Queensland Law Society

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Office of the President

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Manager, Consumer Policy Unit
Consumer and Corporations Policy Division
The Treasury
Langton Crescent
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By email: uctprotections@treasury.gov.au

Dear Manager

Enhancements to Unfair Contract Term Protections – Consultation Regulation Impact Statement December 2019

Thank you for the opportunity to provide comments on the Enhancements to Unfair Contract Term Protections – Consultation Regulation Impact Statement December 2019. The Queensland Law Society (**QLS**) appreciates the opportunity to provide a response to the Consultation Regulation Impact Statement (**Consultation RIS**) and are grateful for the extension of time provided to do so.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 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 response has been compiled by the QLS Franchising Law Committee, Competition and Consumer Law Committee, and Banking and Finance Law Committee whose members are volunteers with substantial expertise in this area.

While we have framed our response in line with key questions of the discussion paper, we have only focused on answering those questions QLS believes are appropriate for it to comment upon and which it can add the greatest value for your consideration.

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 (07) 3842 5930.

Yours faithfully

Luke Murphy
President

Questions

Legality and Penalties

1. ***Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.***

Our comments are largely limited to those aspects which deal with the ease of administration of the law, its efficiency and its effectiveness.

However, one area in which we do raise specific concern is the use of UCTs in online terms. Unfair terms in online transactions are commonplace and of particular concern, due to non-negotiability and practical limitations for small business in terms of enforcement options. This impacts consumers and small business. The recent spate of successful ACCC cases in this area confirm the prevalence of such terms. A further issue which arises given the non-negotiability of these terms is that people including small businesses, do not read them much less understand their import[1].

By contrast, some franchising terms have been the subject of significant scrutiny which has led to the prohibition of particular clauses being included in a franchise agreement[2]. Members of the QLS Franchising Law Committee have extensive experience dealing in franchise agreements, license agreements, lease agreements and supply agreements, and have, over the years, seen parties using potentially UCTs in what are effectively standard form contracts. From that Committee's overall experience over the last few years, many businesses have reviewed their standard documents to remove what may be classified as UCTs and/or sought to address the perceived unfair aspect by insertion of additional clarifications and/or limitations on the application of such terms.

Despite the above, it is noted that there do remain areas of particular concern in respect to some parties continuing to include clauses that, for example, provide:

- uncertainty in the wide discretions granted to one party over another;

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[1] Kate Mathews-Hunt, 2017, *'consumeR-IOT: where every thing collides Promoting consumer internet of things protection in Australia'*, doctoral thesis, accessed here < https://tech.humanrights.gov.au/sites/default/files/inline-files/107%20-%20Kate%20Mathews-Hunt.pdf> at p 122.

[2] Clause 20 of the Code which prohibits a franchise agreement requiring a franchisee to sign a general release of liability or a waiver of verbal or written representations made by the franchisor - clause 20(3) of the Code states that the general release or waiver is 'of no effect" even if signed by the franchisee. Clause 21(2) of the Code prohibits a franchise agreement from containing a clause that requires a party to bring an action or proceeding or mediation in any jurisdiction outside Australia or in any State or territory outside where the franchised business is based. Similarly if the agreement does contain such a clause is 'of no effect" under clause 21(3). Clause 22 also prohibits a franchise agreement containing a clause that requires the franchisee to pay to the franchisor the costs incurred by the franchisor in relation to settling a dispute under the agreement. Again if the agreement does contain such a clause it is of 'no effect'.

- for an automatic renewal where a party is forced to renew without having the ability to exit after the initial term;
- extensive damage liability as a result of an early termination; (it should be kept in mind that many of these clauses may amount to a penalty and consequently are unenforceable.)
- termination rights, including cross-termination rights[3]
- obligations to pay an early termination fee if the agreement is terminated for any reason equal to approximately 12 months fees, despite there being less than 12 months remaining
- inclusion of other penalties
- use and gathering of data for no reasonable purpose (other than possible sale of data)
- passing data on to other 3rd party entities for no related or genuine reason

In addition, many of these kinds of terms are unilateral in nature and may also breach the consumer guarantees. Although, in some instances, there may be legitimate reasons for including certain clauses and what may be unfair in one situation may not necessarily be unfair in another.

