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Office of the President

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Our ref: KB:FrLC

Consumer Policy Unit
The Treasury
Langton Crescent
Parkes ACT 2600

By email: [redacted]

Dear Consumer Policy Unit

Unfair trading practices protections for small businesses

Thank you for the opportunity to contribute to the consultation on "Unfair trading practices protections for small businesses".

This submission has been informed by members of the Queensland Law Society's (**QLS**) Franchising Law Committee.

QLS recently submitted to the Economics Legislation Committee's inquiry examining the Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026 (**Bill**).

We note that Bill proposes:

- a new general prohibition on unfair trading practices towards consumers;
- stronger protections against drip pricing by requiring transparency of transaction based charges; and
- protections against subscription practices that are detrimental to consumers and small business.

We **enclose** our submission to the Committee and reiterate the points made therein with respect to this consultation. Through the Law Council of Australia, QLS also provided feedback on the Consultation RIS and 2024 Supplementary Consultation Paper referenced in this consultation paper.

General comments

As stated in response to the Bill, QLS is concerned a further expansion of unfair trading provisions will have potential unintended consequences for the franchising sector including unnecessarily increasing regulatory layering, business uncertainty, as well as increased litigation risks and compliance costs.

Franchising involves complex, ongoing relationships generally characterised by standard form agreements, recurring fees, and network-wide supply arrangements, which may inadvertently fall within the scope of these provisions. The franchising industry has undergone a number of government reviews over the last few years; indeed, a Franchising Code that materially enhanced and strengthened disclosure, including around costs, as well as return on investment requirements and exit and renewal pre-notifications and requirements and restrictions, was implemented only last year (effective 1 April 2025, with certain provisions delayed to 1 November 2025). The regime impacting the franchising industry already interacts with the unfair contract terms provisions previously introduced.

Small businesses as consumers

Our Franchising Law Committee's views have generally focused on business-to-business relationships, that is, between franchisors and franchisees. We note the Bill's proposed new section 28B – Unfair trading practices prohibition does not apply if the supply is in the course of the consumer carrying on a business (paragraph 1.42 of the explanatory memorandum confirms the prohibition is intended to target unfair trading practices towards consumers rather than business-to business-conduct).

However, we note question 4 of the consultation paper asks:

> *4. Noting that most franchisees in Australia would be captured as small businesses, are there similar issues that impact franchisees that are not small businesses when they acquire goods or services as a consumer? If so, would any such issues be best addressed through reform to the ACL, or through other regulatory frameworks such as the Franchising Code?*

We consider that franchisees who do not meet the small business threshold may still experience material power imbalances, particularly those that are negotiating with large, multinational franchisors. These larger franchisees may face similar issues as smaller franchisees, however, rather than expanding the consumer protection provisions of the Australian Consumer Law (**ACL**) to capture these entities, QLS is of the view that where legislation is required, these issues are best addressed through targeted amendments to the Franchising Code.

This approach ensures that the unique commercial dynamics of the franchising sector in Australia are regulated under a single, cohesive framework, avoiding the regulatory overlap and uncertainty that would arise from applying general consumer law protections to large commercial transactions.

Business-to-business dealings

Our members indicate that the "small business threshold" can sometimes create confusion in the franchising sector when it comes to calculating employee numbers and turnover. Any reform needs to be cognisant of these issues.

Part of question 9 asks:

> *What types of unfair trading practices are occurring in business-to-business dealings, and what harm does this cause small businesses? For each example:*
>
> *• Is this conduct already subject to existing protections, for example, industry codes? To what extent could this conduct be addressed by extending the general prohibition proposed in the Bill to protect small business?*

We repeat our previous comments that, in the franchising context, it may be more prudent to delay an assessment about what types of unfair trading practices may be occurring until further time passes following the commencement of all of the Franchising Code's new provisions.

Question 11. If the Government were to introduce an economy-wide unfair trading practices prohibition that applies to business-to-business conduct:

• Should it apply to all business-to-business dealings involving a small business, or just a subset of these (for example, where there is a significant power imbalance between the parties, where there is a medium or long-term relationship between the parties, and/or where the small business is a supplier or purchaser)? Please provide reasons and evidence.

The Franchising Code already contains provisions about disclosure, terminations and exit requirements. Accordingly, we consider these issues should be excluded from any unfair trading provisions to avoid conflicting regulation and confusion.

We also note the arguments for applying these provisions to all standard form contracts, however, this we submit ignores the complexity of the franchising sector in this regard including the multi-entity structures (for example, trading entities, trusts, master franchisees) which we submit is better suited by more specific regulation under the Franchising Code.

