

To Treasury,

Submission to Franchise Register by Jenny Buchan, PhD

This registry has been a very long time coming. It is good to see it has finally been funded to be created as a government owned and managed repository. In reality the current proposals will tell franchisees some of what they need to know but falls short of what it could achieve.

If I was buying a unit franchise, I would want to know that the franchisor or master franchisee had the right to grant it to me for the entirety of the proposed term. In contract terms I cannot licence someone (the franchisee) to have more than I (master franchisee) am entitled to have. This would mean I would need to have access to the term of the grant from the franchisor to the Australian country or master franchisee, as well as information about the specific unit I was buying.

Some comments on draft Regulation

Competition and Consumer (Industry Codes—Franchising) Amendment (Franchise Disclosure Register) Regulations 2021

s. 53C Initial obligation to provide information and documents for inclusion in the Register

- (1) The Secretary may correct, or cause to be corrected, any clerical errors or obvious mistakes in the Register.
- (2) The Secretary must remove or replace a document or information relating to a franchise that is included in the Register if:
 - (a) the Secretary receives a request from the franchisor asking for the document or information to be removed because the franchise has ceased to exist; or
 - (b) the franchisor gives information to replace information included in the Register; or
 - (c) the franchisor gives a document to replace a document included in the Register.

Comment – historic information is invaluable to help prospective franchisees their advisers and regulators:

- Identify phoenix activity
- Understand **how** a franchise has evolved over time – for example a franchisee that bought in 5 years ago wants to be able to easily work out whether a 5-year renewal on a ‘new’ agreement is going to be fair or not a good investment
- Is the prospective franchisee signing the same agreement as the others in the system and if not, how do they differ?
- Where the franchisor has changed, a person buying from a current franchisee can only evaluate potential profit/ loss if they know the ‘deal’ the seller franchisee is working with

Historic documents should be retained and available albeit under a separate searchable link or tab.

- (3) The Secretary may remove a disclosure document relating to a franchise from the Register if:
 - (a) the disclosure document has been in the Register for a period of at least 18 months commencing on the last day of the financial year to which the document relates; and
 - (b) during that period the franchisor for the franchise has not provided:
 - (i) an updated disclosure document relating to the franchise for inclusion in the Register; or
 - (ii) information required to be provided in relation to the franchise under clause 53F.

Code definition of franchisor

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

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.

Disclosure under Div 2 of current Code

9 Franchisor to give documents to a franchisee or prospective franchisee

- (1) A franchisor must give:
 - (a) a copy of this code; and
 - (b) a copy of the disclosure document:
 - (i) as updated under subclause 8(6); or
 - (ii) if subclause 8(7) applies—updated to reflect the position of the franchise as at the end of the financial year before the financial year in which the copy of the disclosure document is given; and
 - (c) a copy of the franchise agreement, in the form in which it is to be executed; 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.

BOTH the disclosure document and the franchisor's standard form franchise agreement should be on the register, as they are complementary documents that both contribute to a prospective franchisee's decision.

If both documents are not on the public register, the risk identified by the US Federal regulator (the disclosure document giving what the franchise agreement/ operating manuals

take away) can eventuate – ie ‘Separate documents (for example, a confidential operations manual) must not make representations or impose terms that contradict or are materially different from the disclosure in the Franchise Disclosure Document’

Australia is not new in going down the registration route for franchise offerings.

Registration of **some** franchise documents is required in the following jurisdictions.

1. **Antigua**
2. **Barbados**
3. **Belarus**
4. **China**
5. **France**

Only have to register the intellectual property.

6. **Kazakhstan:**

Article 9. Registration and Protection of a Set of Exclusive Rights

1. The state shall carry out registration and protection of the set of exclusive rights of the franchiser which is registered both in the territory of the Republic of Kazakhstan and in the territory of other states, if recognition of such registration by the foreign state is provided for by the international treaty which the Republic of Kazakhstan entered into.

2. In the case if the item of intellectual property is not registered in the territory of the Republic of Kazakhstan, registration of the right of intellectual property and its transfer under a contract of the franchise shall be carried out at the discretion of the parties.

3. The state body shall carry out the supervision of observance of the set of exclusive rights which are transferred by the franchiser under the franchise contract, in accordance with the procedure as provided for by legislative acts of the Republic of Kazakhstan.

7. **Lithuania**

8. **Macau**

9. **Malaysia – Franchise Act 1998**

6. (1) A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.

6A. (1) Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar’s approval.

7. (1) A franchisor shall make an application to register his franchise by submitting to the Registrar the application in the prescribed form together with—

- (a) the complete disclosure documents with all the necessary particulars filled in;
- (b) a sample of the franchise agreement;
- (c) the operation manual of the franchise;

- (d) the training manual of the franchise;
- (e) a copy of the latest audited accounts, financial statements, and the reports, if any, of the auditors and directors of the applicant; and
- (f) such other additional information or documents as may be required by the Registrar for the purpose of determining the application.

(2) At any time after receiving an application and before it is determined, the Registrar may, by written notice, require the applicant, or the director or manager of the applicant, to provide additional information or documents.

11. (1) If there is any material change in the disclosure documents mentioned in paragraphs 7(1)(a) and (f), the applicant or his director or manager shall, with the approval of the Registrar, amend the documents according to the prescribed form.

(2) The documents in subsection (1) shall be filed with the Registrar.

(3) The Registrar may, at any time, require additional information on the amendments made under this section.

(4) Any person who fails to comply with this section commits an offence.

10. Mexico

11. Russia

12. Saudi Arabia:

Both the franchise agreement and the disclosure document must be translated into Arabic and registered with the relevant government ministry.