QLS acknowledges that there are particular challenges associated with enforcement against suppliers based in foreign jurisdictions who carry on an on-line business in Australia. However, even if all Australian owned businesses were to comply with UCT provisions for on-line contracts, a gap would still remain in the regulatory environment. There is a need to:

- maintain equality in the on-line environment between Australian owned businesses and foreign businesses who carry on business in Australia; and
- resource regulators properly, including allocating specific resourcing to ensure compliance by foreign based suppliers carrying on an on-line business in Australia.

2. ***Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.***

QLS makes no comment in response to this question.

3. ***Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs).***

Please see comment in question 1.

[3] Where termination of a separate agreement between another entity, such as a related body corporate, and one of the parties can trigger a termination right under the agreement.

4. ***As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business. Please do not include business names.***

In reality, every person who transacts online is likely to have accepted a potential UCT as research universally evidences that people do not read the trading or privacy terms of transactions. Many industries do not require the obtaining of legal advice in order to agree to such terms and transactions.

There are general trading terms which should appear in contracts which will apply across the board. However, where an entity purports to have non-negotiable terms then they need to ensure those terms are fair across the board and to negotiate special conditions if there are special circumstances which require redress.

From the QLS Franchising Law Committee's experience, certain clients have felt they had no choice but to accept what is perceived as a UCT if they want to obtain a certain product and/or service. The ability to negotiate may be particularly difficult in situations where the party is an existing customer and would suffer detriment if they are unable to renew their contract, especially when there are limited suppliers or supplies available, and the initial agreement required a substantial investment.

In long term contracts, particularly franchise contracts, the franchisor may be required to cover various potential situations during a long term arrangement for the protection of the network overall, which if looked at individually could seem unfair but when considered in the whole context of the franchise system may be necessary or reasonably prudent. However, this position does not generally apply to the more common instances of unfair terms in retail [sales / leasing].

5. ***Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.***

QLS generally welcomes additional guidance and education to reduce the use of UCTs. We suggest that further guidance could be provided by the UCT regulators to assist business and their advisors in complying with both consumer and business UCT provisions.

It can for example, be difficult to determine whether the UCT protections apply. There should be clarification of the application of both regimes (that is, those applying to consumer and business UCT provisions), having regard to the practical steps that could be taken to confirm whether UCT provisions apply. For example:

- The application of the employee / small business tests - and in general terms, how to determine if the other contracting party is in fact caught by the UCT?;

- The application of business UCT in the context of multiple agreements (for example where there are Clayton Contracts);
- The calculation of "consideration" in business UCT (and perhaps using worked examples).

Further guidance is also needed around the issues of transparency and what this means. Any guidance should provide clarification as to adequate levels of "transparency" having regard to objective tests upon comprehensibility (e.g. use of readability formulae such as the Gunning FOG index or Flesch Ease of Readability Scores - all widely available on standard IT software packages and suitable "targets" for readability ease e.g. Grade 8 average comprehension level).

Other matters which might helpfully be included in further guidance include:

1. A flowchart of helpful tips for consumers wishing to negotiate / complain about suspected UCTs (including providing links to applicable external dispute resolution (**EDR**) schemes).
2. Combination of business UCT guidance and examples from the 2016 Review to form a comprehensive Business UCT guide similar to the consumer guide – which is available for businesses and individuals.
3. Naturally, upon updating, the opportunity might be taken to include in the guidance further case examples based upon decided legal cases and EDR decisions.

It is useful in our view to refer to the cases which have already been decided so that consumers and businesses can have an idea of the types of clauses which may be found to be unfair.

