occurring on or after 1 April 2025 in relation to a franchise agreement entered into, transferred, renewed or extended on or after 1 January 2015. The provision only applies prospectively to conduct occurring after 1 April 2025, although the conduct may relate to franchise agreements entered into from 1 January 2015.

Second, sections 43 and 44 only apply to franchise agreements (that are not new vehicle dealership agreements) entered into, transferred, renewed or extended on or after 1 November 2025, rather than 1 April 2025.

- Section 43 prohibits a franchisor from entering a franchise agreement (that is not a new vehicle dealership agreement), unless it provides compensation for early termination in certain circumstances, and the buy back or compensation of certain items returned by the franchisee following early termination.
- Section 44 prohibits a franchisor from entering a franchise agreement (that is not a new vehicle dealership agreement) unless the agreement provides the franchisee with a reasonable opportunity to make a return on any investment required by the franchisor as part of entering into or under the agreement.

Clause 46A and 46B of the old Code have similar requirements for new vehicle dealership arrangements (now in section 45 and 46). The Code expands these requirements to other franchise agreements. The delayed application of sections 43 and 44 provide a transitional period to ensure there is sufficient time for franchisors proposing to enter franchise

agreements that are not new vehicle dealership agreements to adjust to the new requirements.

Third, requirements relating to a specific purpose fund that is not a marketing fund or other cooperative fund controlled or administered by or for a franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor) are delayed. Specifically:

- section 31 (requiring a franchisor to provide financial statements in relation to specific purpose funds if a franchise agreement requires the franchisee to pay money into such a fund) and section 61 (dealing with payments to and from a specific purpose fund) only apply in relation to a specific purpose fund that is not a marketing fund or other cooperative fund controlled or administered by or for a franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor) on and from 1 November 2025; and
- a disclosure document created before 1 November 2025 is not required to include the information in item 15 of Schedule 1 in relation to a specific purpose fund that is not a marketing fund or other cooperative fund controlled or administered by or for a franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor). This only applies to a disclosure document created pursuant to section 20. It does not apply to the requirements to update a disclosure document under section 21 or 33.

The delayed application of these provisions is appropriate because the old Code only dealt with requirements for a fund that is a marketing fund or other cooperative fund controlled or administered by or for a franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor). A specific purpose fund (as defined in section 6) is broader and captures other kinds of funds. The delayed application provides a transitional period for franchisors to adjust to the new requirements relating to specific purpose funds that are not marketing funds or cooperative funds as detailed above.

Fourth, a disclosure document created before 1 November 2025 is not required to include the information in subitems 14(1A) and (1B) of Schedule 1, which deal with new requirements relating to significant capital expenditure. This provides more time for franchisors to comply with the new requirements on franchisors to include information relating to significant capital expenditure in a disclosure document. This only applies to a disclosure document created pursuant to section 20. It does not apply to the requirements to update a disclosure document under section 21 or 33.

Fifth, the requirement to update a disclosure document under section 21 does not apply to a disclosure document given to a prospective franchisee before 1 April 2025 under clause 9 of the old Code (that is taken to be a disclosure document under the Code pursuant to section 99) before 1 November 2025. This does not affect the requirement to update a disclosure document on request under section 33. See section 99 for additional details on this.

#### Section 98 – Saving of old regulations—agreements existing on 1 April 2025

Schedule 2 repeals the old Regulations on 1 April 2025. Section 98 ensures that despite the repeal of the old Regulations, the old Regulations (as in force immediately before 1 April

2025) continue to apply to a franchise agreement entered into before 1 April 2025 until the agreement is terminated, transferred, renewed or extended. The old Regulations, as in force immediately before that day, do not apply in relation to conduct relating to the transfer, renewal or extension of a franchise agreement on or after 1 April 2025.

This is because the Regulations relevantly apply to franchise agreements entered into, transferred, renewed, or extended on or after 1 April 2025 and all conduct engaged in on or after 1 April 2025 in relation to the agreements, as detailed in section 97 above.

Section 98 is complemented by Part 4 of the *Acts Interpretation Act 1901*, dealing with repeal of legislation.

#### Section 99 – Transitional arrangements relating to certain disclosure documents given before 1 April 2025

Section 99 ensures that disclosure documents given to a prospective franchisee before 1 April 2025 under clause 9 of the old Code (existing disclosure documents) transition into the Code in certain circumstances.

