

29 November 2023

Director
Consumer Policy and Product Safety Unit
Market Conduct and Digital Division
The Treasury
Langton Crescent
PARKES ACT 2600

By email only: consumerlaw@treasury.gov.au

Unfair Trading Practices – Consultation Regulation Impact Statement

Background

The Franchise Council of Australia (FCA) welcomes the opportunity to provide this submission to Treasury's consultation in relation to the Unfair Trading Practices – Consultation Regulation Impact Statement.

The FCA is the peak body for Australia's \$174bn franchising sector – representing franchisors and franchisees – comprising over 94,000 business outlets which in turn employ almost 600,000 people.

Importantly, in the context of the issue of unfair trading practices 95% of franchisors and almost all franchisees are small businesses, so almost all franchise sector participants will be impacted by any decisions. As a consequence, the FCA is vitally interested in these issues, and keen to remain actively involved in all industry consultation.

In this submission the FCA makes no comment on alleged unfair trading practices in the context of consumer transactions, except to note that there appears little evidence of substantial damage caused by the practices. It is also unclear why the more serious identified practices would not be already covered by the Australian Consumer Law prohibitions concerning unfair contract terms and unconscionable conduct, or capable of being regulated under that framework with stronger prioritisation in enforcement or minimal legislative adaptation of unconscionable conduct.

The FCA's observations in this submission are directed at business transactions, notably arrangements between franchisors and franchisees, or franchisors/franchisees and other businesses. The word "*consumer*" is used throughout the Consultation Paper. This has the potential to distract attention from a proper consideration of business contracts, including small business contracts.

The FCA notes that to give effect to the prohibition on unfair contract terms in standard form small business contracts, the Australian Consumer Law definition of "*consumer contract*" was amended such that it now reads "*consumer or small business contract*." Although this may be seen as an efficient approach to legislative drafting, it ignores the significant differences between consumer contracts and small business contracts. The FCA would be concerned to avoid any change to the ACL that impacts consumers automatically applying to small businesses.

Executive Summary

The FCA strongly prefers the status quo (Option 1) identified in the Consultation Paper. The FCA strongly opposes the introduction of a general prohibition on unfair trading practices in the context of business transactions (Option 3), and strongly opposes a combination of general and specific prohibitions on unfair trading practices (Option 4). The FCA is open to a thoughtful extension of the definition of unconscionable conduct by adding further indicators of conduct that is likely to be unconscionable (Option 2).

The key points the FCA wishes to make can be summarised as follows:

1. The concept of unfair business practices appears to have arisen from one main area of the economy, being the digital sector. All specific examples of potentially unfair trading practices given in the Consultation Statement relate to the digital economy. None of the examples relate to conduct in Australian franchising.
2. There has been very little time to assess the effectiveness of current regulatory framework. The recent extensions to the prohibitions on unfair contract terms are very new, and the significant penalties that apply to the insertion of unfair contract terms in standard form small business contracts only took effect from earlier this month. The Franchising Code of Conduct (discussed in more detail *below*) is currently under independent review, with the report to government due in December 2023. It seems to be sensible to assess the impact of these reforms and review before moving to introduce any new regulation.
3. The Consultation Statement does not distinguish between consumer transactions and business to business transactions. This distinction is critical for the following reasons:
 - a. Consumers are in a very different position when it comes to the implications of such conduct. Information is typically their personal information, and they may have heightened sensitivity to the impacts of a decision;
 - b. Consumers have less ability to respond to these issues;
 - c. Consumers have far less bargaining power; and
 - d. Principles of fairness are consistent with community expectations in consumer transactions.
4. Business to business transactions are very different to consumer transactions in that:
 - a. They are for profit, and both parties are typically seeking commercial advantage. Prices are set based on different chosen frameworks. Conceptually, it is possible for a business party to deliberately choose an “unfair” arrangement;
 - b. Business parties typically have a choice, whereas consumers may not;
 - c. Contractual certainty is essential to business dealings. The courts have long held the view that they will not intervene to upset a commercial bargain fairly reached between business parties. The law recognises that business parties may drive hard bargains and are free to act in their own interests. They are not obliged to disclose everything they know to the other business party.
 - d. Third parties frequently rely on, or are affected by, business contracts. This is entirely different to consumer contracts. Third parties can include financiers, landlords, suppliers, franchisees, contractors and employees. Chain of title can even be affected.
 - e. Every day, banks lend on the assumption that business contracts will be honoured. Investors invest based on the same assumption. Any legislation to prohibit unfair business practices will require new layers of due diligence from financiers and

investors, and additional cost. These costs will either flow through to borrowers in higher costs, or deter financiers from dealing with small businesses, or both.