Where matters have been resolved by consent, this again provides some guidance as to the ACCC's views as to what unfair is. There have already been a few cases, such as the JJ Richards case, the Mitolo Group Pty Ltd case and the Servcorp B2B case, all of which can provide guidance to parties, both in regards to what has been found to be and not to be a UCT, and legitimate considerations that parties can take into account when drafting a clause.

Keeping in mind comments made in response to questions 1, 4 and 6, it is submitted that ASIC and the ACCC could on their websites keep an easily accessible public database of all cases and undertakings where UCT/s have been considered, and an information sheet summarising key court findings and ASIC / ACCC recommendations from such cases. Transparency is critical to ensure that all industry participants, regardless of size, are aware of the standards required.

However, it is also acknowledged that a balance needs to be struck between transparency and the need for some undertakings to be kept confidential.

Further regulatory guidance that has an industry-based focus would in our view be welcomed.

In the financial services context, QLS endorses ASIC's regulatory guide framework which is useful for practitioners.

It is noted that the ACCC and Griffith University already provide a free online franchising education course, which it is suggested could be extended to deal with the UCTs regime. (See also comments at questions 25).

We also note that the Office of the Australian Information Commissioner has introduced a webinar on rule changes which was presented by the regulator, directed towards education, which was well received. A similar format in this context would be useful, particularly from an industry perspective, where the regulator provides substantive guidance to those working with the UCT framework.

Finally, further guidance is needed for international entitles trading into Australia, as well as Australia's online industry. The OAIC should also look at terms in privacy statements and agreements as many of these contain unjustified or unfair terms which adversely affect business and individual privacy.

6. ***Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.***

QLS agrees that financial penalties would strengthen deterrence however, they should form part of a broader range of remedies available to the ACCC. For example, where it is unclear whether a contract term is unfair, the imposition of financial penalties for breaches may not in and of itself, be an appropriate deterrence. The availability of a range of enforcement options as well as potential financial penalties will allow for an appropriate consideration of the circumstances of each case.

Therefore, we support the options outlined in paragraph 4.5 Option 3 of the Consultation RIS and Option 4, strengthened powers for regulators as they are consistent with current regulatory practices of the ACCC, confer a range of discretion and still enable judicial appeals and oversight.

In the Franchising Code of Conduct there are various clauses that are prohibited from being included in a franchise agreement. Government has indicated by that prohibition that they are not allowed to be included in a contract of that kind. The effect of including such a term in breach of the Code is the same as an unfair contract term namely that the term is void or unenforceable.

Relevantly the Commonwealth legislature has not made those provisions civil remedy provisions to which a fine or penalty applies for contravention. They have limited the effect of including the term to it being unenforceable. As a consequence, the franchising sector know what the offending clauses are and lawyers draft their agreements carefully to ensure they do not include those clauses. There is certainty in contract and the required outcome is achieved. Whilst the ACL does provide some guidance, there is no specified list of UCTs that a business can with certainty know must not be included in a standard form contract. It may also vary significantly - what is unfair in one circumstance may be fair in another.

Care must be taken to ensure that any blanket approach to penalties does not have unintended consequences. For example, any action taken against a franchisor may not only impact the franchisor, but may also have the unintended consequence of harming its' other franchisees and their employees. Of course, the risk of such consequences arising from the application of penalties must be carefully balanced with the benefit e.g. where removing a term which benefits the entire network and prevents individual cases being exploited.

7. ***Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.***

QLS has not received any reports of its members having difficulties with challenging a possible UCT through a court process.

However, QLS suggests that the Australian Financial Complaints Authority (**AFCA**) Complaint Resolution Scheme Rules (**Rules**) be amended to expressly enable AFCA complaints to be lodged against, and binding AFCA determinations to be made against, agents of AFCA's members, if such agents are a "financial firm" for the purposes of the Rules.

This should be available for UCT and other issues, to the same extent any such complaint or determination could be lodged or made if the agent was an AFCA member.

As part of this, the functionality of the online AFCA Complaints lodgement system should be updated to allow complaints to be lodged against such agents directly.