Existing disclosure documents given under the old Code will be subject to these transitional arrangements if:

- under subclause 9(1) of the old Code, the franchisor has given a proposed franchisee the disclosure document prior to 1 April 2025, in relation to a franchise agreement that comes into effect after the Regulations commence;
- under subclause 9(2) of the old Code, the franchisor has given a franchisee disclosure documents for a proposed renewal or extension of a franchise agreement that occurs after the Regulations commence;
- under subclause 9(2A) of the old Code, the franchisor has given a proposed franchisee disclosure documents in relation to a transfer of a franchise agreement and the transfer occurs after the Regulations commences.

In the above circumstances:

- an existing disclosure document is taken to be a disclosure document for the purposes of subsection 20(1);
- an existing disclosure document is taken to have been given to a prospective franchisee for the purposes of subsections 23(2) or 23(3) (which replace section 9 of the old Code and outline the documents a franchisor is supposed to give a prospective franchisee);
- subclauses 8(6) and 8(7) of the old Code continue to apply in relation to the existing disclosure documents until the end of 31 October 2025 rather than section 21 of the Code (which requires the ongoing update of disclosure documents). From 1 November 2025, section 21 applies in relation to the existing disclosure documents.

Subclause 8(6) of the old Code provides that after entering into a franchise agreement, the franchisor must update the disclosure document within 4 months after the end of each financial year. This means that if, after entering a franchise agreement, the end of the

financial year for the entity falls on or before 31 October 2025, an existing disclosure document must be updated in accordance with subclause 8(6) of the old Code. The franchisor would have up to 4 months from the end of the financial year to do so. For example, if the end of the financial year fell on 31 October 2025, the disclosure document would need to be updated in accordance with subclause 8(6) of the old Code within 4 months from 31 October 2025.

Section 21 provides that a franchisor must, within 4 months starting on the first day of the current financial year, update the disclosure document. Section 21 does not apply to existing disclosure documents prior to 1 November 2025.

This means that a franchisor that has an existing disclosure document is only required to update the disclosure document in accordance with section 21 within 4 months of the first day of a financial year that the franchisor is party to the franchise agreement, that occurs on or after 1 November 2025 (in circumstances where the franchisor entered into two or more franchise agreements in the previous financial year, or intends to enter into another franchise agreement in the current financial year). Section 21 also applies for every financial year that follows. This does not prevent a franchisor from updating the existing disclosure document at any time before 1 November 2025. It is open to a franchisor to choose to update the document earlier. A franchisor should also bear in mind that despite the above, other obligations may necessitate the updating of a disclosure document sooner.

As an existing disclosure document is taken to be a disclosure document for the purposes of subsection 20(1), the franchisor is subject to other obligations in the Code in relation to an existing disclosure document. This includes obligations in relation to section 18 (the requirement for parties to act in good faith) section 33 (the requirement to update the disclosure document on request), and section 34 (the requirement to provide materially relevant facts). A franchisor is also subject to the prohibitions on misleading or deceptive conduct under the Act.

#### Section 100 – Transitional arrangements relating to specific purpose funds that are marketing or other cooperative funds–deemed compliance

Section 97 delays the application of certain obligations in relation to a specific purpose fund that is not a marketing fund or other cooperative fund controlled or administered by or for the franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor). This is intended to provide franchisors with a smooth transition to the new requirements relating to specific purpose funds that were not in the old Code.

For the same reason, section 100 deems compliance with the old Code to be compliance with the Code from 1 April 2025 to 31 October 2025 in relation to a specific purpose fund that is a marketing fund or other cooperative fund controlled or administered by or for the franchisor or a master franchisor (whether the franchisee is a franchisee or subfranchisee of the franchisor or master franchisor), in the circumstances detailed below.

- A fund administrator is taken to have complied with:
  - subsection 31(2) in relation to the fund (as detailed above) if they comply with subclauses 15(2) and (4) of the old Code in relation to the fund;
  - subsection 61(3) in relation to the fund (as detailed above) if they comply with subclause 31(2) of the old Code in relation to the fund;

- subsection 61(4) in relation to the fund (as detailed above) if they comply with subclause 31(4) of the old Code in relation to the fund.
- A franchisor or master franchisor is taken to comply with subsection 61(2) in relation to the fund (as detailed above), if they comply with subclause 31(2) of the old Code in relation to the fund.
- A disclosure document is taken to comply with item 15 of Schedule 1 for the purposes of subsections 20(1) and (3), if the document complies with item 15 of Annexure 1 to the old Code.

