

EXPOSURE DRAFT



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Competition and Consumer (Industry Codes—Franchising) Regulation 2014

Select Legislative Instrument No. , 2014

I, General the Honourable Sir Peter Cosgrove AK MC (Ret'd), Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulation under section 51AE of the *Competition and Consumer Act 2010*.

Dated 2014

Peter Cosgrove
Governor-General

By His Excellency's Command

Joe Hockey
Treasurer

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1 Name of regulation

This regulation is the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

2 Commencement

This regulation commences on 1 January 2015.

3 Authority

This regulation is made under section 51AE of the *Competition and Consumer Act 2010*.

4 Code of conduct

For section 51AE of the *Competition and Consumer Act 2010*, the code set out in the Schedule:

- (a) is prescribed; and
- (b) is a mandatory industry code.

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Schedule 1 Franchising Code of Conduct

Part 1 Introduction

Division 1 Preliminary

Clause 1

Schedule 1—Franchising Code of Conduct

Note: See regulation 4.

Part 1—Introduction

Division 1—Preliminary

1 Name of code

This code is the *Franchising Code of Conduct*.

2 Purpose of code

The purpose of this code is to regulate the conduct of participants in franchising towards other participants in franchising.

3 Application

- (1) This code applies to a franchise agreement:
 - (a) entered into on or after 1 January 2015; or
 - (b) renewed on or after 1 January 2015.
- (2) However, this code does not apply to a franchise agreement:
 - (a) to which another mandatory industry code, prescribed under section 51AE of the *Competition and Consumer Act 2010*, applies; or
 - (b) if:
 - (i) the franchise agreement is for goods or services that are substantially the same as those supplied by the franchisee before entering into the franchise agreement; and
 - (ii) the franchisee has supplied those goods or services for at least 2 years immediately before entering into the franchise agreement; and

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Franchising Code of Conduct **Schedule 1**

Introduction **Part 1**

Preliminary **Division 1**

Clause 3

(iii) sales under the franchise are likely to provide no more than 20% of the franchisee's gross turnover for goods or services of that kind for the first year of the franchise.

(3) Paragraph (2)(b) ceases to apply to a franchise agreement if:

- (a) sales under the franchise provide more than 20% of the franchisee's gross turnover for the goods or services for 3 consecutive years; and
- (b) the franchisee tells the franchisor that paragraph (a) of this clause applies.

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Schedule 1 Franchising Code of Conduct

Part 1 Introduction

Division 2 Definitions

Clause 4

Division 2—Definitions

4 Definitions

(1) In this code:

ABN has the same meaning as in the *A New Tax System (Australian Business Number) Act 1999*.

associate, for a franchisor, means a person:

(a) who:

- (i) is a director or related body corporate, or a director of a related body corporate, of the franchisor; or
- (ii) for a franchisor that is a proprietary company—directly or indirectly owns, controls, or holds with power to vote, at least 15% of the issued voting shares in the franchisor; or
- (iii) is a partner of the franchisor; and

(b) whose relationship with the franchisor is relevant to the franchise system, including because:

- (i) the person supplies goods or services to a franchisee; or
- (ii) the person gives the franchisee a right to occupy premises, whether under a lease or otherwise; or
- (iii) the person owns intellectual property used in the franchise system; or
- (iv) the person is involved in market research, market testing, market development, sales promotion or management of the franchise system.

disclosure document has the meaning given by clause 9.

electronic signature of a person means the unique identification of the person in an electronic form.

extend, in relation to the scope of a franchise agreement, means a material change to:

(a) the terms and conditions of the agreement; or

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Franchising Code of Conduct **Schedule 1**

Introduction **Part 1**

Definitions **Division 2**

Clause 4

- (b) circumstances that affect the agreement; or
- (c) the rights of a person under or in relation to the agreement; or
- (d) the liabilities that would be imposed on a person under or in relation to the agreement.

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.

franchise includes the following:

- (a) the rights and obligations under a franchise agreement;
- (b) a master franchise;
- (c) a subfranchise;
- (d) an interest in a franchise.

franchise agreement has the meaning given by clause 5.

franchisee includes the following:

- (a) a person to whom a franchise is granted;
- (b) a person who otherwise participates in a franchise as a franchisee;
- (c) a subfranchisor in its relationship with a franchisor;
- (d) a subfranchisee in its relationship with a subfranchisor.

franchise system includes a business system in which a franchisor grants a franchise to a franchisee.

franchisor includes the following:

- (a) a person who grants a franchise;
- (b) a person who otherwise participates in a franchise as a franchisor;
- (c) a subfranchisor in its relationship with a subfranchisee;
- (d) a subfranchisor in a master franchise system;
- (e) a subfranchisor in its relationship with a franchisee.

interest in a franchise includes a legal or beneficial interest in:

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Schedule 1 Franchising Code of Conduct

Part 1 Introduction

Division 2 Definitions

Clause 4

- (a) a franchise agreement or a franchised business, whether arising as a result of a guarantee of a franchisee's obligations under the agreement or otherwise; or
- (b) shares or voting rights in a corporation, not being a listed corporation, that owns a franchised business; or
- (c) units or voting rights in a unit or other trust that owns a franchised business; or
- (d) the capital or income of a partnership that owns a franchised business.

master franchise means a franchise in which the franchisor grants to a subfranchisor the right:

- (a) to grant a subfranchise; or
- (b) to participate in a subfranchise.

motor vehicle means a vehicle that uses, or is designed to use, volatile spirit, gas, oil, electricity or any other power (except human or animal power) as the principal means of propulsion, but does not include a vehicle used, or designed to be used, on a railway or tramway.

Note: Examples of motor vehicles are as follows:

- (a) motor car;
- (c) motorcycle;
- (d) tractor;
- (e) motorised farm machinery;
- (f) motorised construction machinery;
- (g) aircraft;
- (h) motor boat.

motor vehicle dealership means a business of buying, selling, exchanging or leasing motor vehicles that is conducted by a person other than a person who is only involved as a credit provider, or provider of other financial services, in the purchase, sale, exchange or lease.

obligation to act in good faith: see clause 7.

prospective franchisee means a person who deals with a franchisor for the right to be granted a franchise.

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Franchising Code of Conduct **Schedule 1**

Introduction **Part 1**

Definitions **Division 2**

Clause 4

serious offence means:

- (a) an offence under any law of the Commonwealth or a State or a Territory for which, if the act or omission had taken place in the Jervis Bay Territory, a person would be liable, on first conviction, to imprisonment for a period of not less than 5 years; or
- (b) a contravention of any provision of the *Corporations Act 2001*.

Note: Jervis Bay Territory is mentioned because it is a jurisdiction in which the Commonwealth has control over the criminal law.

significant capital expenditure: see subclause 31(2).

subfranchisor means a person who is:

- (a) a franchisee in relation to a master franchise; and
- (b) a franchisor in relation to a subfranchise granted under the master franchise.

trade mark has the meaning given by the *Trade Marks Act 1995*.

Note: A **trade mark** is a sign (including any letter, word, name, signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent (or any combination of these)) used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person (see section 17 of the *Trade Marks Act 1995*).

transfer, in relation to a franchise agreement, includes a situation in which:

- (a) the agreement is terminated on the basis that a new franchise agreement is entered into between the franchisor and prospective transferee; or
- (b) the franchisee's rights and obligations under the agreement are assigned to a prospective transferee; or
- (c) the agreement contemplates a transfer in specified circumstances and those circumstances happen.

(2) In this code, the following terms have the meanings given by the *Corporations Act 2001*:

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Schedule 1 Franchising Code of Conduct

Part 1 Introduction

Division 2 Definitions

Clause 5

ACN
ARBN
body corporate
consolidated entity
director
externally-administered body corporate
insolvent under administration
listed corporation
misconduct
officer
proprietary company
registered company auditor
registered office
related body corporate
small proprietary company

5 Meaning of *franchise agreement*

- (1) A *franchise agreement* is an agreement:
- (a) that takes the form, in whole or part, of any of the following:
 - (i) a written agreement;
 - (ii) an oral agreement;
 - (iii) an implied agreement; and
 - (b) in which a person (the *franchisor*) grants to another person (the *franchisee*) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and
 - (c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol:
 - (i) owned, used or licensed by the franchisor or an associate of the franchisor; or

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Franchising Code of Conduct **Schedule 1**

Introduction **Part 1**

Definitions **Division 2**

Clause 5

- (ii) specified by the franchisor or an associate of the franchisor; and
- (d) under which, before starting or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:
 - (i) an initial capital investment fee; or
 - (ii) a payment for goods or services; or
 - (iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or
 - (iv) a training fee or training school fee;but excluding:
 - (v) payment for goods and services supplied on a genuine wholesale basis; or
 - (vi) repayment by the franchisee of a loan from the franchisor or an associate of the franchisor; or
 - (vii) payment for goods taken on consignment and supplied on a genuine wholesale basis; or
 - (viii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.
- (2) For subclause (1), each of the following is taken to be a franchise agreement:
 - (a) the transfer or renewal of a franchise agreement;
 - (b) the extension of the term or the scope of a franchise agreement;
 - (c) a motor vehicle dealership agreement.
- (3) However, any of the following does not in itself constitute a franchise agreement:
 - (a) an employer and employee relationship;
 - (b) a partnership relationship;
 - (c) a landlord and tenant relationship;
 - (d) a mortgagor and mortgagee relationship;

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Schedule 1 Franchising Code of Conduct

Part 1 Introduction

Division 2 Definitions

Clause 6

- (e) a lender and borrower relationship;
- (f) the relationship between the members of a cooperative that is registered, incorporated or formed under any of the following laws:
 - (i) the *Corporations Act 2001*;
 - (ii) the *Co-operatives Act 1992* (NSW);
 - (iii) the *Co-operatives Act 1996* (Vic.);
 - (iv) the *Cooperatives Act 1997* (Qld);
 - (v) the *Co-operatives Act 2009* (WA);
 - (vi) the *Co-operatives Act 1997* (SA);
 - (vii) the *Cooperatives Act 1999* (Tas.);
 - (viii) the *Cooperatives Act 2002* (ACT);
 - (ix) the *Co-operatives Act 1997* (NT).

