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Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026 – Exposure Draft

1 Introduction

1. My name is Dr Rob Nicholls. I am a Senior Research Associate in the University of Sydney Centre for AI, Trust, and Governance. I am writing in a personal academic capacity. This submission does not represent the views of my institution.
2. I welcome the opportunity to make this submission on the exposure draft of the *Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026* (the Bill). I support the objective of strengthening protections against unfair trading practices in the Australian Consumer Law (ACL) and commend the Government for finally progressing this reform, which has been under consideration for nearly nine years. That is, since the 2017 ACL Review.
3. This submission is informed by a reading of the exposure draft Bill, the Explanatory Materials, the Decision Regulation Impact Statement (Decision RIS) of December 2025, the supplementary consultation paper of November 2024, the Consultation RIS of August 2023, and the ACL itself. While I support the overall direction of the reform, I have identified four areas where the Bill could be strengthened to better achieve its stated objectives.

2 Executive Summary

This submission raises four issues with the exposure draft Bill.

Firstly, the scope of the general prohibition on unfair trading practices in proposed section 28B is significantly narrower than the position developed through the consultation process. The Bill does not include specific prohibitions for several practices identified as problematic during consultation, and the general prohibition itself is more limited than that canvassed with stakeholders.

Second, small businesses should receive protections equivalent to consumers under the general prohibition. The Bill currently excludes small businesses from the general prohibition entirely (subsections 28B(2) and (3)), despite the consultation process identifying small businesses as facing many of the same vulnerabilities as consumers.

Third, the indicative list of examples in subsection 28B(5) (the 'grey list') should be expanded to include explicit reference to dark patterns and online design elements, as proposed during the supplementary consultation.

Fourth, the Bill should include a non-exhaustive list of factors that a court may have regard to when determining whether conduct contravenes the general prohibition, consistent with the approach taken for unconscionable conduct under section 22 of the ACL.

3 The Scope of the General Prohibition Has Been Significantly Narrowed

4. The general prohibition in proposed section 28B is considerably narrower than the public consultations during both the 2023 Consultation RIS and the November 2024 supplementary consultation. This narrowing is evident in several respects.

3.1 Omission of specific prohibitions consulted upon

5. The supplementary consultation paper sought feedback on specific prohibitions or reforms to address five categories of unfair trading practices: subscription-related practices, drip pricing, dynamic pricing, online account requirements, and barriers to accessing customer support. Of these five, the Bill only introduces specific provisions for subscriptions and drip pricing. The remaining three categories have been left entirely to the general prohibition, despite the consultation process identifying them as distinct areas of consumer harm.
6. While the Decision RIS provides reasons for not progressing specific prohibitions in these areas, stakeholders were led to expect a more comprehensive package of reforms. The consultation paper stated that the government was ‘considering enacting specific prohibitions in addition to the general unfair trading practices prohibition’ for all five categories. The omission of specific prohibitions for dynamic pricing, online account requirements, and barriers to customer support, without clear articulation of why the general prohibition alone is sufficient, undermines confidence that the consultation process has been adequately reflected in the legislation.

3.2 The conduct element is narrower than provided in public consultations

7. The supplementary consultation proposed that the general prohibition capture conduct that ‘unreasonably distorts or manipulates, or is likely to unreasonably distort or manipulate, the economic decision-making or behaviour of a consumer’. The Bill’s formulation in section 28B(1)(a) instead refers to conduct that ‘unreasonably manipulate[s] the consumer’ or ‘unreasonably distort[s] the environment in which the consumer makes, or is likely to make, a decision’.
8. This reformulation changes the focus in important ways. The consultation framed the prohibition around distortion or manipulation of the consumer’s decision-making or behaviour. This is a broad concept that could capture a range of practices that influence how consumers make decisions. The Bill’s language shifts the focus to manipulation of the consumer themselves or distortion of the decision-making environment. This potentially creates a higher threshold, as it may be more difficult to establish that a consumer was ‘manipulated’ than to show that their ‘decision-making was distorted’. The Explanatory Materials acknowledge this distinction but do not adequately explain why the narrower formulation was adopted.

3.3 The Bill does not apply to small businesses

9. The exclusion of small businesses from the general prohibition is a significant departure from the consultation position. The Consultation RIS of August 2023 defined ‘consumer’ as including small businesses (those employing fewer than 100 persons or with turnover below \$10 million), consistent with the unfair contract terms threshold. The supplementary consultation also canvassed the application of the general prohibition to business-to-business dealings. The Bill’s explicit exclusion of bodies corporate and persons acting in the course of business (subsections 28B(2) and (3)) represents a substantial narrowing of the scope consulted upon. This issue is addressed further in section 4 below.



