

Details-stage Regulation Impact Statement (RIS)– Proposed Changes to the Franchise Code of Conduct

<i>Section in RIS</i>	<i>OBPR issue</i>	<i>Treasury response</i>
<ul style="list-style-type: none"> • Problem 	<ul style="list-style-type: none"> • The size (scope) of the problems with the Franchise Code of Conduct should be clearly articulated. 	<ul style="list-style-type: none"> • Treasury has updated the ‘Problem’ section (Section 3 pages 8-21) with evidence from Griffith University, the ACCC and the Wein Review, to support the view that problems in the franchising sector are moderate to low. • Treasury has also reflected in this section that while incidences of some behaviour may not be widespread, the impact can be significant. • Treasury has further clarified the scope and impact of each problem under its relevant heading. • The Griffith University statistics demonstrate that franchise businesses only account for a small percentage of the Australian business community. • The ACCC and Office of the Franchising Mediation Adviser (OFMA) statistics relating to the number of disputes and enquiries are not of a level that indicates a large problem. • Observations made by Mr Wein in the 2013 Franchising Code Review note that generally the code operates effectively and that the recommendations do not advocate an unduly interventionist approach from the government.
<ul style="list-style-type: none"> – Good faith 	<ul style="list-style-type: none"> • The problem section should detail the problematic behaviours which occur and what the implications of these are. 	<ul style="list-style-type: none"> • Treasury has updated the section ‘concerns about conduct within the franchising sector’ (Section 3.5 page 18) to include examples of problematic behaviour by both franchisors and franchisees, and the ‘Options’ section (5.2.1 page 29) has been updated with examples of the implications of problematic behaviours.
<ul style="list-style-type: none"> – Document existing 	<ul style="list-style-type: none"> • The problem section should give detail on what 	<ul style="list-style-type: none"> • Treasury discussed this point with the OBPR to seek

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regulation	common law precedents there are in relation to contract negotiations.	<p>clarification on what was meant by ‘contract negotiations’ so that an appropriate response could be prepared. Treasury was advised that ‘contract negotiations’ was a reference to good faith and that input needed to better reflect existing requirements and common law precedents relating to an obligation to act in good faith.</p> <ul style="list-style-type: none"> • Treasury has updated the section ‘concerns about conduct within the franchising sector’ (Section 3.5 page 18) to include a summary of the existing provision of the Franchising Code of Conduct regarding good faith (Clause 23A), including why it is perceived to be ineffective. • Treasury has also included a discussion on the existing common law (Section 5.2.1 page 29).
– Attachment B	<ul style="list-style-type: none"> • OBPR advised that there could be an expansion on the issues of market power, information asymmetry, inability to understand documents and lack of adequate due diligence, onerous contractual obligations and concerns about conduct within the franchising sector depending on the size of the problems. 	<ul style="list-style-type: none"> • As clarified in the ‘Problem’ section (Section 3 pages 8-21), the problems are considered to be moderate to low (recognising that the impact of some behaviours can be significant). Therefore Treasury has not addressed all the additional questions in Attachment B in line with OBPR’s guidance. However, some questions have been answered as part of the analysis. For example: <ul style="list-style-type: none"> – What are some examples of the ‘poor’ conduct that is said to be occurring? – How widespread is this conduct? – What are the impacts on franchisees and the market more generally? – Is this behaviour currently legal? If so, can current laws address the issue?
• Options		
– Generic statement	• The option section should have more explanation	• Treasury has updated the ‘Options’ section (Section