5. The FCA notes that the identified examples of alleged unfair business practices come from the technology sector, which is largely unregulated. The franchise sector on the other hand is already comprehensively regulated, via the current prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms in the Australian Consumer Law, and the comprehensive disclosure and conduct obligations in the Franchising Code of Conduct.
6. The franchise sector is already comprehensively regulated. The Franchising Code of Conduct contains a comprehensive pre-contractual disclosure process that mitigates against the identified concerns in the discussion paper. For example, the Code ensures that:
 - a. there is full information transparency and full disclosure of contract terms and financial obligations;
 - b. there are specific documents that highlight key information, such as the Information Statement and Key Facts Sheet, as well as the information required by the Franchise Disclosure Register;
 - c. there is ample time for considered decision making and obtaining advice due to the 14-day waiting period prior to signing and the 14-day cooling off period after signing;
 - d. prospective franchisees are directed to obtain legal and business advice, with timeframes allowed for this process, and a certification process to encourage advice; and
 - e. there are specific mechanisms for redress including the highly successful mediation-based dispute resolution framework and arbitration framework, oversight by the ACCC and ASBFEO, and ready access to enforceable remedies via the court system. The Code contains significant financial penalties for breaches of every material provision in the Code, and the ACCC has extensive regulatory and enforcement powers which it regularly exercises.
7. There is no “concealed data practices,” “exploitative bargaining power imbalances,” “distortion of expectations,” “opaque data-driven targeting,” “all or nothing click-wrap consents,” or any other conduct identified as examples of potentially unfair trading practices. Indeed, the Franchising Code and the current Australian Consumer Law provisions already provide significant protection to the parties to a franchise agreement.
8. In addition, and importantly, the Franchising Code of Conduct also contains an express good faith obligation that applies to the parties to a franchise agreement, and carries a penalty of 600 penalty units for breach. No such specific obligation and sanction currently applies to the parties to a contract outside the franchise sector.
9. The FCA considers that there is no need for any new form of regulation outside the Franchising Code of Conduct. If there are any issues of specific concern they can and should be addressed in the Franchising Code of Conduct. In that context, the Code is currently under independent review, which is a further reason why no action should be taken to introduce further regulation at this time.

Response to Key Focus Questions

Key Focus Questions	FCA Response
Q1. Do you agree or disagree with the representation and scope of unfair trading practices identified in this paper? Please provide any evidence to support your position.	In relation to business to business transactions the examples of unfair trading practices are less impactful and can be more easily addressed by businesses. In relation to the franchise sector specifically, virtually all of the examples (concealed consent, unilateral variation of core terms, omitting relevant information, non-disclosure of financial obligations, lack of transparency, etc.) are already addressed in the Franchising Code of Conduct.
Q2. How do you think unfair should be defined in the context of an unfair trading prohibition? What, if any, Australian or overseas precedent should be considered when developing the definition? Are there things which you think should be included, or excluded, from the definition?	The concept of “unfairness” is a poor fit for business to business contracts. It cuts across the principles of freedom of contract that underpin business arrangements and (as can be seen in the context of the prohibition on unfair contract terms) it creates unrealistic expectations in relation to the re-negotiation of commercial terms.
Q3. Do you have any specific information, analysis or data that will help measure the impact of the problems identified?	<p>In the franchise sector the consistently low level of disputation, the outstanding success of mediation in resolving disputes (above 80%), and the declining level of complaints to the ACCC demonstrate that the current regulatory framework is working effectively. Unfair business practices do not really feature in published franchise sector complaints to the ACCC.</p> <p>More broadly, the FCA’s view is that it is up to those who assert the existence of problems to provide evidence of economic detriment and materiality. It is not enough for a regulator to note issues of concern, let alone to seek to extrapolate issues identified in one small area (in this case technology) into a general prohibition on “unfair trading practices”. Small business is struggling under the burden of unnecessary or excessive regulation. Legislation must be the last response, not the first reaction.</p>
Q4. Do you agree with the consultation objectives as outlined? If not, why not?	Yes, although more emphasis should be placed on “quantifying” the problem, not just “identifying” a possible problem. The FCA also notes that the Consultation Statement does not identify any policy problems that are particularly relevant to the franchise sector. The examples given are more relevant to consumer transactions and to digital transactions.