This recommendation arises from experiences where a complaint arises from finance contract terms drafted by a broker who is not a member of AFCA, but the undisclosed financier is a member of AFCA and is therefore automatically captured by AFCA and its Rules.

This situation results in the complaint being lodged with AFCA against the financier, as a member of AFCA, with the broker then being joined later in accordance with the Rules, because "agents" are included in the definition of Financial Firm under the Rules (paragraph (d)).

Whilst ultimately the correct parties are joined, it means that all of the issues cannot be dealt with under one complaint. The current process required is that separate complaints are issued against each AFCA member with the broker later being joined.

Amending the Rules to fix this anomaly, and updating the functionality of the AFCA Complaints website, would simplify the process for complainants in circumstances where the agent should be a party to the complaint.

8. ***What do you consider are the additional costs and benefits for each of the proposed options?***

If a UCT was to be unlawful then there should be publicly available specific guidance as to what has been previously determined as not acceptable. This should include

disclosure of terms for which ASIC or the ACCC has sought and obtained an undertaking from a business not to enforce.

For example, recently Husqvarna gave a s87B court enforceable undertaking to the ACCC in relation to its dealer agreements which amongst other things the ACCC alleged contained unfair contract terms. Husqvarna undertook not to include certain terms that the ACCC alleged were unfair, in future contracts or to enforce those terms in existing dealer agreements. The undertaking did not disclose the unfair terms at all and anyone reading the undertaking (available on the public register) would not know what the offending terms were. This sort of approach makes identification of unfair contract terms extremely difficult.

It would in our view be useful for infringement notices and subsequent increased enforcement to follow unlawful UCTs. This would give the opportunity for the relevant regulator to engage with the trader, at which point there is an opportunity to adjust the terms and potentially also provide an enforceable undertaking to address the issue. It is also an opportunity for the regulator to liaise with a trader as to the specific circumstances of the arrangement prior to the matter progressing to Court or litigation. Some of our members consider that enforcement by the regulator of this nature has been very limited to date. However, we also understand the ACCC very commonly pursues s87B arrangements. Whilst these are not strictly enforcement, they are effective as a regulatory and educational tool and provide a further opportunity for liaison and accountability between the regulator and the trader.

We note that some members of the Banking and Financial Services and Competition and Consumer Law Committees however, have concerns about automatic voiding of all UCTs as it would create uncertainty given the potential consequences for the wider contract.

Therefore, generally we support Option 2 on page 24 of the Consultation RIS that UCTs should not automatically be voided, however, again, there should be a wider scope for enforcement and remedies to ensure that where UCTs are identified, they cannot continue to be used. For example, websites could be required to post a notice and consumers under such a contract should be informed and fair replacement terms proposed so that terms can be renegotiated if necessary.

Flexible Remedies

9. ***Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?***

No comment.

10. ***If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business?***

Given the previously raised concerns about what is unfair in one situation not necessarily being unfair in another, and in many cases we are dealing with long term ongoing arrangements, the courts should have the discretion to make appropriate orders to avoid leaving an applicant without appropriate relief. It may depend upon the current limits on jurisdiction of the court as to what relief it is able to order.

11. ***Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.***

Yes. We submit that the regulator should be able to commence court proceedings on this basis and be properly resourced to do so. This is particularly important for small businesses and consumers whose smaller matters individually may not otherwise draw the attention of other regulators.

Definition of a small business

General comments:

Our members report significant challenges in identifying when clients are dealing with a small business, due to difficulties in applying the headcount test. Some of these challenges are outlined in the Consultation RIS. It is also acknowledged that there is difficulty applying a "turnover" test, although there will always be businesses who are on the cusp of a turnover and may fall in and out of such a category from year to year.

The test to be applied needs to be certain and transparent, which will benefit all involved in applying the UCT framework.

Broadly, QLS submits that where a threshold for a 'small business' is applied, there should be a "safe harbour" so that where a party purports to be, or indeed, not to be a small business, then the other party can assume this to be the case unless it was unreasonable to hold such a belief. It may be helpful to take an approach similar to that of the National Credit Act and National Credit Code, that a person did not know, or had no reason to believe, that the declaration is not true, to ensure that such a declaration is not used as an avoidance mechanism.