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	on the generic statement.	<p>5.2.1 page 29) to include additional information on the generic statement. It notes how the statement will be developed, how it will appear in the Franchising Code of Conduct and what issues it will cover.</p> <ul style="list-style-type: none"> • Treasury has consulted with franchisor and franchisee representatives on the wording of the statement.
– Good faith	<ul style="list-style-type: none"> • The proposal to introduce the requirement to negotiate in good faith should be explained further. • The option section should detail the principles of good faith and how they are different from existing common law precedents. • The RIS should discuss the behaviours which will be addressed by requiring negotiation in good faith. 	<ul style="list-style-type: none"> • Treasury has updated the ‘Options’ section (5.2.1 pages 29-30) to include additional information on the good faith obligation. The section now explains what the principles of good faith are, what the obligation will require from parties to a franchise agreement and how the application of the obligation is different from existing common law concepts of good faith.
• Impact Analysis		
– Good faith	<ul style="list-style-type: none"> • Expand the impact analysis on the requirement to negotiate in good faith. • The OBPR would like further discussion on the views of key stakeholders and the issues they raised. 	<ul style="list-style-type: none"> • Treasury has updated the section on ‘qualitative costs and benefits of this option’ (Section 5.2.2 pages 34 and 39) to include further analysis of whether the requirement to negotiate in good faith will extend to negotiation periods in the franchise sector, highlighting the difficulty in definitively estimating a specific addition or reduction in negotiation times that would come as a result of the introduction of an obligation to act in good faith, given the range of stakeholder views on the issue. • Treasury notes that costs for legal advice to ensure compliance with good faith obligations have been factored into the compliance costs discussed in the RIS. • In relation to the ability of franchisors to cancel agreements with franchisees (with or without cause), Treasury notes that non-renewal does not amount to

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		<p>a breach of good faith.</p> <ul style="list-style-type: none"> • Treasury has updated the RIS to include a short summary of key countries (NZ, UK and US) and their treatment of good faith and examples in the Australian context that can be used as a point of comparison (Section 5.2.2, page 38). • Treasury has assumed compliance with the Code for the purposes of this RIS. The ACCC will continue to develop educational material to assist parties to a franchise agreement with compliance under the Franchising Code.
– Impacts of other proposed changes	<ul style="list-style-type: none"> • The size (scope) of the qualitative impacts of the proposed with the Franchise Code of Conduct need to be clarified. 	<ul style="list-style-type: none"> • As discussed above, Treasury has updated the ‘Problem’ section (Section 3 pages 8-21) to indicate the problems in the franchising sector are moderate to low. • Treasury has noted in the impact analysis (Section 5.2.2 page 31) that it is envisaged the impact of the proposed changes will only be significant in the isolated areas where a specific problem has been identified. • Treasury has expanded the ‘Options’ section (Section 5.2.2 pages 31-36) with views from stakeholders on the impacts of the proposed changes.
– Proposed changes to insolvency arrangements	<ul style="list-style-type: none"> • The problem section should be updated with the issues of concern regarding insolvency. 	<ul style="list-style-type: none"> • Treasury has updated the ‘Problem’ section (Section 3.2 page 13) to include a short summary of the problems that the insolvency proposals addressed and a short description of the proposed changes. • The ‘Options’ section (Section 5.2.1 page 25) refers to insolvency.
– Regulatory burden cost offset table	<ul style="list-style-type: none"> • The OBPR would like work with Treasury to agree to the compliance costs outlined in the RIS. 	<ul style="list-style-type: none"> • Costings have been agreed by email from OBPR on 21/2/14. • The BCC file has been updated by Treasury to reflect

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		<p>OBPR's comments.</p> <ul style="list-style-type: none"> Treasury has discussed the assumptions behind the benefits for master franchisors and OBPR has agreed to these.
<ul style="list-style-type: none"> Consultation 	<ul style="list-style-type: none"> The OBPR would like the discussion on the consultation process to be expanded. The RIS should provide a more detailed summary of the main views presented by stakeholders for and against the proposed changes. The consultation and impact section should outline stakeholder views regarding good faith. 	<ul style="list-style-type: none"> Treasury has updated the RIS to include a discussion of views of stakeholders on proposed changes to the Code with regulatory impacts, including: the provision of a generic risk statement; improvements to onerous contractual terms in the franchise sector; marketing funds; good faith; restraint of trade; and, dispute resolution (Section 5.2.2 pages 31-36). Treasury notes that consultation with industry stakeholders has been used to determine compliance costs.
<ul style="list-style-type: none"> Conclusion 	<ul style="list-style-type: none"> The conclusion should be supported by the analysis in the RIS. 	<ul style="list-style-type: none"> Treasury is of the view that the conclusion to require negotiation in good faith is now supported in the RIS.
<ul style="list-style-type: none"> Implementation and Review 	<ul style="list-style-type: none"> The implementation of the generic statement to be provided to prospective franchisees should be explained further. 	<ul style="list-style-type: none"> The implementation of the generic statement is further explained by additional information in the 'options' section (Section 5.2.1 page 29).