Registration must come into effect within 90 days of the date of signing the franchise agreement. The registration will remain valid for the duration of the agreement; however, a further registration is required if the franchise agreement is amended by changing any of its parties or its term.

13. S Korea

14. Spain

15. Ukraine

16. Vietnam

17. USA (19 registration states) plus Federal regulations:

Federal regulations here and excerpt below -

‘Subpart B - Franchisors' Obligations

§ 436.2 Obligation to furnish documents.

In connection with the offer or sale of a franchise to be located in the United States of America or its territories, unless the transaction is exempted under subpart E of this part, it is an unfair or deceptive act or practice in violation of Section 5 of the Federal Trade Commission Act:

(a) For any franchisor to fail to furnish a prospective franchisee with a copy of the franchisor's current disclosure document, as described in subparts C and D of this part, at least 14 calendar-days before the prospective franchisee signs a binding agreement with, or makes any payment to, the franchisor or an affiliate in connection with the proposed franchise sale.

(b) For any franchisor to alter unilaterally and materially the terms and conditions of the **basic franchise agreement or any related agreements attached to the disclosure document** without furnishing the prospective franchisee with a copy of each revised agreement at least seven calendar-days before the prospective franchisee signs the revised agreement. Changes to an agreement that arise out of negotiations initiated by the prospective franchisee do not trigger this seven calendar-day period.

(c) For purposes of paragraphs (a) and (b) of this section, the franchisor has furnished the documents by the required date if: (etc)

This confirms that the franchise agreement and any related agreement attached to the disclosure document are all essential for the prospective franchisee to understand the deal.

The FDD site also states

'Separate documents (for example, a confidential operations manual) must not make representations or impose terms that contradict or are materially different from the disclosure in the Franchise Disclosure Document' – **this is essential as examples currently exist in Australia of the wording concerning the use of the marketing fund differing between the Disclosure Document and the franchise agreement.**

Arizona

California list of required docs includes FDD and franchise agreement. The **Californian** link <https://docqnet.dbo.ca.gov/search/> enables you to choose a franchisor and search the Franchise Disclosure Document. The FDD includes copies of documents like the standard franchise agreement for that franchisor. You can find names of all franchisees, some contact details for them. As you see, it is a state government owned and operated website as the specific franchise laws in the US are per state.

Californian guidelines for franchise registration [linked here](#)

Californian filing instructions [linked here](#)

Florida

Hawaii

Illinois

Kentucky

Minnesota's registration site is quite easy to use - a sample of information on

Minnesota's website follows: <http://mn.gov/commerce/industries/securities/>

'As one of several states in the United States that requires registration of franchise offerings, the Minnesota Department of Commerce-Securities Division is responsible

for overseeing and helping to maintain the integrity of the franchise community in the State of Minnesota.

The Minnesota Department of Commerce-Securities Section ensures that both franchisor and franchisee are protected from unscrupulous operators in the state and consumers are protected from fraudulent franchise operations as outlined by the [Minnesota Statute 80C.01](#) and [Minnesota Rules Chapter 2860](#), [NASAA Franchise Registration and Disclosure Guidelines](#), and the [Federal Trade Commission's Franchise Rule](#).

Get Franchise Registration Information and Documents

Documents **from the last three years** are available through the [Commerce Actions and Regulatory Documents Search](#)(CARDS) system. These documents are public and may be copied.

Certified copies are available upon reasonable request and payment of \$1.00/page. Call or email the Commerce Department at securities.commerce@state.mn.us or 651-539-1638 to make arrangements for obtaining copies.

Registration of a franchise by the State of Minnesota does not mean that the state recommends the franchise or has verified the information within the application. – obviously this caveat is important and should be included at every entry page on the Australian registry.

- [Fees](#)
 - [Form Requirements](#)
- Franchise Disclosure Documents submitted on/after January 1, 2020 must contain the new [State Cover Sheets and State Effective Dates Page](#).
- [Uniform Franchise Registration Application](#) (Form A, includes a notarized Certification Statement)
 - [Franchiser's Costs and Sources of Funds](#) (Form B)
 - [Uniform Consent to Service of Process](#) (Form C, must be notarized, naming Minnesota Commissioner of Commerce)
 - [Franchise Seller Disclosure Form](#) (Form D)
 - [Consent of Accountant](#) (Form F, must be on accountant's letterhead)
 - [Franchise Disclosure Document](#) (an audited financial statement is required for all initial and renewal applications)

Maine
Maryland
Michigan
Nebraska
NY
N Dakota
S Dakota
Rhode Island
Utah

Virginia
Washington
Wisconsin

s. 53C

2 (d) the ANZSIC division and subdivision codes that apply in relation to the industry in which the business operated under the franchise operates;

This is useful to auditors of quality systems.

In addition, all relevant Directors Identification Numbers should be required.

Redacting information from disclosure document

- (4) Before a franchisor provides a copy of a disclosure document under paragraph (2)(f), the franchisor:
- (a) must redact from the document the following information:
 - (i) any personal information that relates to an individual that is included in the document;
 - (ii) any information that relates to a particular franchisee, or a particular site being occupied by a franchisee, that is required under items 6.5, 9, 13, 14, 16 or 20 of Annexure 1 to be included in the document; and
 - (b) may redact from the document information required under subparagraph 10.1(k)(iii) of Annexure 1 to be included in the document.

10.1 (k) whether any rebate or financial benefit referred to under paragraph (j) is shared, directly or indirectly, with franchisees.

I could not see a clause 10.1(k) iii of Annexure 1 of the Code

It is difficult to see the justification for redacting any piece of information that would help a franchisee evaluate whether the business they buy might be profitable or not and enabling them to compare one offering against another.

I'm happy to provide more input as required.