6 Giving information electronically

- (1) If, under this code, a franchisor is required or permitted to give a person information in writing, that requirement is taken to have been met if:
 - (a) the person consents to the information being given electronically; and
 - (b) in a case where this code requires the franchisor's signature or a signature of a director, officer or authorised agent of the franchisor—the information includes the electronic signature of the franchisor or of a director, officer or authorised agent of the franchisor.
- (2) If, under this code, a franchisee is required or permitted to give a person information in writing, that requirement is taken to have been met if:
 - (a) the person consents to the information being given electronically; and
 - (b) in a case where this code requires the franchisee's signature—the information includes the franchisee's electronic signature.

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Franchising Code of Conduct **Schedule 1**

Introduction **Part 1**

Definitions **Division 2**

Clause 6

- (3) For the purpose of this clause, a person is taken to have consented to information being given electronically if the person has not advised the person giving the information, in writing, otherwise.
- (4) This clause applies to a requirement or permission to give information, whether the expression “give”, “lodge”, “send” or “serve”, or any other expression, is used.
- (5) For the purposes of this clause, giving information includes, but is not limited to, the following:
 - (a) giving, sending or serving a notification;
 - (b) giving a document;
 - (c) making a request;
 - (d) giving a statement of reasons.

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Schedule 1 Franchising Code of Conduct

Part 1 Introduction

Division 3 Obligation to act in good faith

Clause 7

Division 3—Obligation to act in good faith

7 Obligation to act in good faith

Obligation to act in good faith

- (1) Each party to a franchise agreement must act towards another party with good faith in respect of any matter arising under or in relation to:
 - (a) the agreement; and
 - (b) this code.

This is the *obligation to act in good faith*.

- (2) The obligation to act in good faith includes an obligation for a person:
 - (a) to act honestly and not arbitrarily; and
 - (b) to cooperate to achieve the purposes of the franchise agreement.

Civil penalty: 300 penalty units.

- (3) The obligation to act in good faith also applies to a person who proposes to become a party to a franchise agreement in respect of:
 - (a) any dealing or dispute relating to the proposed agreement; and
 - (b) the negotiation of the proposed agreement; and
 - (c) this code.

Franchise agreement cannot limit or exclude the obligation

- (4) A franchise agreement must not contain a clause that limits or excludes the obligation to act in good faith, and if it does, the clause is of no effect.
- (5) A franchise agreement may not limit or exclude the obligation to act in good faith by applying, adopting or incorporating, with or without modification, the words of another document, as in force at a particular time or as in force from time to time, in the agreement.

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Franchising Code of Conduct **Schedule 1**

Introduction **Part 1**

Obligation to act in good faith **Division 3**

Clause 7

Other actions may be taken consistently with the obligation

- (6) To avoid doubt, the obligation to act in good faith does not prevent a party to a franchise agreement, or a person who proposes to become such a party, from acting in his, her or its legitimate commercial interests.
- (7) If a franchise agreement does not include a clause allowing the franchisee to seek its renewal, this does not mean that the franchisor has not acted in good faith in negotiating the agreement.

Obligation imposed by the common law not excluded

- (8) Nothing in this clause limits any obligation imposed by the common law, applicable in a State or Territory, on the parties to a franchise agreement to act in good faith.

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Schedule 1 Franchising Code of Conduct

Part 2 Disclosure requirements before entry into a franchise agreement

Division 1 Application

Clause 8

Part 2—Disclosure requirements before entry into a franchise agreement

Division 1—Application

8 Application of Part—master franchisors

A master franchisor need not comply with the requirements of this Part in relation to a subfranchisee.

Division 2—Disclosure document

9 Franchisor must maintain a disclosure document

Disclosure document to inform franchisee or prospective franchisee

- (1) A franchisor must create a document (a **disclosure document**) relating to a franchise that complies with subclause (3).
- (2) The purpose of a disclosure document is to:
 - (a) give a prospective franchisee, or a franchisee proposing to:
 - (i) enter into a franchise agreement; or
 - (ii) renew a franchise agreement; or
 - (iii) extend the term or scope of a franchise agreement;information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and
 - (b) give a franchisee current information from the franchisor that is material to the running of the franchised business.

Content and form of disclosure document

- (3) A disclosure document:
 - (a) must be set out in the form and order of Annexure 1; and
 - (b) must use the headings and numbering of Annexure 1; and

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Franchising Code of Conduct **Schedule 1**
Disclosure requirements before entry into a franchise agreement **Part 2**
Disclosure document **Division 2**

Clause 10

- (c) may include additional information under the heading “Other relevant disclosure information”; and
- (d) must be signed by the franchisor, or a director, officer or authorised agent of the franchisor.

Civil penalty: 300 penalty units.

- (4) A disclosure document must also have a table of contents based on the items in Annexure 1, indicating the page number on which each item begins. If the disclosure document attaches other documents, the table of contents must list these other documents too.

Maintaining a disclosure document

- (5) After entering into a franchise agreement, the franchisor must update the disclosure document within 4 months after the end of each financial year.
- (6) However, the franchisor need not update the disclosure document after the end of a financial year if:
 - (a) the franchisor has only entered into 1 franchise agreement during the financial year; and
 - (b) the franchisor does not intend, or if the franchisor is a company, its directors do not intend, to enter into another franchise agreement in the following financial year.
- (7) Subclause (6) may not be applied more than once in a 3-year period.

10 Franchisor to give documents to a franchisee or prospective franchisee

- (1) A franchisor must give:
 - (a) a copy of this code; and
 - (b) a disclosure document; and
 - (c) a copy of the franchise agreement, in the form in which it is to be executed;

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Schedule 1 Franchising Code of Conduct

Part 2 Disclosure requirements before entry into a franchise agreement

Division 2 Disclosure document

Clause 11

to a prospective franchisee at least 14 days before the prospective franchisee:

- (d) enters into a franchise agreement or an agreement to enter into a franchise agreement; or
- (e) makes a non-refundable payment (whether of money or of other valuable consideration) to the franchisor or an associate of the franchisor in connection with the proposed franchise agreement.

Civil penalty: 300 penalty units.

Note: For giving information electronically, see clause 6.

- (2) If a franchisor or franchisee proposes to:
 - (a) renew a franchise agreement; or
 - (b) extend the term or scope of a franchise agreement;the franchisor must give to the franchisee the documents mentioned in subclause (1) at least 14 days before renewal or extension of the franchise agreement.

Civil penalty: 300 penalty units.

Note: For giving information electronically, see clause 6.

- (3) A franchisor is taken to have complied with the requirements of this clause even if, during the relevant 14-day or longer period, changes are made to a franchise agreement:
 - (a) to give effect to a franchisee's request; or
 - (b) to fill in required particulars; or
 - (c) to reflect changes of address or other circumstances; or
 - (d) for clarification of a minor nature; or
 - (e) to correct errors or references.

11 Franchisee or prospective franchisee to give advice to franchisor before entering into franchise agreement

- (1) The franchisor must not:
 - (a) enter into a franchise agreement; or
 - (b) renew or transfer a franchise agreement; or

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Franchising Code of Conduct **Schedule 1**
Disclosure requirements before entry into a franchise agreement **Part 2**
Disclosure document **Division 2**

Clause 11

- (c) extend the term or scope of a franchise agreement; or
- (d) enter into an agreement to:
 - (i) enter into a franchise agreement; or
 - (ii) renew or transfer a franchise agreement; or
 - (iii) extend the term or scope of a franchise agreement; or
- (e) receive a non-refundable payment (whether of money or of other valuable consideration) under a franchise agreement or an agreement to enter into a franchise agreement;

unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and this code.

Note: Paragraph (b)—for the transfer of a franchise agreement, see also subclause (4).