This means that a franchisor may comply with the old Code or the new Code in relation to the provisions detailed above from 1 April 2025 to 31 October 2025. From 1 November 2025, a franchisor must comply with the Code in relation to all kinds of specific purpose funds.

Section 101 – Saving of *Competition and Consumer (Industry Codes–Franchising) (Additional Information Required by the Secretary) Determination 2022*

Section 101 ensures that the *Competition and Consumer (Industry Codes–Franchising) (Additional Information Required by the Secretary) Determination 2022* remains in force and has effect for the purposes of section 92, even after the old Regulations are repealed.

The operation of the *Competition and Consumer (Industry Codes – Franchising) (Additional Information Required by the Secretary) Determination 2022* continues unchanged under the Regulations.

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

Schedule 1 sets out the requirements for disclosure documents. Schedule 1 remakes Annexure 1 of the old Code subject to several updates, primarily to item 14, dealing with significant capital expenditure, and payments other than payments to agents, and item 15, dealing with specific purpose funds.

### **Item 1 – First page**

Item 1 of Schedule 1 requires that the first page of the disclosure document includes certain information and a prescribed statement about the disclosure document and the franchising relationship.

Item 1 of Schedule 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 of Schedule 1 requires details of the franchisor and the franchisor’s business, such as the names of associates of the franchisor and its relationship with those associates.

### **Item 3 – Business experience**

Item 3 of Schedule 1 requires details of the business experience of the franchisor and each person mentioned in item 2 of Schedule 1, over the previous ten years.

### **Item 4 – Litigation**

Item 4 of Schedule 1 requires disclosure of the details of current proceedings involving the franchisor, a director of the franchisor or an associate of the franchisor alleging certain breaches, such as breach of a franchise agreement or misconduct, or under certain legislation.

Item 4 of Schedule 1 also requires disclosure of whether the franchisor, a director of the franchisor or an associate of the franchisor have been convicted of a serious offence, been subject to a final judgement in civil proceedings, or been bankrupt or insolvent, within a certain time period.

Item 4 of Schedule 1 has been updated to require disclosure of any proceedings or judgments against a responsible franchisor entity for 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* were 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 of Schedule 1 requires disclosure of the name of any person who is not an officer, director or employee of the franchisor, to whom the franchisor must pay or give valuable consideration in connection with the introduction or recruitment of a franchisee, under an agreement.

## Item 6 - Existing franchises

Item 6 of Schedule 1 requires franchisors to provide information related to existing franchises, existing franchisees, former franchisees, and 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 of Schedule 1 has been updated to clarify that the 'contact details' required of a former franchisee are the franchisee's name, location, telephone number and email address.

Section 13 provides that the disclosure of personal information under subitem 6(5) of Schedule 1 is authorised for the purposes of the Australian Privacy Principles under the *Privacy Act 1988*.

Disclosure of the above personal information is only required if specific events relate to the former franchisee. The events are limited to where a franchise was transferred, the franchise business ceased to operate or was bought back by the franchisor, or a franchise agreement was terminated (including when the franchise business is acquired by the franchisor) or not extended.

Further, disclosure is only permitted in a disclosure document for a prospective franchisee. Such information is not available for the general public. Pursuant to section 63, a franchisor must not disclose a former franchisee's personal information to a prospective franchisee unless:

- the franchisor informs the former franchisee, in writing, that the franchisee may request that their personal information not be disclosed, and
- the former franchisee has not made that request.

This disclosure is necessary and appropriate to protect franchisees seeking to enter into a franchise agreement. Current franchisees may be contacted through their publicly available business contact details.

## Item 7 - Master franchises

Item 7 of Schedule 1 requires information about the master franchisor and master franchise agreement, where the franchisor is also a subfranchisor.

## Item 8 – Intellectual property

Item 8 of Schedule 1 requires details of intellectual property, which includes 'any trade mark used to identify, and any patent, design or copyright that is material to, the franchise system'.

## Item 9 – Franchise site or territory

Item 9 of Schedule 1 requires disclosure of whether the franchise is for an exclusive or non-exclusive territory or limited to a particular site and certain information in relation to the territory.

Item 9 of Schedule 1 has been updated to require 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 in relation to the territory for the franchise.

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

Item 10 of Schedule 1 requires details of the franchisor's requirements around the supply of goods or services to a franchisee. Item 10 of Schedule 1 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 of Schedule 1 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 of Schedule 1 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 of Schedule 1 requires details of 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 of Schedule 1 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. Subitem 14(9) of Schedule 1 provides that if two or more of subitems 14(1A), 14(1B), 14(1), 14(3) and 14(6) apply to a payment, then information required by those items in relation to the payment, only needs to be set out once.