3.4 Recommendation

10. I recommend that the Government publish a detailed explanation of how the scope of the Bill relates to the positions consulted on, and that consideration be given to broadening the conduct element to more closely reflect the language used during consultation. Where specific prohibitions were consulted on but not included, the Explanatory Materials should clearly articulate how the general prohibition will address those practices.

4 Small Businesses Should Be Treated Like Consumers

11. Subsections 28B(2) and (3) of the Bill explicitly exclude bodies corporate and consumers acting in the course of carrying on a business from the general prohibition. While the subscription provisions in proposed Division 4A of Part 3-1 include a 'small business requirement' (subsection 48H(2)), the general prohibition itself offers no protection to small businesses. This is a significant gap.

4.1 The case for small business protection

12. Small businesses face many of the same vulnerabilities as individual consumers when dealing with larger suppliers. The consultation process recognised this repeatedly. Several stakeholders to the Consultation RIS argued that small businesses experience the same types of unfair trading practices as consumers, including dark patterns, drip pricing, and manipulative subscription practices. The ACCC has also noted that small businesses can face significant bargaining power imbalances in their dealings with larger businesses.
13. There is strong precedent in the ACL for extending consumer protections to small businesses on a phased basis. The unconscionable conduct provisions were first introduced for consumer transactions in 1986, then extended to small businesses in 1998 through a separate provision with an expanded list of factors. The unfair contract terms protections followed a similar trajectory: introduced for consumers in 2010, then expanded to standard form small business contracts in 2016. In both cases, the extension to small businesses was informed by evidence gathered during the initial consumer-only phase.

4.2 The current protections are inconsistent

14. The Bill's treatment of small businesses is internally inconsistent. The subscription provisions (Division 4A) apply where a contract meets either the 'consumer requirement' or the 'small business requirement' (subsection 48H(2)), demonstrating that Parliament recognises small businesses need protection from unfair subscription practices. However, the general prohibition in section 28B offers no such protection. This creates an anomalous position where a small business is protected from an unfair subscription trap but not from other forms of manipulation or distortion that may be equally or more harmful.
15. It is acknowledged that the drip pricing provisions in proposed section 48A take a different approach, applying to goods or services 'of a kind ordinarily acquired for personal, domestic or household use or consumption' (the PDH test). Because this test looks to the nature of the goods rather than the identity of the buyer, small businesses purchasing goods of a consumer kind are already protected from drip pricing. This demonstrates that Parliament is capable of drafting provisions that protect small businesses without undue complexity, and strengthens the case for extending the general prohibition to small businesses as well.



4.3 The Government's stated position supports extension

16. The Decision RIS noted that in March 2025, the Government announced it would 'separately consult later in 2025 on extending unfair trading practices protections to small businesses'. While this signals an intention to act, the better approach is to include small businesses in the Bill from commencement, applying the same threshold used for unfair contract terms (fewer than 100 employees or turnover below \$10 million) and for the subscription provisions. Delaying this protection means small businesses will remain exposed to the very practices the Bill identifies as harmful.

4.4 Recommendation

17. I recommend that the general prohibition in section 28B be extended to protect small businesses, using the same threshold as the unfair contract terms regime and the subscription provisions in proposed subsection 48H(2). If the Government considers that a phased approach is necessary, the legislation should at minimum include a provision requiring a review within 12 months of commencement, with a legislated commitment to extend protections to small businesses by a specified date.

5 The Grey List Should Be Expanded

18. Subsection 28B(5) provides a non-exhaustive list of three examples of conduct that may contravene the general prohibition (the 'grey list'). While I support the inclusion of a grey list as an interpretive aid, the current list is narrower than what was proposed during consultation and does not adequately capture the range of practices the prohibition is intended to address.

5.1 The consultation proposed a broader list

19. The supplementary consultation proposed four examples for the grey list:
 - (a) the omission of material information;
 - (b) the provision of material information in an unclear, unintelligible, ambiguous or untimely manner, including provision of information in a manner that overwhelms or is likely to overwhelm a consumer;
 - (c) impeding the ability of a consumer to exercise their contractual or other legal rights; and
 - (d) the use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making an economic decision.

20. The Bill's grey list in subsection 28B(5) broadly captures the first three items but omits the fourth. This is the explicit reference to design elements in online consumer interfaces (dark patterns). While the Explanatory Materials discuss dark patterns at length and indicate the prohibition is intended to capture them, this intention is not reflected in the statutory text of the grey list. It is clear that the ACL cannot address dark patterns and it is not clear why the draft Bill contains this omission.