- (2) Before a franchise agreement is entered into, the franchisor must have received from the prospective franchisee:
 - (a) signed statements, that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by:
 - (i) an independent legal adviser; or
 - (ii) an independent business adviser; or
 - (iii) an independent accountant; or
 - (b) for each kind of statement not received under paragraph (a), a signed statement by the prospective franchisee that the prospective franchisee:
 - (i) has been given that kind of advice about the proposed franchise agreement or franchised business; or
 - (ii) has been told that that kind of advice should be sought but has decided not to seek it.
- (3) Subclause (2):
 - (a) does not apply to:
 - (i) the renewal or transfer of a franchise agreement; or
 - (ii) the extension of the term or scope of a franchise agreement; and

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Schedule 1 Franchising Code of Conduct

Part 2 Disclosure requirements before entry into a franchise agreement

Division 2 Disclosure document

Clause 11

- (b) does not prevent the franchisor from requiring any or all of the statements mentioned in paragraph (2)(a).
- (4) For the purpose of this clause, the transfer of a franchise agreement does not include the situation mentioned in paragraph (b) of the definition of *transfer*.

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Franchising Code of Conduct **Schedule 1**
Disclosure requirements before entry into a franchise agreement **Part 2**
Information statement **Division 3**

Clause 12

Division 3—Information statement

12 Franchisor to give information statement to prospective franchisee

- (1) A franchisor must give a copy of the information statement set out in Annexure 2 to a prospective franchisee.
- (2) The information statement must be set out in size 11 font and be contained on no more than 2 pages.
- (3) A copy of the information statement is to be given to a prospective franchisee as soon as practicable after it becomes apparent to the franchisor that a franchise agreement will be, or is likely to be, entered into by the prospective franchisee.
- (4) To avoid doubt, the requirements of this clause do not apply in relation to:
 - (a) the renewal of a franchise agreement; or
 - (b) the extension of the term or scope of a franchise agreement.

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 1 Application

Clause 13

Part 3—Franchise agreements

Division 1—Application

13 Application of Part—master franchisors

A master franchisor need not comply with the requirements of this Part in relation to a subfranchisee.

Division 2—Franchisor’s obligations

Subdivision A—Disclosure obligations

14 Copy of lease etc.

Occupying premises under lease

- (1) If a franchisee leases premises from the franchisor or an associate of the franchisor for the purposes of a franchised business, the franchisor or the associate must give to the franchisee:
 - (a) either:
 - (i) a copy of the lease; or
 - (ii) a copy of the agreement to lease; and
 - (b) details of any incentive or financial benefit that the franchisor or associate is entitled to receive as a result of the lease or agreement to lease.

Civil penalty: 300 penalty units.

- (2) The copy and details must be given within 1 month after the lease or agreement to lease is signed by the parties.

Civil penalty: 300 penalty units.

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Franchising Code of Conduct **Schedule 1**

Franchise agreements **Part 3**

Franchisor's obligations **Division 2**

Clause 15

Occupying premises without lease

- (3) If the franchisee occupies, without a lease, premises leased by the franchisor or an associate of the franchisor, the franchisor or the associate must give to the franchisee:
- (a) both:
 - (i) a copy of the franchisor's lease or agreement to lease or of the associate's lease or agreement to lease; and
 - (ii) details of any incentive or financial benefit that the franchisor or associate is entitled to receive as a result of the lease or agreement to lease; or
 - (b) all of the following:
 - (i) a copy of the documents that give the franchisee the right to occupy the premises;
 - (ii) written details of the conditions of occupation;
 - (iii) details of any incentive or financial benefit that the franchisor or associate is entitled to receive as a result of the franchisee's right to occupy the premises.

Civil penalty: 300 penalty units.

- (4) The copy and details must be given within 1 month after:
- (a) the occupation commences; or
 - (b) for the documents mentioned in subparagraph (3)(b)(i)—the documents are signed by the parties.

Civil penalty: 300 penalty units.

15 Copy of other agreements

- (1) If a franchise agreement requires:
- (a) the franchisee; or
 - (b) directors, shareholders, beneficiaries, owners or partners of the franchisee;
- to enter into an agreement of a kind mentioned in subclause (2), the franchisor must give to the franchisee a copy of the agreement.

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 2 Franchisor's obligations

Clause 16

Civil penalty: 300 penalty units.

- (2) The franchisor must give to the franchisee a copy of the following kinds of agreements:
 - (a) a lease or hire purchase agreement;
 - (b) an agreement under which the franchisee gains ownership of, or is authorised to use, any intellectual property;
 - (c) a security agreement, including a guarantee, mortgage, security deposit, indemnity, loan agreement or obligation to provide a bank guarantee to a third party;
 - (d) a confidentiality agreement;
 - (e) an agreement not to carry on business within an area or for a time after the franchise agreement is terminated.
- (3) The agreement must be given:
 - (a) at least 14 days before the day on which the franchise agreement is signed, if it is available at that time; or
 - (b) if it is not available at that time—when it becomes available.

16 Copy of financial statements

- (1) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the franchisor must:
 - (a) within 4 months after the end of the last financial year, prepare an annual financial statement detailing all of the fund's receipts and expenses for the last financial year; and
 - (b) ensure that the statement includes sufficient detail of the fund's receipts and expenses so as to give meaningful information about:
 - (i) sources of income; and
 - (ii) items of expenditure, particularly with respect to advertising and marketing expenditure; and
 - (c) have the statement audited by a registered company auditor within 4 months after the end of the financial year to which it relates; and
 - (d) give to the franchisee:

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Franchising Code of Conduct **Schedule 1**

Franchise agreements **Part 3**

Franchisor's obligations **Division 2**

Clause 17

- (i) a copy of the statement, within 30 days of preparing the statement; and
- (ii) a copy of the auditor's report, if such a report is required, within 30 days of preparing the report.

Civil penalty: 300 penalty units.

- (2) A franchisor does not have to comply with paragraph (1)(b) in respect of a financial year if:
 - (a) 75% of the franchisor's franchisees in Australia, who contribute to the fund, have voted to agree that the franchisor does not have to comply with the paragraph in respect of the financial year; and
 - (b) that agreement is made within 3 months after the end of the financial year.
- (3) If a franchise agreement provides that a franchisee must pay money to a marketing or other cooperative fund, the reasonable costs of administering and auditing the fund must be paid from the fund.

17 Disclosure document

- (1) Upon receiving a written request from a franchisee, a franchisor must give to the franchisee a disclosure document:
 - (a) if subclause 9(6) applies—within 28 days of the date of the request; and
 - (b) in any other case—within 14 days of the date of the request.

Civil penalty: 300 penalty units.

- (2) However, a request under subclause (1) can be made only once every 12 months.

18 Disclosure of materially relevant facts

- (1) If a disclosure document does not mention a matter mentioned in subclause (2), the franchisor must tell a franchisee or prospective franchisee about the matter, in writing, within a reasonable time

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 2 Franchisor's obligations

Clause 18

(but not more than 14 days) after the franchisor becomes aware of it.

Civil penalty: 300 penalty units.

- (2) For subclause (1), the matters are the following:
- (a) change in majority ownership or control of:
 - (i) the franchisor or an associate of the franchisor; or
 - (ii) the franchise system;
 - (b) proceedings by a public agency, a judgement in criminal or civil proceedings or an award in an arbitration against the franchisor, a franchisor director, an associate of the franchisor or an associate director of the franchisor in Australia alleging:
 - (i) breach of a franchise agreement; or
 - (ii) contravention of trade practices law; or
 - (iii) contravention of the *Corporations Act 2001*; or
 - (iv) unconscionable conduct; or
 - (v) misconduct; or
 - (vi) an offence of dishonesty;
 - (c) a judgement against the franchisor or an associate of the franchisor, other than for unfair dismissal of an employee, under:
 - (i) Part 3 of the *Independent Contractors Act 2006*; or
 - (ii) a State or Territory industrial law;
 - (d) civil proceedings in Australia against the franchisor, a franchisor director, an associate of the franchisor or an associate director of the franchisor by at least 10%, or 10, of the franchisees in Australia of the franchisor (whichever is the lower);
 - (e) any judgement that is entered against the franchisor or an associate of the franchisor in Australia, and is not discharged within 28 days, for at least:
 - (i) for a small proprietary company—\$100 000; or
 - (ii) for any other company—\$1 000 000;

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Franchising Code of Conduct **Schedule 1**

Franchise agreements **Part 3**

Franchisor's obligations **Division 2**

Clause 19

- (f) any judgement that is entered against the franchisor or an associate of the franchisor in a matter mentioned in item 4 of Annexure 1;
 - (g) the franchisor or an associate of the franchisor becoming an externally-administered body corporate;
 - (h) a change in the intellectual property, or ownership or control of the intellectual property, that is material to the franchise system;
 - (i) the existence and content of:
 - (i) any undertaking given by the franchisor or an associate of the franchisor under section 87B of the *Competition and Consumer Act 2010*; and
 - (ii) any order made by the Federal Court of Australia under that section in relation to such an undertaking.
- (3) For paragraphs (2)(b), (c), (d), (e) and (f), the franchisor must tell the franchisee:
- (a) the names of the parties to the proceedings; and
 - (b) the name of the court or tribunal; and
 - (c) the case number; and
 - (d) the general nature of the proceedings.
- (4) For paragraph (2)(g), the franchisor must tell the franchisee the name and address of the administrator, controller or liquidator.