Key Focus Questions	FCA Response
Q5. Are there any other consultation objectives that should be considered in addressing unfair trading practices in Australia?	Consumer and business consultation should be separated, and industry issues (for example in automotive) should be addressed by specific industry responses.
Q6. As a consumer or small business, have you suffered detriment from unfair trading practices? Please describe your experience and quantify the impact in monetary terms, if possible.	<p>As small businesses operating in a market economy franchisors and franchisees regularly encounter challenges in dealing with larger corporations. For example, landlords in major shopping centres that sign a lease on agreed terms without disclosing their intention to grant a competitor a lease for nearby premises. The financial impact can be substantial, and indeed can cause the business to be unviable.</p> <p>However, this is unlikely to be addressed by legislation dealing with “unfair business practices” as this will be seen as part of the commercial terms of a deal or normal hard bargaining. On balance, the franchise sector is prepared to accept that it will sometimes be at a disadvantage in a market economy. The franchise sector does not wish to see even more regulation, as it has a disproportionately negative impact on small business.</p>
Q7. Have you experienced any difficulties with challenging or disputing a potentially unfair trading practice? Please provide any relevant details.	In relation to retail tenancy issues, the legislation is state-based and differs between states. Major shopping centres are in essence markets unto themselves, and the conduct of major shopping centre proprietors should be assessed in the context of competition law concepts such as abuse of market power.
Q8. What is your preferred reform option, or combination of options? What are your reasons?	Option 1 in relation to business to business transactions. The FCA makes no comment in relation to consumer transactions.
Q9. Are there any alternative or additional reform options to those presented you think should be considered?	Major shopping centres should be regulated under federal law to recognise they are markets unto themselves, to provide consistency, and to reduce compliance costs for all parties.

Consultation objectives

Further to its response to Q4, the FCA notes the following in the context of the five perspectives for assessing policy options.

Perspective	Observations
Productivity and economic impact	Any option other than retaining the status quo for business transactions will create contractual uncertainty where none

	currently exists, will impact third parties such as lenders and suppliers, and will create significant compliance cost. The FCA also notes that the franchise sector has been adversely impacted by an almost constant state of regulatory review. The Franchising Code of Conduct is currently under review, having been amended 10 times since 1998. Franchisors and franchisees have had to come to grips with new Code obligations, including a specific good faith statutory obligation not applying to other sectors; court interpretations of unconscionable conduct; prohibitions on unfair contract terms (and subsequent amendments to those provisions and new pecuniary penalties); and the challenges of the COVID pandemic. It seems none of the legislative initiatives has been given any time to settle. Regulatory fatigue has impacted productivity, increased cost and reduced net economic output.
Fairness and equity	In the franchise sector the current regulatory framework – Franchising Code disclosure obligations and processes, the Code good faith obligation and the ACL prohibitions on misleading or deceptive conduct, unconscionable conduct and unfair contract terms – strikes the right balance in terms of fairness and equity.
Ease of implementation	Any option other than retaining the status quo would be difficult to implement in the context of business transactions. We have already seen the challenges with unfair contract terms including the need for specific education and training, court and regulatory challenges in interpreting the law, and challenges in enforcing illusory concepts. Courts have traditionally been reluctant to revise commercial bargains fairly made. Any new law would seem to either require them to do so, or else create false impressions with parties to a business contract that some trading practice could enable a contract to be commercially varied or set aside. There is also an obvious overlap between concepts of good faith, unconscionable conduct, reliance on an unfair contract term and what might be an unfair trading practice.
Regulatory and administrative burden	The introduction of a new and confusing legal concept will create regulatory uncertainty in business contracts when none currently exists. Regulators such as the ACCC are already challenged in their ability to meet enforcement expectations in individual circumstances. The focus of the ACCC should continue to be endemic issues or egregious conduct. In a recent submission to the review of the Franchising Code of Comment, the ACCC indicated it was struggling to meet enforcement expectations in the context of individual franchisee complaints having regard to enforcement priorities. Any new law would essentially require a regulator to become a commercial arbiter
Stakeholder support	The FCA strongly supports Option 1. Some fine tuning of unconscionable conduct (Option 2) is possible, and at least would avoid creating a new, different and confusing new legal concept. However, the FCA sees no need for an extension of unconscionable conduct in relation to franchise sector issues.