Automotive dealerships

In our view, the existing regulatory framework under the Franchising Code already explicitly recognises that the automotive sector is a distinct subset of franchising, with unique commercial characteristics and specific issues that require tailored regulation. The Franchising Code currently maintains a structural separation between general franchise agreements and "new vehicle dealership agreements" to ensure that regulation is targeted and appropriate. For example:

1. Part 6 of the Franchising Code is exclusively dedicated to "New vehicle dealership agreements" (see section 84);
2. Section 35 of the Franchising Code expressly disapplies the general notification obligations in Subdivision B of Division 2 of Part 4 to new vehicle dealership agreements, recognising that the standard approach is not suitable for this sector; and
3. Sections 45 and 46 impose specific obligations regarding compensation for early termination and return on investment solely for new vehicle dealership agreements, distinct from the general obligations in sections 43 and 44;

This legislative architecture demonstrates that where specific concerns exist regarding the automotive industry, the appropriate legislative response is targeted intervention, rather than a broad, generalised approach applied to the entire franchising sector.

If the Government's policy concerns regarding unfair trading practices are driven by specific practices within the automotive industry, the any legislative reform could adopt the Franchising Code's established approach. This would address the specific policy concerns without negatively impacting the broader franchising industry, which is already heavily regulated and facing significant compliance costs.

> • Should there be an exception for conduct that is reasonably necessary to protect the legitimate business interests of the party engaging in it? Please provide reasons and evidence.

It is submitted that any proposed business-to-business unfair trading prohibition must include an express exception for conduct that is reasonably necessary to protect the legitimate business interests of a party. In respect to the franchising sector, franchisors must be able to protect the integrity of the franchise system, brand reputation, and intellectual property.

Without such an exception, standard operational requirements, such as mandating network wide software systems, quality control audits, employment audits or uniform marketing campaigns, could be vulnerable to challenge as "unfair". It is submitted the inclusion of this exception is critical to maintaining business efficacy and commercial certainty for franchise systems operating across Australia.

> • Should there be a harm element and, if so, should that harm element include financial and non-financial harm? Please provide reasons and evidence.
>
> • What would be the potential costs and benefits? Please provide reasons and evidence.

Yes, a harm element should be a mandatory component of any proposed prohibition. To prevent vexatious or trivial claims (which may increase due to a proliferation of automated or unverified self-generated legal complaints), a claimant should be required to demonstrate that the conduct has caused, or is highly likely to cause, material harm.

This harm element, we submit should encompass both financial harm (such as direct monetary loss or unreasonable compliance costs) and non-financial harm (such as significant operational disruption or loss of business opportunity). Requiring a threshold of material harm ensures that the law targets genuinely exploitative behaviour rather than ordinary commercial friction.

The potential benefit of a well-targeted prohibition is the reduction of exploitative conduct in transactions characterised by extreme power imbalances. However, the potential costs are substantial.

Without clear guidelines, safe harbours, and carve-outs for highly regulated sectors, the reform will lead to defensive contracting practices, increased litigation, and a significant rise in compliance costs. For franchise networks, these costs will ultimately be passed down to franchisees and consumers, undermining the competitiveness of small businesses in Australia.

> 12. Would a new economy-wide unfair trading practices prohibition that applies to business-to-business conduct interact with other existing laws and regulations (such as industry codes)? How should any overlap or duplication be managed?

A new economy wide business-to-business prohibition would significantly overlap with existing regulatory frameworks, most notably the Franchising Code. The Franchising Code in its latest version, we submit already contains robust, industry-specific protections addressing disclosure, good faith, termination, and dispute resolution. There should be an opportunity to review its effectiveness before further changes are progressed.

To manage this duplication, the government should adopt a "carve out" approach. Where a commercial relationship is already subject to a prescribed industry code under the *Competition and Consumer Act 2010*, that relationship should be exempt from the general business-to-business unfair trading practices prohibition. This would arguably prevent regulatory layering, eliminate the risk of conflicting legal obligations, and provide certainty to businesses operating under established regulatory regimes.

> 13. What costs or impacts would a new economy wide unfair trading practices prohibition that applies to business-to-business conduct have on businesses (e.g. compliance costs, changes to contracting practices or prices) and who would bear these costs? Please provide estimates where possible.