#### Item 15 – Specific purpose funds

Item 15 of Schedule 1 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. This includes a statement that subsection 31(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. 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 paragraph 15(1)(i) of Schedule 1.

#### Item 16 – Financing

Item 16 of Schedule 1 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 of Schedule 1 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 of Schedule 1 requires information on whether the franchise agreement provides for arbitration of disputes in a manner consistent with Subdivision C of Division 3 of Part 5 of the Code.

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

Item 17B of Schedule 1 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 of Schedule 1 requires details of arrangements to apply at the end of the franchise agreement, such as whether the franchisee will have an option to renew or extend. Item 18 also requires details of whether the franchisor has, in the previous three years, considered any significant capital expenditure undertaken franchisees in determining 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 paragraph 18(1)(a) of Schedule 1 includes a reference to a legal right.

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

Item 19 of Schedule 1 requires the disclosure document to state whether the franchisor will amend the franchise agreement on or before transfer of the franchise.

#### Item 20 – Earnings information

Item 20 of Schedule 1 requires earnings information to be set out in a certain way in a disclosure document (or attachment to it), if the franchisor proposes to provide such information, or has done so previously.

Earnings information includes 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. However, the disclosure document (or attachment to it) must include certain statements, depending on whether earnings information is given.

### Item 21 – Financial details

Item 21 of Schedule 1 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 of Schedule 1 requires any materially relevant facts to be disclosed, as required under section 34, that have changed between the date of disclosure document and the date it is given to the prospective franchisee.

### Item 23 – Receipt

Item 23 of Schedule 1 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.

## **Schedule 2 –Repeals**

Schedule 2 repeals the old Regulations and the *Competition and Consumer (Industry Codes—Franchising) Repeal Regulation 2014*.

This ensures that the old Regulations are repealed and no longer in force, to allow for the commencement or their replacement, the Regulations.

The *Competition and Consumer (Industry Codes—Franchising) Repeal Regulation 2014* repealed the *Trade Practices (Industry Codes—Franchising) Regulations 1998* (which preceded the old Regulations) and included several provisions to facilitate the transition from the *Trade Practices (Industry Codes—Franchising) Regulations 1998* to the old Regulations. These transitional provisions are covered by Part 4 of the *Acts Interpretation Act 1901*, making the *Competition and Consumer (Industry Codes—Franchising) Repeal Regulation 2014* redundant, and suitable to be repealed.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

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

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

#### **Overview of the Legislative Instrument**

The *Competition and Consumer (Industry Codes–Franchising) Regulations 2024* (the Regulations) prescribes a mandatory industry code regulating the conduct between franchisors and franchisees. The purpose of the code is to regulate the conduct of participants in franchising, 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) Regulation 2014* (the old Regulations) that sunset on 1 April 2025 in accordance with the *Legislation Act 2003*. The 2023 Independent Review of the Franchising Code of Conduct (Schaper Review) brought several reviews together, including a sunset review of the old Regulations. The Regulations implement the Government response to the Schaper Review, as set out in the *Government Response to the Independent Review of the Franchising Code of Conduct*.

#### **Human rights implications**

This Legislative Instrument engages the following rights:

- the right to protection from unlawful or arbitrary interference with privacy under Article 17 of the International Covenant on Civil and Political Rights (ICCPR); and
- the right to a fair trial, as well as the presumption of innocence in Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR).

The right in Article 17 may be subject to permissible limitations, where these limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case.

Schedule 1 to the Regulations sets out information that must be included in a disclosure document. Subitem 6(5) of Schedule 1 to the Regulations requires a franchisor to supply the name, location, telephone number and email address of former franchisees in relation to the events set out in subitem 6(4) of Schedule 1 to the Regulations, if the information is available. The events are limited to where a franchise was transferred, the franchise business ceased to operate or was bought back by the franchisor, or a franchise agreement

was terminated (including when the franchise business is acquired by the franchisor) or not extended.

Disclosure of the above personal information is only permitted in relation to disclosure documents for prospective franchisees. Such information is not available for the general public. Further, pursuant to section 63 of the Regulations, a franchisor must not disclose a former franchisee's personal information to a prospective franchisee unless:

- the franchisor informs the former franchisee, in writing, that the franchisee may request that their personal information not be disclosed; and
- the former franchisee has not made that request.

