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Office of the President

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Committee Secretariat
Economics Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA

By email: [redacted]

Dear Committee Secretariat

Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026

Thank you for the opportunity to submit to the inquiry considering the Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026.

The Queensland Law Society (**QLS**) is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This submission has been compiled by the QLS Competition and Consumer Committee and Franchising Law, whose members have substantial expertise in this area.

Executive Summary

- QLS broadly supports the objectives of the Bill but wishes to highlight concerns regarding uncertainty and lack guidance in relation to the unfair trading practices prohibition in new section 28B. QLS calls for specific examples to be included in the provision, or a more targeted prohibition, to better support compliance and give certainty for businesses and consumers. This is essential given businesses may need to assess post-commencement conduct connected with pre-commencement offers or arrangements against the new prohibition

- Additionally, the drafting of section 28B does not address the significant degree of overlap between the concepts of (unreasonable) manipulation and unreasonable distortion, nor does it (or the Explanatory Memorandum (**EM**)) deal with the overlap between conduct covered by prohibition and the existing sections 18 and 29 of the *Competition and Consumer Act 2010* (**CCA**).

- To avoid confusion, the wording used in the chapeau to current section 29(1) of the CCA, "in connection with the supply ... or use of goods or services", should replicated in section 28B(2).
- We consider the phase, "offering to supply" in the drip pricing prohibition in section 48A is confusing and there should be better clarity as to what this means.
- In order to recognise the specific nature of the franchising sector, including its prescriptive regulation by the Franchising Code of Conduct, the Bill should be amended to:
    - expressly exclude franchising in Division 4A or, at least, cave out franchising agreements and disclosed ancillary agreements from the 'exit method' requirements in section 48F;
    - consider whether section 28B can be amended to add flexibility to allow some limited time conditional offers where these are likely to provide an overall benefit to the consumer, with the supplier bearing the evidential burden of proof;
    - ensure so the small business requirement provisions better accommodate the franchise network structure. Alternatively, the sector could be carved out of these provisions.

Unfair trading practices prohibition (section 28B)

QLS considers the drafting of this provision will create uncertainty and would benefit from amendment to include further guidance for business and consumers. Without clear legislative guidance, there will be confusion for consumers and business, and it will be difficult for our members to provide legal advice to clients. There is also a risk that businesses may continue borderline practices due to uncertainty about the scope of the section.

Need for further and better examples

We refer to the Law Council of Australia's (**LCA**) submission on the exposure draft of the Bill[1], to which QLS contributed, and note that the examples listed in section 28B(6) of the Bill do still not meaningfully clarify the boundary between legitimate marketing practices and conduct that would breach the new prohibition in this version of section 28B.

Further, the EM still does not explain what falls within "legitimate marketing and advertising activities" and "ordinary or reasonable business practices used to influence consumers by promoting goods and services", which it says, at paragraph 1.40, will not amount to unfair trading practices

The difficulty with identifying the boundary between prohibited and legitimate conduct is compounded by paragraph 1.39 of the EM which states that the examples are "intended to indicate some of the kinds of conduct that *may* be unfair trading practices" (see also the use of 'may' in section 28B(6)). This suggests that conduct that engages one or more of the examples

[1] Law Council of Australia, Unfair trading practices—exposure draft to The Treasury, 26 February 2026: 4798 - S - Unfair Trading Practices Bill 2026.pdf

by itself may not be enough to engage the prohibition (and so could be legitimate) but that such an analysis is also context specific (see paragraph 1.33 which states that use of a single dark pattern can have legitimate application but could also contravene the section if it is used to pressure consumers and create a false sense of urgency). However, no clarity is provided as to what the threshold is to engage the operation of the section.

While the use of "may" when providing examples is used in section 25 of the *Australian Consumer Law* in relation to unfair contract terms, the examples in that section are clear and it is more apparent what type of conduct is prohibited.

While we understand the argument that section 28B is intended to be industry neutral and so 'legitimate marketing and advertising activities' are unlikely to be entirely consistent from industry to industry, there should still be some attempt to define what falls within the term by way of more specific examples. For example, dark patterns (cookie consent design, hidden policies) and some harmful conduct such as claims management after disasters, may fall outside existing consumer protections and it is not clear they are captured by the Bill.

QLS calls for specific examples to be included in the provision, or a more targeted prohibition, to better support compliance and give certainty for businesses and consumers. This certainty is imperative given the proposed maximum penalty for a contravention of section 28B by a body corporate will be at least $100 million.

Further, the application provision in section 311 further reinforces the need for clear guidance. Section 311 provides that section 28B applies to conduct occurring on or after commencement, whether in connection with a supply or an offer to supply made before, on or after commencement. This means businesses may need to assess post-commencement conduct connected with pre-commencement offers or arrangements against the new prohibition. QLS considers that transitional guidance and clear examples are necessary so that businesses can identify what changes, if any, are required before 1 July 2027.

Effect of "manipulate the consumer"

In the absence of more specific examples of prohibited conduct, the change in the wording of the prohibition from "unreasonably manipulate the consumer" to "manipulate the consumer" in section 28B(2)(a)(i) does not clarify the scope of the prohibition.

The point in paragraph 16 of the LCA Submission, that there is a significant degree of overlap between the concepts of (unreasonable) manipulation and unreasonable distortion, remains in section 28B and should be addressed.