The FCA has already been involved in one consultation roundtable session. Its concerns with the roundtables, and consultation processes more broadly, are:

1. Groups have included consumer groups and some business groups in the same session. The consumer groups are forceful and passionate advocates for legislative reform in this area. Although we have no factual insight into the extent of consumer issues, it is very clear from the roundtables that consumer issues are very different to business issues. In the FCA's view, consumer consultation should be kept separate from business consultation to avoid giving a distorted picture of the overall situation;
2. Some of the business groups, notably those involved with the automotive industry, appear to see the area of "unfair trading practices" as providing an opportunity to achieve reform in their specific industry. The FCA believes any legitimate automotive industry issues should be addressed by industry focused reform and should not disproportionately influence broad business policy decisions.
3. The FCA is concerned that the possible impression given is that both consumer and business groups support legislative reform. The FCA considers that is a false impression and requests more careful consultation with those business groups that will be substantively impacted by the policy options. It is also important to scrutinise stakeholder perspectives to ensure specific industry issues are not conflated with overall business.

Option 1 Questions

1.1 Do you agree with the impact analysis of this option? Are there other issues that should be taken into account when analysing the impact of this option?	Yes. The point concerning mandatory industry codes has particular relevance to the franchise sector. The Franchising Code of Conduct is a good example of how specific industry regulation already covers the issues identified as unfair business practices.
1.2 If a trading practice is found to have caused consumer harm, do you think that the courts are able to determine appropriate remedies in line with community expectations under the current legal framework? If not, why not?	Yes. Business community expectations are underpinned by the profit motivation of parties and the principles of freedom of contract. It is undesirable for regulation to intervene to review a particular business to business trading practice to assess if it was "fair."
1.3 Could a focus on stakeholder education help reduce the prevalence of unfair trading practices under existing consumer protections?	The Franchising Code of Conduct already contains provisions addressing many of the identified issues – information accuracy and transparency, fair contracting processes, dispute resolution and so forth. The publication of specific examples of practices that the ACCC considers to be unfair would have a significant impact on market behaviour.

Additional Observations

The FCA makes the following additional observations in relation to the Consultation Paper:

The comparison with regulation in other countries is quite superficial, somewhat selective and potentially misleading. The material appears to give the impression that other countries have already legislated to prohibit unfair business practices and/or that Australia needs to catch up. For example:

1. The comparison with the United States highlights the use of the word “*unfair*” but fails to mention that the legislation is the overall response to these types of issues. The term “*unfair or deceptive acts or practices affecting commerce*” is the equivalent of the compendium of Australian laws including misleading or deceptive conduct, unconscionable conduct, unfair contract terms and (notably in relation to the Franchising Code) good faith. The implication that should be drawn from the US comparison is that the US has chosen a significantly lower level of regulation than Australia.
2. The same comment could be made in relation to the European Union, where the word “*unfair*” is also highlighted. Again, the implication that should be drawn from the EU comparison is that the EU has also chosen a significantly lower level of regulation than Australia.
3. The UK comparison fails to mention the prohibition on unfair contract terms, or the fact that the UK legislators and courts kept the concept deliberately narrow to mitigate uncertainty in the context of the principles of freedom of contract. Again, the implication that should be drawn from the UK comparison is that the UK has also chosen a significantly lower level of regulation than Australia.
4. The same comments can be made in relation to Singapore.

Thank you once again for the opportunity to respond to this consultation. Should you wish to discuss this submission further, or any other matter relating to the franchise sector, I can be contacted on _____ or at _____.

Yours sincerely

Matthew Monaghan
Chief Executive Officer
Franchise Council of Australia