5.2 The importance of explicitly referencing dark patterns

21. Dark patterns were a central focus of the consultation process. The CPRC's research found that 83 per cent of respondents had experienced negative consequences from dark patterns. The International Consumer Protection and Enforcement Network's 2024 global sweep found

that 75.7 per cent of traders used at least one dark pattern. The Explanatory Materials devote significant attention to dark patterns (paragraphs 1.20 to 1.23).

22. Despite this, the grey list does not explicitly reference online design elements or dark patterns. While subsection 28B(5)(c) refers to 'creating an environment which places the consumer under unreasonable pressure', this language does not specifically capture the range of dark pattern techniques identified during consultation, such as false hierarchies, confirm-shaming, hidden information, and visual misdirection. Including an explicit reference would provide greater certainty for businesses operating online and stronger guidance for regulators and courts.

5.3 Recommendation

23. I recommend that subsection 28B(5) be expanded to include a fourth example: the use of design elements in online consumer interfaces that unduly pressure, obstruct or undermine a consumer in making a decision, consistent with the fourth item proposed in the supplementary consultation. This would strengthen the signal that the general prohibition is intended to address dark patterns and provide clearer guidance to digital businesses.

6 The Bill Should Include Judicial Guidance Factors

24. Section 28B does not include a list of factors that a court may have regard to when determining whether conduct contravenes the general prohibition. This is a notable omission given the approach taken for comparable ACL provisions.

6.1 Precedent in the ACL

25. Section 22 of the ACL sets out a non-exhaustive list of matters that a court may have regard to in determining whether conduct is unconscionable. These include factors such as the relative bargaining positions of the parties, whether any conditions were reasonably necessary to protect the legitimate interests of the supplier, and whether the consumer was able to understand any documents. This list has been instrumental in providing certainty to businesses about the types of conduct that may be found unconscionable and has guided the development of a substantial body of case law.
26. Similarly, the unfair contract terms provisions in section 24 include specific criteria (significant imbalance, not reasonably necessary to protect legitimate interests, and detriment) that courts must apply. Section 25 provides examples of terms that may be unfair.

6.2 The need for guidance factors in section 28B

27. The general prohibition introduces concepts of 'unreasonable manipulation' and 'unreasonable distortion' that are new to Australian consumer law. Without statutory guidance on the factors relevant to assessing reasonableness, there is a risk that the prohibition will be interpreted inconsistently and that businesses will face prolonged uncertainty about their compliance obligations. This was a concern raised by several stakeholders during the consultation process, including by industry groups who expressed concern about the subjective nature of 'unfairness'.
28. A list of factors would not constrain judicial discretion. It would be non-exhaustive and permissive. That is, a court 'may' have regard to the factors. However, it would provide an important framework for the development of case law and assist businesses in assessing their own conduct.



6.3 Proposed factors

29. I propose that the Bill be amended to include a provision (for example, a new subsection 28B(6)) setting out a non-exhaustive list of matters that a court may have regard to in determining whether conduct contravenes the general prohibition. Relevant factors could include:
- (a) the nature and characteristics of the consumer or class of consumers to whom the conduct was directed, including any particular vulnerability;
 - (b) the nature of the goods or services being supplied or offered;
 - (c) whether the conduct involved the use of technology or design elements to influence consumer decision-making;
 - (d) the extent to which the conduct departed from reasonable standards of commercial behaviour in the relevant industry;
 - (e) whether the consumer was given a genuine opportunity to make an informed decision;
 - (f) the cumulative effect of the conduct when considered with any other conduct of the person directed at the consumer.

6.4 Recommendation

30. I recommend that the Bill be amended to include a non-exhaustive list of factors that a court may have regard to in determining whether conduct contravenes the general prohibition, consistent with the approach in section 22 of the ACL for unconscionable conduct. This would provide greater certainty for businesses, guide the development of case law, and ensure the prohibition operates effectively from commencement.

7 Conclusion

31. I support the Government's decision to introduce protections against unfair trading practices into the ACL. The reforms are long overdue and address genuine gaps in Australia's consumer protection framework that have been identified through extensive consultation over nearly nine years.
32. However, the Bill as drafted falls short of the comprehensive reform that the consultation process envisaged. In particular, the general prohibition is narrower than that suggested in the public consultations, small businesses are inadequately protected, the grey list is too narrow, and the absence of judicial guidance factors may impede the effective operation of the prohibition.
33. The four recommendations in this submission are directed at ensuring the Bill achieves its stated objectives of protecting consumers from manipulative and distortive practices while providing sufficient certainty for businesses. I would welcome the opportunity to discuss these issues further with Treasury.
34. I consent to this submission being published on the Treasury website.