Additional comments

The point made in paragraph 22 of the LCA submission about the overlap between conduct covered by proposed section 28B and the existing sections 18 and 29 of the CCA, and uncertainty about how Courts will interpret section 28B remains in the drafting of this provision.

Section 28B(7) in the Bill makes it clear that nothing in Part 3-1 (which includes section 29) "limits by implication this section" which appears to contemplate overlap and reinforces this concern. It is unclear why this subsection does not also address section 18 given that what is required to prove a contravention of section 18 significantly overlaps with what is required to prove a contravention of any of the subsections of section 29(1). Some clarifying statements, either in the provisions or at least in the EM, would assist consumers, business and the Courts.

Finally, the comments in paragraphs 25 and 27 of the LCA submission have not been addressed in the Bill and should be considered before it is progressed. It is not clear why the words, "in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services", which appear in section 29(1), have not been used in section 28B(2) given they have an established meaning and paragraph 1.19 of the EM makes it clear that section 28B(2) is intended to capture conduct that would fall within the quoted wording in section 29(1).

Drip pricing prohibition (section 48A)

We consider the phase, "offering to supply" in the drip pricing prohibition in new section 48A is confusing and there should be better clarity as to what this means.

Specific impacts on the franchising sector

QLS is concerned the Bill 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 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. <u>Risk of unintended capture under Division 4A – Subscription contracts</u>

Division 4A introduces offer-stage disclosure requirements, prescribed information requirements for subscription contracts in effect, and exit method obligations for subscription contracts. Subscription contracts are defined broadly to include contracts involving an indefinite period, a fixed period, an initial free period, or an initial discount period (section 48B). A 'subscriber' is any person who incurs or may incur liability to pay for supply (section 2(1)). Sections 48E and 48F apply where the contract meets the consumer or small business requirement (section 48G), with section 48H addressing whether a contract is a standard form contract for the purposes of Division 4A. While exclusions apply to leases, licences in respect of real property, hire-purchase, payment in instalments, childcare, certain pre-school or school tuition contracts, and prescribed kinds of contracts, 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 agreements 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 Bill could capture franchisees as small businesses, triggering obligations, such as pre-renewal notifications (sections 48D and E) and easy exit methods (sections 48F) 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 these obligations to business-to-business franchising models, which are already highly regulated under the Franchising Code (which we again note has undergone a number of reviews with a new version only in force).

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 48F) could undermine these structured processes that have been specifically created for the unique aspects of franchising.

In transactions where the Franchising Code applies, the exist methods under Division 4A should not apply.

b. <u>Section 28B – Unfair trading practices prohibition</u>

Section 28B(4) provides the prohibition does not apply if the supply is in the course of the consumer carrying on a business. Paragraph 1.42 of the EM confirms the prohibition is intended to target unfair trading practices towards consumers rather than business-to business-conduct.

To avoid uncertainty and allow flexibility, where warranted, consideration should be given to expressly carving out other 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 providing 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 this flexibility, the likelihood of franchises offering deals and/or being innovative in their marketing, especially when using online methods, will be reduced.

c. <u>Small business requirement and franchise network structures</u>

Section 48G extends protections to small businesses where the contract is a standard form contract and the subscriber satisfies either or both of the following conditions: the subscriber employs fewer than 100 persons, or the subscriber's turnover, worked out under section 48G(4) for the subscriber's last income year ending at or before the time the contract is made, is less than $10 million. The rebuttable presumption of standard form and factors like bargaining power, further heighten the potential for franchise arrangements to be characterised as standard form contracts for the purposes of Division 4A.

However, franchising's multi-entity structures (for example, trading entities, trusts, master franchisees) are not addressed, leading to the potential for threshold disputes. For example, turnover calculations under section 48G(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. The same issue may arise with the employee threshold, which also focuses on the subscriber rather than a broader franchise group or commonly controlled network of entities.

d. Automative dealers

We note from the EM that stakeholders in the automotive industry provided views on the draft legislation.

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 or subscription traps are driven by specific practices within the automotive industry, the Bill could 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 legislation should utilise a specialised section or schedule to deal specifically with that industry. This would address the specific policy concerns without negatively impacting the broader franchising industry, which is already heavily regulated and facing significant compliance costs.

Recommendations

To address issues relevant to the franchising section, QLS recommends:

1. **An express exclusion for franchising in Division 4A:** Amend section 48C, or otherwise amend Division 4A, to exclude franchise agreements regulated by the Franchising Code and agreements ancillary to those franchise agreements from "subscription contracts".
2. **Exit method alignment**: Where franchising has not been carved out, amend the provisions to at least clarify section 48F 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 as well as agreements that were disclosed to the franchisee prior to entering into the franchise agreement.

3. **Amending section 28B**: Consider adding into the provision some flexibility to allow some limited time conditional offers where these will reasonably provide an overall benefit to the consumer that may otherwise have contravened section 28B, the submitter of this argument having the evidential burden of proof.
4. **Small Business requirement**: These provisions should better accommodate the franchise network structure, including multi-entity and multi-unit franchise arrangements. Alternatively, the sector could be carved out of these provisions.

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 regulation via the Franchising Code (which has only recently been enhanced to enable greater disclosure, termination rights and compensation payments). Without these changes to the Bill, 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