It is submitted that the introduction of an economy-wide business-to-business prohibition will impose immediate and ongoing compliance costs as businesses will need to again obtain legal advice (when, in most instances, advice had only been obtained to complete reviews following the latest Franchising Code changes) to review and redraft standard form contracts, operational manuals, and marketing guidelines to ensure compliance with the new, subjective standard of "fairness".

We submit that where small to medium enterprises form the backbone of the economy, these compliance costs will place a disproportionate burden on small business franchisors and master franchisees, of which we understand make up the majority of franchise systems in Australia. Additionally, the uncertainty of the prohibition's scope is likely to increase the frequency of commercial disputes, leading to higher legal expenses and increased pressure on alternative dispute resolution bodies and the courts.

> 14. Previous consultations identified barriers that prevent small businesses from enforcing their rights, including cost of legal action, fear of retaliation, and knowledge of rights. How would such barriers affect the effectiveness of any new protection?

To ensure any new protections are effective, the government should focus on directing resources into plain English focused public education and awareness programs. These programs should seek to enable a clear and accessible central location for relevant information, providing all those in the franchising sector the best chance of understanding their obligations, identifying when their rights may have been infringed and knowing how to take action.

Consideration should also be given to provide dedicated funding for legal assistance and advocacy services. This should include increased funding for small business commissioners to provide accessible, low-cost advisory and mediation services. Without robust, publicly funded awareness and education programs as well as enforcement mechanisms and accessible dispute resolution pathways, new legislative protections will remain inaccessible to the very small businesses they are designed to protect.

> 15. Should unfair trading practice protections apply in respect of franchisees who exceed the proposed small business threshold (i.e. franchisees with 100 or more employees and more than $10 million annual turnover)? Please provide reasons, including addressing the questions above where relevant.

We refer to our previous comments relating to whether it is necessary to extend unfair trading provisions to dealings within the franchising sector, noting the potential unintended consequences. In relation to franchisees who exceed the current small business threshold, the potential consequences and regulatory overlap may outweigh any commercial benefit obtained.

> 16. If unfair trading protections were to apply to franchisees who exceed the small business threshold, what is the most appropriate mechanism to do this?

If it was assessed that unfair trading protections are necessary for franchisees who exceed the small business threshold, then ideally these provisions would be placed into the Franchising Code so that franchisors' and franchisees' rights and obligations are contained in the one regulatory framework.

Remedies: 17. If a general prohibition that addresses the unfair trading practices affecting small businesses was introduced, should the full range of remedies, including civil pecuniary penalties, be available? Why, or why not?

We submit that the focus of any remedy framework for business-to-business unfair trading practices should be on restorative and commercial outcomes rather than punitive measures. While standard civil remedies, such as damages, injunctions, declarations, and orders to void or vary contracts are appropriate, civil pecuniary penalties should not be widely available under a general business to business prohibition.

The concept of "unfairness" is highly subjective and lacks a settled, objective statutory definition. Introducing severe pecuniary penalties for conduct that is subject to wide judicial interpretation creates immense commercial uncertainty. This uncertainty risks penalising businesses, including small businesses, that act in good faith but are retrospectively found to have breached a subjective standard. Punitive penalties should be reserved for clear, objective statutory breaches rather than broad standards of conduct.

18. What is the maximum civil penalty a court should be able to impose for a breach of any such provision? Should this be aligned with the maximum penalties available for other key provisions under the ACL?

Should the government decide to introduce civil pecuniary penalties, they must not be aligned with the maximum penalties available under the ACL for consumer facing-breaches. We submit that such high penalties are entirely disproportionate for commercial transactions and would introduce systemic risk into business-to-business relationships.

Instead, we submit any penalty regime must be tiered and scaled to reflect the commercial nature of the transaction, the size and turnover of the business, and the actual material harm caused. Aligning B2B penalties with maximum consumer law penalties would arguably stifle ordinary commercial negotiations, encourage defensive contracting, and significantly increase the cost of doing business in Australia.

19. Should there be a transition period before any new laws commence, or before civil penalties apply to any new laws?

Yes, a substantial transition period is absolutely critical. We recommend a transition period of at least 12 to 18 months from the date of royal assent before the commencement of any new laws, with a further deferred period before any civil pecuniary penalties apply.

The franchising sector in Queensland and wider Australia has recently undergone exhaustive regulatory updates. Businesses and their legal advisers require adequate time to review standard form contracts, update operational manuals, and train staff to ensure compliance with any new standards. A rushed commencement would place an unreasonable compliance burden on the sector and lead to unnecessary litigation.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [redacted].

Yours faithfully

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Peter Jolly
President