The onus of proving that the business is not a small business should rest with the party seeking to establish that the contract is not caught for the purposes of UCT protections.

With respect to related bodies corporate, we support option 2 on page 32 that at least one party to the contract should meet the small business threshold at the time the contract is entered into in order for the contract to be considered a 'small business contract'. This means that corporate bodies are considered as a whole, rather than just that entity.

12. ***What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including costs, benefits, impact on business practices etc.***

    QLS notes that there are concerns around difficulties in calculating the relevant headcount at the relevant time. This is not being regarded as a simple calculation, and as such may cause uncertainty.

13. ***If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.***

    This is a question for industry stakeholders.

14. ***If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?***

    QLS notes the concerns around using annual turnover as a threshold given it does not consider the costs of operation and/or the investment required to reach those sales.

    However some of our members consider that annual turnover may be preferable to a headcount threshold. As noted above in "general comments", any threshold applied must provide certainty to businesses.

QLS considers that Questions 15 to 21 are best responded to by industry stakeholders.

Clarity on standard form contracts

22. ***What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.***

    QLS supports the two options proposed in the paper which seek to provide further clarity around standard form contracts. We support the proposal to make 'repeat usage' a factor that a court must consider in determining whether a contract is a standard form contract.

23. ***If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?***

    QLS supports certainty. We therefore support further legislative clarification of actions which do not constitute an 'effective opportunity to negotiate'.

    In many cases negotiations as to the contract terms will take place. The degree of negotiation and willingness to negotiate will vary significantly, including depending on whether they have legal representation. In some cases the unfair contract term is

raised in those negotiations and an amendment (including that it be deleted) is requested.

The current UCT regime does not require the actual term that is alleged to be unfair to be negotiated. However it would be extremely useful to include practical examples where the alleged unfair contract term is identified and the small business has requested in writing that:

(a) it be amended to mitigate its effect; or

(b) it be replaced by another clause suggested by the small business; or

(b) the term be deleted in its entirety.

By engaging in good faith negotiations to amend or remove the actual alleged unfair contract term, it may be considered to be affording the small business with an effective opportunity to negotiate.

For example, is it an effective opportunity to negotiate if the small business (or its lawyer) identifies the imbalance and indicates to the other party in writing that it (and or other terms) is an unfair term and provides reasons why and then requests the term (or other terms) is either amended in the way requested by the small business to mitigate its effect or to delete it. If such a request is simply refused, does that constitute denial of an 'effective opportunity to negotiate' the unfair term?

Similarly, a party may be willing to negotiate terms that are not core commercial terms and unlikely to show an imbalance. Would the willingness to negotiate only (or predominantly) non-core terms mean that an effective opportunity to negotiate has or has not occurred?

Does the willingness to negotiate those terms that are not covered by the regime in any event (e.g. going to the subject matter or price), show a genuine opportunity to negotiate?

Examples or types of actions expected in negotiations would assist lawyers to clearly identify the consequences of taking or not taking certain action and advise their clients accordingly. It also has the potential to streamline negotiations by making it clearer what is required to meet the statutory threshold.

24. ***In addition to the types of actions outlined in option 4, are there any other types of actions that may appear to be 'negotiation' but which you consider do not constitute 'an effective opportunity to negotiate'? What effect have these actions had on your business?***

See response to question 23 above.

25. ***Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please***

provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.

While QLS submits that there is already clear knowledge around what is a 'standard form of contract', the ACCC and fair trading bodies could develop a separate webpage or information sheet around ie 'Doing Business: Standard Form Contracts – what they are and your rights', rather than having it as a subheading under UCT, which requires people to first be aware of the UCT regime.