Note: Nothing in this code affects the operation of Part VIIC of the *Crimes Act 1914* (which includes provisions that, in certain circumstances, relieve persons from the requirement to disclose spent convictions and require persons aware of such convictions to disregard them).

Subdivision B—Notification obligations

19 End of term arrangements

- (1) The franchisor of a franchise agreement must notify the franchisee, in writing, whether the franchisor intends to:
 - (a) renew the agreement; or
 - (b) enter into a new agreement.

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 2 Franchisor's obligations

Clause 20

- (2) The franchisor's notice must be given:
- (a) if the term of the franchise agreement is 6 months or longer—at least 6 months before the end of the term of the agreement; and
 - (b) if the term of the franchise agreement is less than 6 months—at least 1 month before the end of the term of the agreement.

Civil penalty: 300 penalty units.

- (3) Unless the franchisor does not intend to renew the franchise agreement, the franchisor's notice must include a statement to the effect that, subject to subclause 17(2), the franchisee may request a disclosure document under clause 17.

Civil penalty: 300 penalty units.

Subdivision C—Record keeping obligations

20 Keeping certain information and documents

- (1) If this code requires or allows a franchisee to give something to a franchisor in writing, the franchisor must keep the written thing or a copy of it.
- (2) If the franchisor:
- (a) makes a statement or claim in the franchisor's disclosure document; and
 - (b) relies on a document to support the statement or claim;
- the franchisor must keep the document.

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Franchising Code of Conduct **Schedule 1**

Franchise agreements **Part 3**

Terms of franchise agreement **Division 3**

Clause 21

Division 3—Terms of franchise agreement

21 Prohibition on release from liability etc.

- (1) A franchise agreement must not require a franchisee to sign:
 - (a) a general release of the franchisor from liability towards the franchisee; or
 - (b) a waiver of any verbal or written representation made by the franchisor.
- (2) However, subclause (1) does not prevent a franchisee from settling a claim against the franchisor after entering into a franchise agreement.

22 Jurisdiction for settling disputes

- (1) A franchise agreement may contain a clause that, if a party to the agreement wishes to bring an action or proceedings in relation to a dispute under the agreement, requires the party to bring the action or proceedings in a State or Territory in which the franchised business is based.
- (2) A franchise agreement must not contain a clause that requires a party to the agreement to bring an action or proceedings in relation to a dispute under the agreement in any other State or Territory, and if it does, the clause is of no effect.

23 Costs of settling disputes

A franchise agreement must not contain a clause that requires the franchisee to pay to the franchisor costs incurred by the franchisor in relation to settling a dispute under the agreement, and if it does, the clause is of no effect.

EXPOSURE DRAFT

Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 3 Terms of franchise agreement

Clause 24

24 Effect of restraint of trade clause if franchise agreement not renewed

A restraint of trade clause in a franchise agreement has no effect after the agreement ends if:

- (a) the franchisee had sought to renew the agreement on substantially the same terms; and
- (b) the franchisee was not in breach of the agreement; and
- (c) the franchisee had not infringed the intellectual property of the franchisor during the term of the agreement; and
- (d) the franchisor does not renew the agreement; and
- (e) either:
 - (i) the franchisee claimed compensation because the agreement was not renewed, but the compensation given was merely a nominal amount and did not genuinely compensate the franchisee; or
 - (ii) the agreement did not allow the franchisee to claim compensation in the event that it was not renewed.

EXPOSURE DRAFT

Franchising Code of Conduct **Schedule 1**
Franchise agreements **Part 3**
Transfer of franchise agreement **Division 4**

Clause 25

Division 4—Transfer of franchise agreement

25 Request for franchisor’s consent to transfer

- (1) A person may request, in writing, that a franchisor consent to the transfer of a franchise agreement.
- (2) A request must be accompanied by all information that the franchisor would reasonably require and expect to be given to make an informed decision.
- (3) If the franchisor requires further information to make an informed decision, the franchisor may, in writing, request the person to provide specified information relevant to making the decision.

26 Franchisor’s consent to transfer

- (1) A franchisor must advise, in writing, a person who has made a request under clause 25 for consent to the transfer of a franchise agreement:
 - (a) whether consent is given, and if not, give reasons why not; and
 - (b) if consent is given—whether the franchisor’s consent is subject to one or more conditions being satisfied.
- (2) A franchisor must not unreasonably withhold consent to the transfer of a franchise agreement.
- (3) A franchisor may reasonably withhold consent in the following circumstances:
 - (a) the proposed transferee is unlikely to be able to meet the financial obligations that the proposed transferee would have under the franchise agreement;
 - (b) the proposed transferee does not meet a reasonable requirement of the franchise agreement for the transfer of the franchise agreement;

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 4 Transfer of franchise agreement

Clause 26

- (c) the proposed transferee does not meet the selection criteria of the franchisor;
- (d) the proposed transferee does not agree, in writing, to comply with the obligations of the franchisee under the franchise agreement;
- (e) the franchisee has not paid or made reasonable provision to pay an amount owing to the franchisor;
- (f) the franchisee has not remedied a breach of the franchise agreement;
- (g) the franchisor has not received from the proposed transferee a written statement that the transferee has received, read and had a reasonable opportunity to understand the disclosure document and this code.

Paragraphs (a) to (g) do not limit the circumstances in which a franchisor's consent may be reasonably withheld.

- (4) If the franchisor does not advise the person, in writing, that the franchisor does not consent to the transfer of the franchise agreement within 42 days of the later of:
 - (a) the date the request is made; and
 - (b) if the franchisor seeks further information—the date the last of the information is provided to the franchisor;the franchisor is taken to have given consent.
- (5) The franchisor may revoke consent by advising the person, in writing, that the franchisor's consent is revoked and the reasons why consent has been revoked.
- (6) In this clause:

transferee means a franchisee who seeks to acquire a franchise business through the transfer of the franchise agreement.

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Franchising Code of Conduct **Schedule 1**
Franchise agreements **Part 3**
Termination of franchise agreement **Division 5**

Clause 27

Division 5—Termination of franchise agreement

27 Termination—cooling off period

- (1) A franchisee may terminate an agreement (being either a franchise agreement or an agreement to enter into a franchise agreement) within 7 days after the earlier of:
 - (a) entering into the agreement; and
 - (b) making any payment (whether of money or of other valuable consideration) under the agreement.
- (2) Subclause (1) does not apply to:
 - (a) the transfer or renewal of an existing franchise agreement; or
 - (b) the extension of the term or scope of an existing franchise agreement.
- (3) If the franchisee terminates an agreement under subclause (1), the franchisor must, within 14 days, repay all payments (whether of money or of other valuable consideration) made by the franchisee to the franchisor under the agreement.

Civil penalty: 300 penalty units.
- (4) However, the franchisor may deduct from the amount repaid under subclause (3) the franchisor's reasonable expenses if the expenses or their method of calculation have been set out in the agreement.

28 Termination—breach by franchisee

- (1) This clause applies if:
 - (a) a franchisee breaches a franchise agreement; and
 - (b) the franchisor proposes to terminate the franchise agreement.
- (2) The franchisor must:
 - (a) give to the franchisee reasonable notice, in writing, that the franchisor proposes to terminate the franchise agreement because of the breach; and

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 5 Termination of franchise agreement

Clause 29

(b) tell the franchisee what the franchisor requires to be done to remedy the breach; and

(c) allow the franchisee a reasonable time to remedy the breach.

Civil penalty: 300 penalty units.

- (3) For paragraph (2)(c), the franchisor does not have to allow more than 30 days.
- (4) If the breach is remedied in accordance with paragraphs (2)(b) and (c), the franchisor cannot terminate the franchise agreement because of that breach.
- (5) Part 4 (resolving disputes) applies in relation to a dispute arising from termination under this clause.

29 Termination—no breach by franchisee

- (1) This clause applies if:
- (a) a franchisor terminates a franchise agreement:
 - (i) in accordance with the agreement; and
 - (ii) before it expires; and
 - (iii) without the consent of the franchisee; and
 - (b) the franchisee has not breached the agreement.
- (2) For subparagraph (1)(a)(iii), a condition of a franchise agreement that a franchisor can terminate the franchise agreement without the consent of the franchisee is not taken to be consent.
- (3) Before terminating the franchise agreement, the franchisor must give reasonable written notice of the proposed termination, and reasons for it, to the franchisee.

Civil penalty: 300 penalty units.

- (4) Part 4 (resolving disputes) applies in relation to a dispute arising from termination under this clause.