The purpose of this disclosure is to allow prospective franchisees the opportunity to seek information from former franchisees and make an informed decision when becoming a franchisee. In light of the above safeguards to protect the personal information, this is necessary and appropriate to protect franchisees seeking to enter into a franchise agreement.

Article 14(2) of the ICCPR recognises that all people have the right to be presumed innocent until proven guilty according to the law. Articles 14 and 15 apply only in relation to the rights of natural persons, not legal persons, such as companies.

Civil penalty provisions may engage criminal process rights under Articles 14 and 15 of the ICCPR. Although there is a domestic law distinction between criminal and civil penalties, 'criminal' is separately defined in international human rights law. Therefore, when a provision imposes a civil penalty, it is necessary to determine whether or not the penalty amounts to a 'criminal' penalty for the purposes of Articles 14 and 15 of the ICCPR.

The Regulations prescribe a maximum pecuniary penalty of \$500,000 (the higher tier civil penalty) for contravention of the following civil penalty provisions by a person that is not a body corporate.

- subsections 34(1) and (2) of the Regulations, which prescribe requirements for a franchisor to disclose material facts;
- subsections 45(2), (3) and (5) of the Regulations, which broadly prohibit a franchisor entering into a new vehicle dealership agreement unless it contains provision for compensation, and does not exclude compensation;
- subsection 46(2) of the Regulations, which prohibits a franchisor entering into a new vehicle dealership agreement unless it provides a reasonable opportunity for a franchisor to make a return on investment; and
- section 64 of the Regulations, which prohibits a franchisor from engaging in conduct that restricts a franchisee or prospective franchisee's freedom to form an association or associating with other franchisees for a lawful purpose.

The maximum penalty that is prescribed for contravention of all other civil penalty provisions by a person that is not a body corporate in the Regulations is 600 penalty units.

The higher tier civil penalty may be viewed as ‘criminal’ for the purposes of human rights law. This view may be formed as such provisions are deterrent in nature and proceedings would be instituted by a public authority with statutory powers of enforcement. While this may be the case, the civil penalty provisions do not amend or seek to limit any rights of an individual or an applicable legal process.

Further, the provisions do not apply to the general public, but to franchisors that should reasonably be aware of their obligations under the Regulations. Therefore, imposing these civil penalties will enable an effective disciplinary response to non-compliance.

While the higher tier civil penalty is large, it is appropriate in size. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* outlines that larger penalties are more appropriate for bigger entities, as they provide an adequate deterrent.

Further, the judiciary continues to have discretion to consider the seriousness of the contravention and impose a penalty that is appropriate in the circumstances. The civil courts are experienced in making civil penalty orders at appropriate levels having regard to the maximum penalty amount, taking into account a range of factors including the nature of the contravening conduct and the size of the organisation involved.

Therefore, a relevant consideration in setting a civil penalty amount is the maximum penalty that should apply in the most egregious instances of non-compliance with the Regulations.

The higher tier civil penalty is intentionally significant and is in line with the penalties that were prescribed under the old Regulations.

Finally, there is no sanction of imprisonment for non-payment of these civil penalties.

## **Conclusion**

The Legislative Instrument is compatible with human rights because to the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate.

To the extent that the Regulations limit the rights under Article 14 and 15 of the ICCPR, they are compatible with human rights as:

- the increased penalty amounts are aimed at deterring non-compliance with the Regulations, and not punitive in nature;
- the maximum penalty amount will only be used in the most egregious instances; and
- the civil penalties are applicable to people who should reasonably be aware of their obligations.

**FINDING TABLE—*Competition and Consumer (Industry Codes–Franchising) Regulations 2024***

This Explanatory Statement includes a finding table to assist in identifying which provision in the *Competition and Consumer (Industry Codes–Franchising) Regulations 2024* (the Regulations) correspond to a provision in the *Competition and Consumer (Industry Codes–Franchising) Regulation 2014* (the old Regulations).

In the finding table:

- no equivalent means that this is a new provision in the Regulations that has no equivalent in the old Regulations.
- omitted means that the provision of the old Regulations has not been rewritten into the Regulations. Omitted provisions are generally redundant.