26. ***If minimum standards under state and territory laws could be challenged as being unfair, what impact is this likely to have on your business (or those businesses you represent)?***

The Consultation RIS identifies the Small and Medium Enterprise Committee of the Business Law Section of the Law Council of Australia's position that a state or territory minimum standard should not be assessed as an unfair term.

The Consultation RIS also notes the previous QLS submission to the effect that the status quo should be maintained and that we opposed exempting minimum standards prescribed by state or territory laws because there was already sufficient protection for minimum standards under the protection of mandatory provisions imposed by law.

QLS recognises that if minimum standards are capable of being challenged under the UCT regime, this may result in contractual uncertainty, given that what is effectively a legally mandated minimum standard may be still be unfair.

This could increase business complexity and costs, discouraging parties to grow their business and operate in different jurisdictions. However, this must be balanced with the opportunity of a small business to challenge laws and the resulting mandatory clauses which are otherwise unfair.

On balance, after further reflection and discussion between members, QLS considers that the law should be changed to permit minimum standards to be challenged as a UCT. This possibility of uncertainty must be outweighed by an opportunity to challenge mandatory clauses which are otherwise unfair under the UCT regime.

In order to address this uncertainty, QLS recommends that all minimum standard provisions should be systematically and comprehensively reviewed for fairness for the purposes of the UCT regime.

Any offending provisions should be amended or deleted as necessary from the relevant statutes. It is acknowledged that there will need to be consultation between all levels of government, industry and consumers to seek, as far as possible, a national uniformity between these provisions and their timely promulgation so as to permit a suitable transition period.

QLS appreciates the significant size of this recommended task. However, if this task is not undertaken, then either mandatory "unfair clauses" will be provided with statutory protection or (if these clauses are made assessable under the UCT regime) then the real possibility arises of the commencement of many and potentially inconsistent piecemeal applications under the UCT framework regarding these terms.

If these applications are successful, they will result in uncertainly and confusion as to the effect of the relevant provision of the impacted mandatory minimum standard. This latter possibility would remove the whole intended purpose of these provisions - namely to provide clarity and uniformity to all parties.

27. ***What would be the impact of applying any of the options around illegality, penalties and flexible remedies to consumer and insurance contracts?***

It would seem appropriate that these options should generally be available to individuals and businesses to ensure consistency.

QLS makes no comment on questions 28 and 29.

Application to franchising agreements

30. ***How would the options for defining small business (in Section 6) apply to franchisees and franchisor businesses, and what proportion of franchisees would be a small business under each of the options?***

Many franchisors are small businesses in their own right.

Conversely, motor vehicle dealership agreements are taken to be a franchise agreement yet the vast majority of motor dealers would not meet the definition of a small business. Some are in fact publicly listed entities or groups with conglomerates of dealerships.

Given the above, it may be an option to consider defining a motor vehicle dealership agreement (or, if the proposed new car amendments come in, a new vehicle dealership agreement) to be a small business for the purposes of the regime and the new vehicle dealership agreement taken to be a standard form small business contract for the purposes of the UCT regime. In this regard, we note there have been recent announcements[4] from the Assistant Treasurer the Hon Stuart Robert MP which suggest that car dealers may soon be afforded protections from UCTs.

Care needs to be taken with defining what agreements are captured by the UCT regime if it is to deem or take certain agreements to be subject to the UCT regime.

For example the amendments to the Fair Work Act implemented under the *Fair Work Act Amendment (Protecting Vulnerable Workers) Act 2017* to protect vulnerable workers relied on the definition of a 'franchise' under the *Corporations Act* and not a 'franchise agreement' under the Code. The definition of a 'franchise' under the Corporations Act is much wider and captures agreements that may not technically be a franchise agreement under the Code.

[4] https://hwlebsworth.com.au/government-to-consider-extending-protections-from-unfair-contract-terms-which-would-apply-to-car-dealers/.

31. ***Will changes to the value thresholds for contracts (Section 7) apply to franchise agreements, and what proportion of franchising agreements would be captured under each option?***

In most cases the changes to the thresholds will not matter other than in respect to motor dealerships or franchisees that own and operate multi store units.