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Franchising Code of Conduct **Schedule 1**
Franchise agreements **Part 3**
Termination of franchise agreement **Division 5**

Clause 30

30 Termination—special circumstances

- (1) Despite clauses 28 and 29, a franchisor may terminate a franchise agreement without complying with either clause if the agreement gives the franchisor the right to terminate the agreement should the franchisee:
 - (a) no longer hold a licence that the franchisee must hold to carry on the franchised business; or
 - (b) become bankrupt, insolvent under administration or an externally-administered body corporate; or
 - (c) in the case of a franchisee that is a company—become deregistered by ASIC; or
 - (d) voluntarily abandon the franchised business or the franchise relationship; or
 - (e) be convicted of a serious offence; or
 - (f) operate the franchised business in a way that endangers public health or safety; or
 - (g) act fraudulently in connection with the operation of the franchised business.
- (2) Despite clauses 28 and 29, a franchisor may terminate a franchise agreement without complying with either clause if, at the time of termination, the franchisor and the franchisee mutually agree to the agreement's termination.

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 6 Miscellaneous

Clause 31

Division 6—Miscellaneous

31 Capital expenditure

- (1) A franchisor must not require a franchisee to undertake significant capital expenditure in relation to a franchised business during the term of the franchise agreement.
- (2) For the purpose of subclause (1), *significant capital expenditure* excludes the following:
 - (a) expenditure that is disclosed to the franchisee in the disclosure document that is given to the franchisee before:
 - (i) entering into or renewing the agreement; or
 - (ii) extending the term or scope of the agreement;
 - (b) expenditure:
 - (i) incurred by all or a majority of franchisees; and
 - (ii) approved by a majority of franchisees;
 - (c) expenditure incurred by the franchisee to comply with legal obligations;
 - (d) expenditure agreed by the franchisee;
 - (e) expenditure that the franchisor considers is necessary as capital investment in the franchised business, justified by a statement of the following:
 - (i) the rationale for making the investment;
 - (ii) the amount of capital expenditure required;
 - (iii) the anticipated outcomes and benefits;
 - (iv) the expected risks associated with making the investment.

32 Marketing and advertising fees

- (1) A franchisor must maintain a separate bank account for marketing fees and advertising fees contributed by franchisees.

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Franchising Code of Conduct **Schedule 1**

Franchise agreements **Part 3**

Miscellaneous **Division 6**

Clause 33

- (2) If a franchisor operates one or more units of a franchised business, the franchisor must pay marketing fees and advertising fees on behalf of each unit on the same basis as other franchisees.
- (3) Despite any terms of a franchise agreement, marketing fees or advertising fees may only be used to:
 - (a) meet expenses that:
 - (i) have been disclosed to franchisees under paragraph 14.1(g) of the disclosure document; or
 - (ii) are legitimate marketing or advertising expenses; or
 - (iii) have been agreed to by a majority of franchisees; or
 - (b) pay the reasonable costs of administering and auditing a marketing fund.

33 Disclosure of former franchisee details

- (1) A former franchisee may give a franchisor a written request that the former franchisee's details not be disclosed to a prospective franchisee.
- (2) If such a request is made, the franchisor must not disclose the former franchisee's details to a prospective franchisee.

Civil penalty: 300 penalty units.

- (3) A franchisor must not do, or omit to do, any thing with the intention of influencing a former franchisee to make such a request.

Civil penalty: 300 penalty units.

34 Association of franchisees or prospective franchisees

A franchisor must not make an inducement to a franchisee or prospective franchisee that would restrict or impair:

- (a) the franchisee or prospective franchisee's freedom to form an association; or

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Schedule 1 Franchising Code of Conduct

Part 3 Franchise agreements

Division 6 Miscellaneous

Clause 34

- (b) the franchisee or prospective franchisee's ability to associate with other franchisees or prospective franchisees for a lawful purpose.

Civil penalty: 300 penalty units.

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Franchising Code of Conduct **Schedule 1**

Resolving disputes **Part 4**

General **Division 1**

Clause 35

Part 4—Resolving disputes

Division 1—General

35 Internal complaint handling procedure

A franchise agreement must provide for a complaint handling procedure that complies with clauses 38 and 42.

36 Resolving disputes

A party to a franchise agreement (the *complainant*) who has a dispute with another party to the franchise agreement may:

- (a) start the procedure under clause 38; or
- (b) take any other action that the complainant considers appropriate to resolve the dispute.

37 Right to bring proceedings unaffected

This Part does not affect the right of a party to a franchise agreement to bring legal proceedings, whether under the franchise agreement or otherwise.

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Schedule 1 Franchising Code of Conduct

Part 4 Resolving disputes

Division 2 Notification of dispute

Clause 38

Division 2—Notification of dispute

38 Procedure

- (1) The complainant must tell the respondent in writing:
 - (a) the nature of the dispute; and
 - (b) what outcome the complainant wants; and
 - (c) what action the complainant thinks will resolve the dispute.
- (2) The parties should then try to agree about how to resolve the dispute.
- (3) If the parties cannot agree how to resolve the dispute within 3 weeks, either party may refer the matter to a mediator for mediation under:
 - (a) a franchise agreement; or
 - (b) this code.
- (4) If the parties cannot agree on who should be the mediator, either party may ask the mediation adviser to appoint a mediator.

Note: The mediation adviser is appointed by the Minister, see clause 39.

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Franchising Code of Conduct **Schedule 1**

Resolving disputes **Part 4**

Mediation **Division 3**

Clause 39

Division 3—Mediation

Subdivision A—Appointments

39 Mediation adviser

The Minister is to appoint a mediation adviser for this Division.

40 Mediator

Within 14 days of a referral under subclause 38(3) or a request under subclause 38(4), the mediation adviser must appoint a mediator for the dispute.

Subdivision B—Mediation under this code

41 Application

This Subdivision applies in relation to mediation under this code.

42 Mediation

- (1) Subject to subclause (2), a mediator appointed for a dispute may decide the time and place for mediation.
- (2) The mediation must be conducted in Australia.
- (3) The parties must attend the mediation.

Civil penalty: 300 penalty units.

- (4) For subclause (3), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.
- (5) After the mediation has started, the mediator must advise the mediation adviser, within 28 days, of that fact.

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Schedule 1 Franchising Code of Conduct

Part 4 Resolving disputes

Division 3 Mediation

Clause 43

43 Termination of mediation

- (1) This clause applies to the mediation of a dispute if:
 - (a) at least 30 days have elapsed after the day that mediation began; and
 - (b) the dispute has not been resolved.
- (2) The mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.
- (3) However, if either party asks the mediator to terminate the mediation, the mediator must do so.
- (4) If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate stating:
 - (a) the names of the parties; and
 - (b) the nature of the dispute; and
 - (c) that the mediation has finished; and
 - (d) that the dispute has not been resolved.
- (5) The mediator must give a copy of the certificate to:
 - (a) the mediation adviser; and
 - (b) each of the parties to the dispute.

44 Costs of mediation

- (1) The parties are equally liable for the costs of mediation under this Subdivision unless they agree otherwise.
- (2) The parties must pay for their own costs of attending the mediation.
- (3) In this clause:

costs of mediation under this Subdivision include the following:

 - (a) the cost of the mediator;
 - (b) the cost of room hire;

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Franchising Code of Conduct **Schedule 1**

Resolving disputes **Part 4**

Mediation **Division 3**

Clause 44

- (c) the cost of any additional input (including expert reports) agreed by both parties to be necessary to conduct the mediation.

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Schedule 1 Franchising Code of Conduct

Annexure 1 Disclosure document for franchisee or prospective franchisee

Clause 1

Annexure 1—Disclosure document for franchisee or prospective franchisee

Note: See subclause 9(3).

1 First page

1.1 On the first page:

(a) in bold upper case:

**DISCLOSURE DOCUMENT FOR FRANCHISEE OR
PROSPECTIVE FRANCHISEE**; and

(b) the franchisor's:

(i) name; and

(ii) business address and phone number; and

(iii) ABN, ACN or ARBN (or foreign equivalent if the franchisor is a foreign franchisor); and

(c) the signature of the franchisor, or of a director, officer or authorised agent of the franchisor; and

(d) the preparation date of the disclosure document; and

(e) the following statement:

This disclosure document contains some of the information you need in order to make an informed decision about whether to enter into a franchise agreement. It should be read together with the information statement you have received.

Entering into a franchise agreement is a serious undertaking. Franchising is a business and, like any business, the franchise (or franchisor) could fail during the franchise term. This could have consequences for the franchisee.

A franchise agreement is legally binding on you if you sign it.

You are entitled to a waiting period of 14 days before you enter into this agreement.

If this is a new franchise agreement (not a renewal, extension, extension of the scope or transfer of an agreement), you will be entitled to a 7 day "cooling off"

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Franchising Code of Conduct **Schedule 1**
Disclosure document for franchisee or prospective franchisee **Annexure 1**

Clause 2

period after signing the agreement, during which you may terminate the agreement.

If you decide to terminate the agreement during the cooling off period, the franchisor must, within 14 days, return all payments (whether of money or of other valuable consideration) made by you to the franchisor under the agreement. However, the franchisor may deduct from this amount the franchisor's reasonable expenses, if the expenses or their method of calculation have been set out in the agreement.

