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Office of the President

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Dr James Popple
Chief Executive Officer
Law Council of Australia
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By email: [redacted]

Dear Dr Popple

Exposure draft – Unfair trading practices

Thank you for the opportunity to provide feedback on the exposure draft legislation regarding unfair trading practices.

This response has been compiled with the assistance of the Queensland Law Society (**QLS**) Competition and Consumer Law Committee and Franchising Law Committee, whose members have substantial expertise in this area.

QLS welcomes efforts to address gaps in the existing consumer protection framework but holds concerns about aspects of the drafting of the unfair trading practices provisions.

Competition and Consumer Law Committee Feedback

Concerns Regarding Section 28B(5)

Members consider the examples provided in section 28B(5) (examples of conduct that may amount to unfair trading practices), to be overly general and insufficient to guide businesses, advisers, regulators, or courts on what conduct would constitute "unreasonable manipulation" of consumers or "unreasonable distortion" of the consumer environment. As drafted, the examples do not meaningfully clarify the boundary between legitimate marketing practices and conduct that would breach the new prohibition.

There is concern that the scope and ambiguity of the general prohibition, combined with the limited illustrative guidance, may create significant uncertainty for businesses, especially SMEs who are navigating compliance. This uncertainty may in turn negatively impact consumers and businesses who may inadvertently breach the law or, conversely, avoid benign marketing practices due to fear of non-compliance.

Interaction with Existing ACL Provisions

Members also note it remains unclear how courts will interpret the new prohibition alongside existing Australian Consumer Law (**ACL**) provisions, particularly section 18. For example, the Explanatory Memorandum (**EM**) refers to the "unnecessary display of countdown timers" as potentially unlawful, yet misleading use of countdown timers is already likely captured under sections 18 and 29 of the ACL (misleading or deceptive conduct and false or misleading representations about goods or services respectively). It is therefore unclear whether the accurate and transparent use of a countdown timer in, for example, a genuine 24-hour sale would be prohibited under the new provision.

Until a body of enforcement action develops, legal practitioners will face difficulty determining what conduct goes "beyond reasonable marketing practice," especially given that all marketing necessarily interacts with consumer biases. The Competition and Consumer Law Committee emphasises that clearer, more specific examples or a more targeted prohibition would better support compliance, reduce ambiguity, and mitigate risks for both businesses and consumers.

Franchising Law Committee feedback

The Franchising Law Committee similarly supports the policy objectives of enhancing consumer protections against unfair trading practices, including manipulative online tactics, subscription traps, and drip pricing.

However, the Committee has identified potential unintended consequences for the franchising sector. In particular, there are concerns the current draft Bill risks unnecessarily increasing regulatory layering, business uncertainty, litigation risks and compliance costs.

Franchising involves complex, ongoing relationships 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 new Code (*Competition and Consumer (Industry Codes—Franchising) Regulations 2024*) (**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 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.

a. Risk of unintended capture under Division 4A – Subscription contracts

The proposed Division 4A introduces disclosure, notification, and exit method obligations for subscription contracts, defined broadly to include fixed term, indefinite term, and free trial/promotional period contracts (sections 48C–48E). A 'subscriber' is any person who incurs or may incur liability to pay for supply (section 2(1)), and contracts must meet the consumer or small business requirement (section 48H). While exclusions apply to leases, hire-purchase, and public utilities, franchise agreements are *not* expressly carved out.

Franchise arrangements often feature recurring liabilities (for example, royalties as a percentage of turnover, marketing levies, technology fees etc). In most situations, these recurring liabilities will be set out in standard form agreements alongside ancillary supply contracts for system services (these may include point-of-sale software, mystery shop programs, as well bookkeeping, IT, admin or procurement programs etc). These may qualify as 'recurring or continuing supply' for an indefinite or fixed period, with automatic or conditional renewal unless terminated. The broad 'subscriber' definition in the exposure draft could capture franchisees as small businesses, triggering obligations, such as pre-renewal notifications (sections 48C-F) and easy exit methods (sections 48G) for both franchise agreements and any ancillary agreements connected with the franchise operation. This is unnecessary and potentially confusing given the operation of the Franchising Code.

The EM acknowledges the focus on consumer 'subscription traps', but the current drafting risks extending to business-to-business franchising models, which are already highly regulated separately under the Franchising Code, which we again note has undergone a number of reviews with a new version only recently coming into play.