32. ***How would the options for clarifying a standard form contract (Section 8) apply to franchise agreements, and what proportion of franchisee agreements would be a standard form contract?***

Usually a franchisor will want its franchise agreements to be largely uniform and consistent across the network. Some franchisors are willing to negotiate but usually the core commercial terms are not negotiable. There is a high proportion of franchise agreements used in systems that would be considered to be standard form. The Code requires the version of the franchise agreement to be in execution form to be attached to the formal disclosure document so it is largely standard form at the time it is given to start the disclosure period pre contract. In some cases the agreement is provided before formal disclosure so they can seek advice earlier before they commit to proceed.

In reality, some franchisors (and in fact lawyers representing them) are prepared to negotiate some of the commercial terms of their franchise agreements whilst others are not. In many cases ancillary agreements such as outlet licence agreements and general security agreements are not negotiated.

The Code fortunately allows (clause 9(3)) relief from re-disclosure in limited circumstances where the changes to the franchise agreement are to give effect to a request by the franchisee (requested amendments) as well as some other minor circumstances.

The members of this committee are aware of this provision of the Code and it has been used frequently in practice by those who do negotiate the terms. It was included in the 2014 new Code to deal with a practical issue about re-disclosure after negotiations have led to amendments being made to the agreement before it is executed. Clearly the Code does contemplate amendments being requested by the prospective franchisee.

33. ***How will the different penalties, infringement notices and enforcement options (Section 4) apply in the franchising sector? Would they be appropriate for franchise agreements?***

The Franchising Code of Conduct has been prescribed with civil penalty provisions that impose a fine or penalty for contravention.

The relevant provisions that make inclusion of a term in a franchise agreement void or unenforceable are limited and currently they are not subject to a fine or penalty currently. These clauses include clauses 20, 21(2), 22.

If the mischief identified is that franchisors continue to include them when they know they should not, then QLS would generally support the need to make those clauses of the Code subject to a civil penalty provision as well. In this way, not only is the clause unenforceable but if it is used it would expose the franchisor to be liable to a fine or penalty for contravention.

Note, however, clause 23 of the Code renders a restraint of trade unenforceable in certain circumstances. That is quite different to the other provisions and, in the Society's view, should not be subject to a fine or penalty.

There are also various provisions in the Code which already set out procedures that must be followed or included in a franchise agreement that deal with breach, termination, disputes, transfer, to name a few.

The Code requires a franchise agreement to include certain provisions (for example an internal complaint handling procedure (clause 34)) and express terms consistent with the Code if a franchisor wants to rely on them (for example clauses 27, 28, 29 dealing with termination). The clauses are drafted so that if the procedure is not followed then a fine or penalty will follow. Clauses of that kind that should be included would be of a kind "required or permitted by law" and therefore not normally subject to the unfair contract term regime.

Again, it is submitted that in any approach taken, especially any blanket approach with penalties, care must be taken to ensure that it is recognised that this is an industry where most of parties are small businesses, and any action taken against a franchisor may not only harm the franchisor but have the unintended consequence of harming its other franchisees.

34. ***What proportion of franchise agreements are perpetual or evergreen, and how could UCTs in these agreements be addressed?***

Perpetual franchise agreements do exist, although it is unlikely that there would be a large number in place at present.

They are more commonly seen in older motor vehicle dealerships where their term continues indefinitely or rolls over automatically unless the agreement is terminated on notice. However, they can still exist in other franchised businesses.

Whilst UCTs could be addressed in those agreements by making all such agreements automatically subject to the regime on or after a specified date, there is a real question as to whether it is possible to say they were unfair at the time the contract was entered into (as opposed to when the offending term was to be enforced). Possibly, in respect to those agreements that qualify as a perpetual agreement, the question of fairness is better directed to when the term is to be enforced.

If it is intended to make UCTs illegal, then it would be problematic and unfair to make that change retrospective in its application to a time before the regime even commenced.