Take your time, read all the documents carefully, talk to other franchisees and assess your own financial resources and capabilities to deal with the requirements of the franchised business.

You should make your own enquiries about the franchise and about the business of the franchise.

You should get independent legal, accounting and business advice before signing the franchise agreement.

It is often prudent to prepare a business plan and projections for profit and cash flow.

You should also consider educational courses, particularly if you have not operated a business before.

2 Franchisor details

2.1 The franchisor's:

- (a) name; and
- (b) address, or addresses, of registered office and principal place of business in Australia; and
- (c) ABN, ACN or ARBN (or foreign equivalent if the franchisor is a foreign franchisor).

2.2 The name under which the franchisor carries on business in Australia relevant to the franchise.

2.3 A description of the kind of business operated under the franchise.

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Schedule 1 Franchising Code of Conduct

Annexure 1 Disclosure document for franchisee or prospective franchisee

Clause 3

- 2.4 The number of years that the franchise or franchise system has operated in Australia.
- 2.5 The name, ABN, ACN or ARBN, address of registered office and principal place of business of each associate of the franchisor that is a body corporate (if any).
- 2.6 A description of the relationship between each associate mentioned in item 2.5 and the franchisor, and of the relevance of the relationship to the franchise system and the franchise.
- 2.7 The name and address of each associate of the franchisor that is not a body corporate (if any).
- 2.8 For each officer of the franchisor—name, position held and qualifications (if any).

3 Business experience

- 3.1 A summary of the relevant business experience of each person mentioned in item 2.8 for the past 10 years, including length of experience in:
 - (a) working in the franchise system; and
 - (b) working for the franchisor.
- 3.2 A summary of relevant business experience of the franchisor for the past 10 years, including:
 - (a) length of experience in:
 - (i) operating a business that is substantially the same as that of the franchise; and
 - (ii) offering other franchises that are substantially the same as the franchise; and
 - (b) whether the franchisor has offered franchises for other businesses and, if so:
 - (i) a description of each such business; and
 - (ii) for how long the franchisor offered franchises for each such business.

EXPOSURE DRAFT

Franchising Code of Conduct **Schedule 1**
Disclosure document for franchisee or prospective franchisee **Annexure 1**

Clause 4

4 Litigation

4.1 Details of:

- (a) current proceedings by a public agency, criminal or civil proceedings or arbitration, relevant to the franchise, against the franchisor, a franchisor director, an associate of the franchisor or an associate director of the franchisor in Australia alleging:
 - (i) breach of a franchise agreement; or
 - (ii) contravention of trade practices law; or
 - (iii) contravention of the *Corporations Act 2001*; or
 - (iv) unconscionable conduct; or
 - (v) misconduct; or
 - (vi) an offence of dishonesty; and
- (b) proceedings against the franchisor, a franchisor director, an associate of the franchisor or an associate director of the franchisor under:
 - (i) section 12 of the *Independent Contractors Act 2006*; or
 - (ii) a State or Territory industrial law.

4.2 Whether the franchisor, a franchisor director, an associate of the franchisor or an associate director of the franchisor has been:

- (a) in the last 10 years—convicted of a serious offence, or an equivalent offence outside Australia; or
- (b) in the last 5 years—subject to final judgement in civil proceedings for a matter mentioned in paragraph 4.1(a); or
- (c) in the last 10 years—bankrupt, insolvent under administration or an externally-administered body corporate in Australia or elsewhere.

4.3 For items 4.1 and 4.2—the following details (where relevant):

- (a) the names of the parties to the proceedings;
- (b) the name of the court, tribunal or arbitrator;
- (c) the case number;
- (d) the general nature of the proceedings;
- (e) the current status of the proceedings;

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- (f) the date and content of any undertaking or order under section 87B of the *Competition and Consumer Act 2010*;
- (g) the penalty or damages assessed or imposed;
- (h) the names of the persons who are bankrupt, insolvent under administration or externally administered;
- (i) the period of the bankruptcy, insolvency under administration or external administration.

5 Payments to agents

- 5.1 For any agreement under which the franchisor must pay an amount, or give other valuable consideration, to a person who is not an officer, director or employee of the franchisor in connection with the introduction or recruitment of a franchisee—the name of the person.

6 Existing franchises

- 6.1 Number, sorted by State, Territory or region, of:
- (a) existing franchised businesses; and
 - (b) existing franchisees; and
 - (c) businesses owned or operated by the franchisor or an associate of the franchisor in Australia that are substantially the same as the franchised business.
- 6.2 For each existing franchisee:
- (a) business address, if this is not the franchisee's residential address; and
 - (b) business phone number; and
 - (c) year when the franchisee started operating the franchised business.
- 6.3 However, if there are more than 50 franchises, the franchisor may instead give details under item 6.2 for all franchisees in the State, region or metropolitan area in which the franchise is to be operated.

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- 6.4 For each of the last 3 financial years and for each of the following events—the number of franchised businesses for which the event happened:
- (a) the franchise was transferred;
 - (b) the franchised business ceased to operate;
 - (c) the franchise agreement was terminated by the franchisor;
 - (d) the franchise agreement was terminated by the franchisee;
 - (e) the franchise agreement was not renewed when it expired;
 - (f) the franchised business was bought back by the franchisor;
 - (g) the franchise agreement was terminated and the franchised business was acquired by the franchisor.

Note: An event may be counted more than once if more than one paragraph applies.

- 6.5 Subject to subclause 33(1), the franchisor must supply, for each event mentioned in item 6.4, the name, location and contact details of each franchisee if the information is available.

7 Master franchises

- 7.1 If the franchisor is also a subfranchisor—the master franchisor's:
- (a) name; and
 - (b) address, or addresses, of registered office and principal place of business; and
 - (c) ABN, ACN or ARBN (or foreign equivalent if applicable).
- 7.2 The name under which the master franchisor carries on business relevant to the franchise.
- 7.3 For each officer of the master franchisor—name, position held and qualifications (if any).
- 7.4 For each of the last 3 financial years and each of the following events—the number of:
- (a) franchise agreements terminated by the master franchisor;
 - (b) franchise agreements terminated by the franchisor;

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- (c) franchise agreements that were not renewed when they expired.

Note: An event may be counted more than once if more than one paragraph applies.

7.5 The following details about the master franchise:

- (a) the term of the franchise agreement, including the date that it began;
- (b) the territory of the franchise;
- (c) whether the franchise agreement may be renewed;
- (d) whether the term of the franchise agreement may be extended and if so, any preconditions applying to an extension;
- (e) whether the scope of the franchise agreement may be extended;
- (f) whether the franchise agreement may be transferred, and if so, whether the franchisee is required to become a party to a franchise agreement with the transferee;
- (g) the grounds on which the franchise agreement may be terminated;
- (h) if the franchise agreement is terminated, how a subfranchisor's franchise agreement with a franchisee is affected.

8 Intellectual property

8.1 For any trade mark used to identify, and for any patent, design or copyright that is material to, the franchise system (*intellectual property*):

- (a) description of the intellectual property; and
- (b) details of the franchisee's rights and obligations in connection with the use of the intellectual property; and
- (c) whether the intellectual property is registered in Australia, and if so, the registration date, registration number and place of registration; and
- (d) any judgement or pending proceedings that could significantly affect ownership or use of the intellectual property, including:

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- (i) name of court or tribunal; and
 - (ii) matter number; and
 - (iii) summary of the claim or judgement; and
 - (e) if the intellectual property is not owned by the franchisor—who owns it; and
 - (f) details of any agreement that significantly affects the franchisor's rights to use, or to give others the right to use, the intellectual property, including:
 - (i) parties to the agreement; and
 - (ii) nature and extent of any limitation; and
 - (iii) duration of the agreement; and
 - (iv) conditions under which the agreement may be terminated.
- 8.2 The franchisor is taken to comply with item 8.1 for any information that is confidential if the franchisor gives:
- (a) a general description of the subject matter; and
 - (b) a summary of conditions for use by the franchisee.

9 Franchise site or territory

- 9.1 Whether the franchise is:
- (a) for an exclusive or non-exclusive territory; or
 - (b) limited to a particular site.
- 9.2 For the territory of the franchise:
- (a) whether other franchisees may own or operate a business that is substantially the same as the franchised business; and
 - (b) whether the franchisor or an associate of the franchisor may own or operate a business that is substantially the same as the franchised business; and
 - (c) whether the franchisor or an associate of the franchisor may establish other franchises that are substantially the same as the franchise; and

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- (d) whether the franchisee may own or operate a business that is substantially the same as the franchised business outside the territory of the franchise; and
- (e) whether the franchisor may change the territory or site of the franchise and if so, the circumstances in which such a change may occur.