<i>Old Law</i>	<i>New Law</i>
<i>Competition and Consumer (Industry Codes–Franchising) Regulation 2014</i>	<i>Competition and Consumer (Industry Codes–Franchising) Regulations 2024</i>
Section 1	Section 1
No equivalent (due to repeal of section 2)	Section 2
Section 3	Section 3
No equivalent	Section 4
No equivalent	Section 5
Section 4	Section 8
No equivalent	Section 9
Section 4A	Section 16
Section 5	Omitted
No equivalent	Section 11
No equivalent	Section 12
No equivalent	Section 13
<i>Schedule 1</i>	
Clause 1	Section 14
Clause 2	Section 15
Clause 3	Section 10
Clause 3A	Subsection 10(5)
Clause 4	Section 6
Clause 5	Section 7
Clause 5A	Section 17
Clause 6	Section 18
Clause 7	Section 19
Clause 8	Section 20
Subclause 8(6)-(7)	Section 21
Clause 9	Section 23
Clause 9A	Omitted
Subclause 9(2A)	Section 24
Subclause 9(2C)	Section 25

Subclause 10(1)	Section 26
Subclause 10(2)-(3)	Section 27
Clause 11	Section 22
Clause 12	Section 28
Clause 13	Section 29
Clause 14	Section 30
Clause 15	Section 31
Clause 16	Section 32
Paragraph 16(1)(a)-(b)	Section 33
Clause 17	Section 34
Clause 17A	Section 35
Clause 18	Section 36
Clause 19	Section 37
Clause 19A	Section 38
Clause 20	Section 39
Clause 21	Section 40
Clause 22	Section 41
Clause 23	Section 42
No equivalent	Section 43
No equivalent	Section 44
Subclause 24	Section 48
Subclause 25	Section 49
Subclause 26(1)-(2)	Section 50
Subclause 26(3)-(4)	Section 51
Subclause 26A(1)-(3)	Section 52
Subclause 26A(4)-(7)	Section 53
Clause 26B	Section 54
Clause 27	Section 55
Clause 28	Section 56
Clause 29	Section 57
Subclause 29(4)	Section 58
Subclause 29(5)-(6)	Section 59
Clause 30	Section 60
Subclause 30A(1)-(2)	Subsection 20(4)
Subclause 30A(3)-(4)	Section 47
Clause 31	Section 61
Clause 31A	Section 62
Clause 32	Section 63
Clause 33	Section 64
No equivalent	Section 65
No equivalent	Section 66
No equivalent	Section 67
Clause 34	Section 69
Clause 35	Section 70
Clause 36	Section 71



Clause 37	Section 68
Clause 40A	Section 72
Clause 40B	Section 73
Clause 41A	Section 74
Subclause 41A(4)	Section 75
Clause 41B	Section 76
Clause 41C	Section 77
No equivalent	Section 78
Clause 43A	Section 79
Clause 43B	Section 80
Clause 43C	Section 81
Clause 43D	Section 82
Clause 44A	Section 83
Clause 46	Section 84
Clause 46A	Section 45
Clause 46B	Section 46
Clause 47	Section 85
Clause 48	Section 86
Clause 49	Section 87
Clause 52	Section 88
Clause 53	Section 89
Clause 53A	Section 90
Clause 53B	Section 91
Clause 53C	Omitted; but general application, saving and transitional provisions are in Chapter 3, Part 1 of the Regulations.
Clause 53D	Section 92
Clause 53E	Section 93
Clause 53F	Section 94
Clause 53G	Section 95
Clause 53H	Section 96
Clause 53J	Omitted; however, there is a general review provision in section 12.
Clause 54	Omitted; but general application, saving and transitional provisions are in Chapter 3, Part 1 of the Regulations.
Clause 55	
Clause 56	
Clause 57	
Clause 58	
Clause 59	
Clause 60	
Clause 61	
Clause 62	
Clause 63	
Clause 64	
Clause 65	
Clause 66	

Clause 67	
Clause 68	
Clause 69	
Clause 70	
Clause 71	
Clause 72	
No equivalent; but similar application, saving and transitional provisions are in, for example, Part 6 of Schedule 1.	Section 97
	Section 98
	Section 99
	Section 100
	Section 101
<i>Annexure 1</i>	<i>Schedule 1</i>
Item 1	Clause 1
Item 2	Clause 2
Item 3	Clause 3
Item 4	Clause 4
Item 5	Clause 5
Item 6	Clause 6
Item 7	Clause 7
Item 8	Clause 8
Item 9	Clause 9
Item 10	Clause 10
Item 11	Clause 11
Item 12	Clause 12
Item 13	Clause 13
Item 14	Clause 14
Item 15	Clause 15
Item 16	Clause 16
Item 17	Clause 17
Item 17A	Clause 17A
Item 17B	Clause 17B
Item 18	Clause 18
Item 19	Clause 19
Item 20	Clause 20
Item 21	Clause 21
Item 22	Clause 22
Item 23	Clause 23