This overlap arguably creates regulatory duplication and uncertainty. Franchisees, often small businesses, may potentially exploit Division 4A to challenge terminations or restraints, conflicting with Franchising Code provisions on exit and good faith. The new Franchising Code's enhanced end-of-term notifications and compensation for early termination further heighten this risk, as Division 4A's 'exit method' (section 48G) could undermine these structured processes that have been specifically created for the unique aspects of franchising.

b. Section 28B – General prohibition

It is noted that section 28B seeks to prohibit conduct that unreasonably manipulates consumers or distorts their decision-making environment, causing detriment (section 28B(1)). It arguably seeks to target 'dark patterns' such as obstructive interfaces, artificial urgency, and confirm shaming, with examples including failure to disclose material information or creating unreasonable pressure.

The Franchising Law Committee supports the above comments from the Competition and Consumer Law Committee regarding scope and ambiguity of this provision. We also recommend section 28B(3) which provides, “does not apply if supply is in the course of the consumer carrying on a business” be amended to clearly set out the relevant carve out. Is the purpose to have consumers purchasing for use in their business operations excluded? Given the exclusion of body corporates in section 28B(2), we expect this is the intention, but suggest this should be clearer to avoid ambiguity.

We also submit that to avoid uncertainty and to allow flexibility where warranted, consideration should be given to expressly recognising special limited arrangements that may have an overall benefit to consumers.

In respect of the franchising sector, limited dealings that may put pressure on a party to make a purchase should be considered so long as the relevant supplier is able to prove that overall, there is higher benefit to the consumer (more so than any potential detriment). There is a concern that without any further amendments the existing terms may reduce the likelihood of franchises offering deals and/or being innovative in their marketing, especially when using online methods. This view needs to be considered with the comments expressed about subsection (5) above, and in relation to its application more broadly.

c. Small Business Requirement and Franchise Network Structures

Section 48H extends protections to small businesses via a standard form gateway (fewer than 100 employees or where there is a less than $10m turnover; section 48H(2)). The rebuttable presumption of standard form and factors like bargaining power, align with unfair contract terms precedents.

However, franchising's multi-entity structures (for example, trading entities, trusts, master franchisees) are not addressed, leading to the potential for threshold disputes.

To demonstrate, turnover calculations under section 48H(4) apply to the specific 'subscriber' and do not expressly provide for the aggregation of turnover for multi-unit franchisees operating via a group of related entities.

d. Exit arrangements

In line with earlier comments, it is recommended that whilst the Franchising Code applies, franchise agreements that fall within that regime and any ancillary agreements reasonably required for the proper operation of the franchise, be excluded from these provisions or, at least, be excluded so far as they relate to any obligations around exit arrangements per section 48G, on the basis that exit arrangements for franchises are already heavily regulated under the Franchising Code.

e. Automative dealers

It is submitted that 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" or "subscription traps" are driven by specific practices within the automotive industry, we submit the draft legislation should adopt the Franchising Code's established approach. Rather than imposing the broad obligations of Division 4A (Subscription Contracts) or section 28B on all franchise systems—many of which do not present the same risks—the draft legislation should utilise a specialised section or schedule to deal specifically with that industry. This would address the specific policy concern without negatively impacting the broader franchising industry, which is already heavily regulated and facing significant compliance costs.

Recommended improvements

In line with earlier comments, the QLS Franchising Law Committee recommends:

1. **Express exclusion for franchising in Division 4A**: Amend section 2(1) to specifically exclude agreements regulated by the Franchising Code from "subscription contracts".
2. **Amend section 28B**: Add clarity to those definitions and terms highlighted, as well as a further provision to allow any limited time conditional offers, subject to such offers reasonably providing a benefit that equates to or exceeds the pressure otherwise placed on a consumer that may otherwise have contravened section 28B, the submitter of this argument having the evidential burden of proof.
3. **Small Business**: Again, we continue to recommend for reasons mentioned above carve outs for franchise agreements regulated by the Franchising Code of Conduct, otherwise update clause 48J to exclude franchise agreements regulated under the Franchising Code and amend s 48H(2)(b) to permit group aggregation for related entities (e.g., consolidated turnover).
4. **Exit method alignment**: Where franchising has not been carved out, amend to at least clarify section 48G is to not apply to franchise agreements or agreements ancillary to franchise agreement that are required by the franchisor for the proper operation of the franchise, and such agreements that have been first disclosed to the franchisee prior to entering into the franchise agreement.

It is submitted that these recommendations reflect the intention of the reforms, but reduce the likelihood for unintended consequences for an industry that already has specialised regulations via the Franchising Code (only recently enhanced to enable greater disclosure, termination rights and compensation payments). Without these changes to the exposure draft, and the provision of additional guidance to those impacted, there will be an unnecessary increase to regulatory layering, business uncertainty, as well as increased litigation risks and compliance costs.

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