10 Supply of goods or services to a franchisee

10.1 For the franchisor's requirements for supply of goods or services to a franchisee—details of:

- (a) any requirement for the franchisee to maintain a level of inventory or acquire an amount of goods or services; and
- (b) restrictions on acquisition of goods or services by the franchisee from other sources; and
- (c) ownership by the franchisor or an associate of the franchisor of an interest in any supplier from which the franchisee may be required to acquire goods or services; and
- (d) the obligation of the franchisee to accept goods or services from the franchisor, or from an associate of the franchisor; and
- (e) the franchisor's obligation to supply goods or services to the franchisee; and
- (f) whether the franchisee will be offered the right to be supplied with the whole range of the goods or services of the franchise; and
- (g) conditions under which the franchisee can return goods, and to whom; and
- (h) conditions under which the franchisee can obtain a refund for services provided by the franchisor, and from whom; and
- (i) whether the franchisor may change the range of goods or services, and if so, to what extent; and
- (j) whether the franchisor, or an associate of the franchisor, is entitled to receive an incentive or financial benefit as a result of a lease of premises or an agreement to lease premises, including the name of the business providing the incentive or financial benefit; and

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- (k) whether the franchisor, or an associate of the franchisor, will receive a rebate or other financial benefit from the supply of goods or services to franchisees, including the name of the business providing the rebate or financial benefit; and
- (l) whether any rebate or financial benefit referred to under paragraph (k) is shared, directly or indirectly, with franchisees.

Note: Before a requirement is made under paragraph (b) or (c), the franchisor may notify, or seek authorisation from, the Australian Competition and Consumer Commission (see Part VII of the Act).

11 Supply of goods or services by a franchisee

11.1 For the franchisor's requirements for supply of goods or services by a franchisee—details of:

- (a) restrictions on the goods or services that the franchisee may supply; and
- (b) restrictions on the persons to whom the franchisee may supply goods or services; and
- (c) whether the franchisee must supply the whole range of the goods or services of the franchise.

Note: Before a requirement is made under paragraph (a) or (b), the franchisor may notify, or seek authorisation from, the Australian Competition and Consumer Commission (see Part VII of the Act).

12 Supply of goods or services—online sales

12.1 Details of whether:

- (a) the franchisor or an associate of the franchisor; and
- (b) the franchisee; and
- (c) other franchisees;

may make goods or services available online.

12.2 If goods or services may be made available online by the franchisor, an associate of the franchisor or other franchisees, the following information:

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- (a) the extent to which those goods or services may be supplied in the territory of the franchise;
 - (b) in the case of goods or services made available via a third party website—the domain name or URL of the third party website and full registration details of the domain name.
- 12.3 If goods or services may be made available online by the franchisee, the following information:
- (a) the extent to which those goods or services may be supplied outside the territory of the franchise;
 - (b) whether the franchisee must supply a good or service sold by the franchisor, and if so, the terms and conditions on which that supply must be made.
- 12.4 Details of whether goods or services may be made available online via a third party website, and if so, whether any conditions or restrictions apply to the use of the third party website.
- 12.5 Details of whether the franchisor requires the franchisee to enter into an agreement with a third party in relation to making goods or services available online.
- 12.6 Details of any profit sharing arrangements that apply in relation to goods or services made available online and whether these arrangements may be unilaterally changed by the franchisor.

13 Sites or territories

- 13.1 The policy of the franchisor, or an associate of the franchisor, for selection of as many of the following as are relevant:
- (a) the site to be occupied by the franchised business;
 - (b) the territory in which the franchised business is to operate.
- 13.2 Details of whether the territory or site to be franchised has, in the previous 10 years, been subject to a franchised business operated by a previous franchise granted by the franchisor and, if so, details of the franchised business, including the circumstances in which the previous franchisee ceased to operate.
- 13.3 The details mentioned in item 13.2 must be provided:
-

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- (a) in a separate document; and
- (b) with the disclosure document.

14 Marketing or other cooperative funds

- 14.1 For each marketing or other cooperative fund, controlled or administered by or for the franchisor, to which the franchisee may be required to contribute, the following details:
- (a) the kinds of persons who contribute to the fund (for example, franchisee, franchisor, outside supplier);
 - (b) how much the franchisee must contribute to the fund and whether other franchisees must contribute at a different rate;
 - (c) who controls or administers the fund;
 - (d) whether the fund is audited and, if so, by whom and when;
 - (e) how the fund's financial statements can be inspected by franchisees;
 - (f) the kinds of expense for which the fund may be used;
 - (g) the fund's expenses for the last financial year, including the percentage spent on production, advertising, administration and other stated expenses;
 - (h) whether the franchisor or its associates supply goods or services for which the fund pays and, if so, details of the goods or services;
 - (i) whether the franchisor must spend part of the fund on marketing, advertising or promoting the franchisee's business.

15 Payments

Prepayments

- 15.1 If the franchisor requires a payment before the franchise agreement is entered into—why the money is required, how the money is to be applied and who will hold the money.
- 15.2 The conditions under which a payment will be refunded.

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Establishment costs

- 15.3 Details of the range of costs to start operating the franchised business, based on current practice, for the following matters:
- (a) real property, including property type, location and building size;
 - (b) equipment, fixtures, other fixed assets, construction, remodelling, leasehold improvements and decorating costs;
 - (c) inventory required to begin operation;
 - (d) security deposits, utility deposits, business licences, insurance and other prepaid expenses;
 - (e) additional funds, including working capital, required by the franchisee before operations begin;
 - (f) other payments by a franchisee to begin operations.
- 15.4 For item 15.3, the details for each payment must include:
- (a) a description of the payment; and
 - (b) the amount of the payment or the formula used to work out the payment; and
 - (c) to whom the payment is made; and
 - (d) when the payment is due; and
 - (e) whether the payment is refundable and, if so, under what conditions.
- 15.5 For item 15.4, if the amount of the payment cannot easily be worked out—the upper and lower limits of the amount.

Other payments

- 15.6 For each recurring or isolated payment payable by the franchisee to the franchisor or an associate of the franchisor or to be collected by the franchisor or an associate of the franchisor for another person:
- (a) description of the payment; and
 - (b) amount of the payment or formula used to work out the payment; and
 - (c) to whom the payment is made; and
 - (d) when the payment is due; and

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(e) whether the payment is refundable and, if so, under what conditions.

15.7 For each recurring or isolated payment, that is within the knowledge or control of the franchisor or is reasonably foreseeable by the franchisor, that is payable by the franchisee to a person other than the franchisor or an associate of the franchisor:

- (a) a description of the payment; and
- (b) the amount of the payment or formula used to work out the payment; and
- (c) to whom the payment is made; and
- (d) when the payment is due; and
- (e) whether the payment is refundable and, if so, under what conditions.

15.8 For item 15.6 or 15.7, if the amount of the payment cannot easily be worked out—the upper and lower limits of the amount.

15.9 If 2 or more of items 15.1, 15.3 and 15.6 apply to a payment, the information required by those items in relation to that payment need be set out only once.

16 Financing

16.1 The material conditions of each financing arrangement that the franchisor, its agent or an associate of the franchisor offers to the franchisee for establishment or operation of the franchised business.

16.2 For item 16.1, the material conditions of a financing arrangement include the following:

- (a) any requirement that the franchisee must provide a minimum amount of unborrowed working capital for the franchised business;
- (b) any requirement that a franchisee must meet a stated debt to equity ratio in relation to the franchised business.

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17 Unilateral variation of franchise agreement

17.1 The circumstances in which the franchisor has unilaterally varied a franchise agreement in the last 3 financial years (including, if applicable, financial years before this code came into force), other than variations of a minor nature.

17.2 The circumstances in which the franchise agreement may be varied, unilaterally, by the franchisor in the future.

18 Arrangements to apply at the end of the franchise agreement

18.1 Details of the process that will apply in determining arrangements to apply at the end of the franchise agreement, including:

(a) whether the prospective franchisee will have any options to:

(i) renew the franchise agreement; or

(ii) extend the term or scope of the franchise agreement; or

(iii) enter into a new franchise agreement;

and, if so, the processes the franchisors will use to determine whether to renew, or extend the term or scope of, the franchise agreement or enter into a new franchise agreement; and

(b) if the prospective franchisee will have an option to renew the franchise agreement—whether the prospective franchisee will be entitled to compensation at the end of the agreement if it is not renewed and, if so, how that compensation will be determined; and

(c) details of the arrangements that will apply to unsold stock, marketing material, equipment and other assets purchased when the franchise agreement was entered into, including:

(i) whether the franchisor will purchase the stock, marketing material, equipment and other assets; and

(ii) if the franchisor is to purchase the stock, marketing material, equipment and other assets—how prices will be determined; and

(d) whether the prospective franchisee will have the right to sell the business at the end of the franchise agreement; and

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- (e) if the prospective franchisee will have the right to sell the business at the end of the franchise agreement—whether the franchisor will have first right of refusal, and how market value will be determined; and
- (f) whether the franchisor will consider any significant capital expenditure undertaken by the franchisee during the franchise agreement, in determining the arrangements to apply at the end of the franchise agreement.

18.2 Details of whether the franchisor has, in the last 3 financial years, considered any significant capital expenditure undertaken by franchisees, in determining the arrangements to apply at the end of franchise agreements between the franchisor and those franchisees.

18.3 If the franchisee does not have the option to:

- (a) renew the franchise agreement; or
- (b) extend the term of the franchise agreement;

the following statement must be included in size 12 font and bold:

The franchisee does not have the right to renew the franchise agreement or to extend the term of the franchise agreement. At the end of the franchise agreement, the franchisor may, but does not have to, grant such a right. If the franchisor does not grant such a right, the franchise agreement ends and the franchisee no longer has a right to carry on the franchised business.

19 Amendment of franchise agreement on transfer or novation of franchise

19.1 Whether the franchisor will amend (or require the amendment of) the franchise agreement on or before the transfer or novation of the franchise.

20 Earnings information

20.1 Earnings information may be given in a separate document attached to the disclosure document.

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20.2 Earnings information includes the following information:

- (a) historical earnings data for:
 - (i) the franchised business; or
 - (ii) a franchise in the franchise system;
- (b) if subparagraph (a)(ii) applies—any differences between the franchise in the franchise system and the franchised business;
- (c) projected earnings for the franchised business and the assumptions on which those projections are based;
- (d) any other information from which historical or future financial details of the franchised business can be assessed.

20.3 If earnings information is not given—the following statement:

The franchisor does not give earnings information about a [insert type of franchise] franchise.

Earnings may vary between franchises.

The franchisor cannot estimate earnings for a particular franchise.

20.4 Earnings information that is a projection or forecast must include the following details:

- (a) the facts and assumptions on which the projection or forecast is based;
- (b) the extent of enquiries and research undertaken by the franchisor and any other compiler of the projection or forecast;
- (c) the period to which the projection or forecast relates;
- (d) an explanation of the choice of the period covered by the projection or forecast;
- (e) whether the projection or forecast includes depreciation, salary for the franchisee and the cost of servicing loans;
- (f) assumptions about interest and tax.

21 Financial details

21.1 A statement of the franchisor's solvency that:

- (a) reflects the franchisor's position:
 - (i) at the end of the last financial year; or
-

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- (ii) if the franchisor did not exist at the end of the last financial year—at the date of the statement; and
- (b) is signed by at least one director of the franchisor; and
- (c) gives the directors' opinion as to whether there are reasonable grounds to believe that the franchisor will be able to pay its debts as and when they fall due.

21.2 Financial reports for each of the last 2 completed financial years in accordance with sections 295 to 297 of the *Corporations Act 2001*, or a foreign equivalent of that Act applicable to the franchisor, prepared by the franchisor.

Note: See also items 21.4 to 21.6.

21.3 If:

- (a) the franchisor is part of a consolidated entity that is required to provide audited financial reports under the *Corporations Act 2001*, or a foreign equivalent of that Act applicable to the consolidated entity; and
- (b) a franchisee requests those financial reports; financial reports for each of the last 2 completed financial years, prepared by the consolidated entity.

Note: See also items 21.4 to 21.6.

21.4 Items 21.2 and 21.3 do not apply if:

- (a) the statement under item 21.1 is supported by an independent audit provided by:
 - (i) a registered company auditor; or
 - (ii) if the franchisor is a foreign franchisor—a foreign equivalent for that franchisor; within 12 months after the end of the financial year to which the statement relates; and
- (b) a copy of the independent audit is provided with the statement under item 21.1.

21.5 If the franchisor or consolidated entity (the *entity*) has not existed for 2 or more financial years, then instead of providing the financial reports mentioned in item 21.2 or 21.3, the following:

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- (a) a statutory declaration of the entity's solvency;
- (b) an independent audit report on the entity's solvency as at the date of the entity's declaration.

21.6 If the franchisor or consolidated entity (the *entity*) was insolvent in either or both of the last 2 completed financial years, the following:

- (a) a statement of the period during which the entity was insolvent;
- (b) a statutory declaration of the entity's solvency;
- (c) an independent audit report on the entity's solvency as at the date of the entity's declaration.

22 Updates

22.1 Any information given under clause 18 that has changed between the date of the disclosure document and the date the disclosure document is given under the code.

23 Receipt

23.1 On the last page of the disclosure document:

- (a) a statement to the effect that the prospective franchisee may keep the disclosure document; and
- (b) a form on which the prospective franchisee can acknowledge receipt of the disclosure document.

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Annexure 2—Information statement for prospective franchisee

Note: See subclause 12(1).

THINKING OF BECOMING A FRANCHISEE? IT IS IMPORTANT TO CONSIDER THE RISKS AND THE REWARDS

This document is not a complete guide to franchising, it is a starting point.

It should be combined with your own independent legal, accounting or business advice and the disclosure document provided by the franchisor.

Entering a franchise is a big decision. Before you do so, you should:

Conduct due diligence – this means researching the franchise system and talking to current and former franchisees.

- **Get advice** - get legal, accounting and/or business advice from professionals with expertise in franchising.
- **Read all the documents** - carefully study the disclosure document, franchise agreement, operating manual and any other documents provided by the franchisor.
- **Know your rights** - make your own enquiries to ensure that it is the right decision for you. The [Franchising Code of Conduct](#) sets out the rights and obligations of the people involved in a franchising relationship. It can be found at <http://www.comlaw.gov.au/Details/F2010C00457>

You should also consider taking a specialist franchising or business course before making a decision to enter a franchise agreement. There are **free, online education courses** available for prospective franchisees. Some courses can be found here <http://www.franchise.edu.au/education.html>.

What is franchising?

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Franchising is a model for doing business. When you enter a franchise agreement, the franchisor controls the name, brand and business system you are going to use. The franchisor grants you the right to operate a business in line with its system, usually for a set period of time. There is no guarantee you will be able to keep your franchise business after the initial period of the agreement ends.

Franchisors must comply with the [Franchising Code of Conduct](#), which exists under the Competition and Consumer Act 2010, as well as consumer and company laws. The Franchising Code sets out minimum requirements for a franchisor to provide specific information to you. A franchise agreement, once entered into, is a legally binding contract that sets out the terms of the franchise.

Why consider franchising?

A franchise can offer particular benefits over other types of businesses. For example, franchises may have an established product or service and an existing reputation and image. It may also give you access to the franchisor's experience and knowledge in the industry, planning, marketing skills and operating procedures. Some franchise systems offer franchisees a lot of support, some do not.

You should carefully think about whether the franchise system you are considering suits your business experience, skills and needs.

Understanding the franchising relationship

Two important features of franchising are that the franchisor has established the business system you are using and that most franchise systems rely on each franchise maintaining consistency. For those reasons, franchisees are usually required to strictly comply with the operating procedures set down by the franchisor. As a result, you may be limited in the changes you can make to the franchise system without the agreement of the franchisor.

You will usually also be bound by confidentiality obligations. This includes limits on your rights to use the franchisor's intellectual property or business system outside the franchise.

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Most businesses adjust to meet changes in the market. The franchisor might make changes to the franchise system at any time but does not have to discuss them with all franchisees.

Unexpected expenses

In franchising, as in any business, unexpected expenses may arise. Events such as a natural disaster or a change in the law or Australian standards can impact your business. You need to have a business plan that takes this into account when working out the funds you will need for the future. You should also make sure you have the type of insurance which is right for your situation.

During the life of your franchise agreement, a franchisor might also decide to update computer systems or introduce new uniforms or change the appearance of the franchise system. These changes might not have been thought about when you entered the agreement. Those costs would normally be paid by the franchisee under the agreement.

The risks of franchising

Statistics suggest franchises have a lower failure rate than other businesses, but franchising is not risk free. Franchising is a business and, like any business, there is the potential for a franchisor or franchisee to become **insolvent**. If this occurs this may have significant impacts on your business, for instance, you may no longer be able to use the franchise system's branding.

Some of the things you should think about are:

- How much **working capital** or **extra funds** you need for the first year or two while the business is getting established.
- Consumer demand for products or services is not the same in every **geographical area** and a franchise system might not be successful in every area.
- Your franchisor may have the ability to compete with you **online**.
- As a franchisee, you won't necessarily have the **choice of where you buy the products** you need to run the business, even if you believe you can get those products for a lesser price somewhere else.

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- An agreement may allow the franchisor to **terminate the agreement** even if there hasn't been a breach by a franchisee.
- Some **locations** are better for some businesses than others (i.e. consider a shopping centre versus a main street).
- The **economy** has its ups and downs.
- Whether the business is a **fad** or should it pass the test of time.

You may not have an automatic right to renew your agreement once the initial term is over. You should think about what happens at the end of the agreement:

- Will you be able to recover your outlay and make a profit during the term of the agreement?
- What are your rights and responsibilities around renewing your franchise agreement?
- What are the rules about you selling your business?
- Are there any restrictions on you starting a similar business if you want to?

The **Australian Competition and Consumer Commission (ACCC)** administer and enforce the Franchising Code. For example, the ACCC can provide information on how supply arrangements work in a franchising relationship.

Further information

Further information on franchising can be found at www.accc.gov.au or by calling the ACCC Small Business Helpline on 1300 302 021.

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Section 23

No. , 2014

*Competition and Consumer (Industry Codes—Franchising)
Regulation 2014*

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