Unfair trading practices: Submission in response to February 2026 Exposure draft

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Executive Summary

Australians were promised that the government would act "to stop businesses ripping off Australians by banning unfair trading practices under the Australian Consumer Law". The National AI Plan asserts that Australia's existing regulatory frameworks – including the *Australian Consumer Law* (ACL) – are sufficient to protect Australians' rights and safety even in the context of rapidly developing technology, including Artificial Intelligence (AI), and states that regulatory gaps will be addressed. The Treasury has assured the Australian public– that "[t]he principles-based protections provided under the ACL are generally well adapted to address the potential consumer law risks of AI enabled goods and services".[1] Australians have been told that Australia's existing and expert regulators will be empowered to act to ensure AI is used safely and responsibly.

The Exposure Draft released 9 February 2026 does not meet these commitments. In particular, proposed s 28B:

- is not a prohibition on unfair trading practices;
- requires the regulator (or consumer) to address multiple challenging evidential requirements before action; and
- abandons the ACL's principles-based approach, and lacks the flexibility to address emerging or future technologies, including already-emerging AI-based systems.

Assessed against past promises and stated policy, the Exposure Draft could be characterised as the government's own bait and switch.

In order to meet Australians' expectations of an *Australian Consumer Law* that ensures fairer markets and a fair go for consumers, including in a rapidly shifting technological environment, the Exposure Draft should be amended to:

- Set out a **clear and unequivocal prohibition** on unfair trading practices;
- Amend language that could be interpreted as requiring **proven intent to manipulate or distort** on the part of business; and
- **Expand the grey list** to include a much wider range of known problematic practices.

This submission focuses on s 28B, but we note (and support) comments by consumer organisations that more specific prohibitions such as the subscription traps provisions are more complicated than they need to be.

[1] Rec 1.

Why the Exposure Draft is not principles-based or general – and it matters

The most effective parts of the Australian Consumer Law are principles-based

The *Australian Consumer Law's* (ACL) most effective elements provide principles-based regulation: obligations, prohibitions or rules drafted in general, open-ended language.[2] These provisions provide a flexible regime that can adapt to changing technologies, and empower the regulator to act as and when new commercial practices emerge that harm consumers and undermine trust in fair markets.[3] Examples include:

- Section 18(1): "A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."
- Section 20: "A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time".[4]
- Section 23: "A term of a consumer contract or small business contract is void if: (a) the term is unfair; and (b) the contract is a standard form contract."

Each of these provisions **states a general prohibition**: misleading or deceptive conduct; unconscionable conduct; unfair standard form contract terms. The general prohibition in each case is not limited to specific mechanisms. Section 18 does not specify, for example, exactly *how* the consumer is deceived or misled: the specific mechanism; that it should occur via a statement, or an advertisement, or conduct, or the comments or facial expressions of a sales person.

The power of these general prohibitions is twofold. First, their generality is the key reason these provisions have proved capable of applying to emerging phenomena: for example, to websites as well as leaflets; the outputs of algorithms as well as the statements of salespeople. If the prohibition on 'misleading or deceptive conduct' had focused on, for example, statements in advertisements or the comments or conduct of employees, it would

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[2] Julia Black, *Principles Based Regulation: Risks, Challenges and Opportunities* (2007) London School of Economics and Political Science, 3 Ch 18.

[3] See discussion in Treasury, Unfair trading practices: Consultation on the design of proposed general and specific prohibitions (Consultation Paper, November 2024) p11; and Exposure Draft Explanatory Materials, Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026 (EM) 1.18.

[4] This is coupled with the more specific statutory prohibition in s 21 against conduct in trade or commerce, and in connection with supply, possible supply; acquisition or possible acquisition' of goods or services where the conduct is, "in all the circumstances, unconscionable".

have been difficult to capture deception arising from the way information is calculated in a dynamic web environment (e.g. *ACCC v Trivago*).

Second, their generality **sets a clear, easily communicated standard and message for business and consumers**. This **empowers regulators** to be clear and hence more effective in their communications. A regulator who can say "you must not engage in misleading or deceptive conduct" is more likely to communicate appropriate standards of market behaviour than one who has to say "you must not put misleading statements in your advertising, or your conversations with consumers, or fail to tell consumers something important". The more specific and detailed the provision, the more challenging the message for business and consumers.

For each of the existing general provisions identified above, there is further guidance and detail in the legislation. Certain kinds of false or misleading representations are singled out for specific prohibitions (ss 29-37); factors for establishing unfairness in contract terms is set out (s 24) and examples of terms that could be unfair are given (ie a grey list) (s 25). Details, interpretations and applications of the law can be *supplemented* through further provisions – grey lists, lists of factors to consider etc. – as well as regulator guidance and education, but the **core expression of the principle is not constrained** to specific mechanisms.

Draft s 28B does not prohibit unfair trading practices.[5] In fact, the word "unfair" never appears in the substance of the draft, despite this being a common and well-understood term in Australian law. [6]

Draft s 28B singles out *specific kinds and mechanisms* of unfair practices: unreasonable manipulation of the consumer, and unreasonable distortion of the decision-making environment. These are not the only possible mechanisms for unfair conduct or business practices that creates unfair markets for consumers. Consumers may be treated unfairly or taken advantage of in other ways: consumer organisations have previously provided an extensive list.[7] The provision reads as if the drafters started with the phenomena known as "dark patterns" – and drafted with those in mind. **This is the wrong approach: it is neither principles-based, nor technology neutral.**

Even if we are convinced that all the forms of unfair conduct identified in extensive rounds of consultation over many years *could* be interpreted as falling within s 28B, the drafting creates a strong risk that future unfair conduct arising from as-yet-emerging technological

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[5] Cf the US Act, which generally prohibits unfair practices: Federal Trade Commission Act s5.

[6] Unfair trading practices Consultation Paper p11.

[7] See e.g., CPRC's submission (pp 8-15) to the Treasury's Consultation Regulatory Impact Statement, Protecting consumers from unfair trade practices.

practices, for example, from AI use will not be captured – or it will take years to establish that it does through the courts.

Consider agentic AI. It is possible in the future that consumers may give general instructions to an agent system (perhaps programmed and provided by a firm) that then enacts multiple activities or actions without reference back to the consumer. An agent might interact with businesses, which may also be operating via agents. In these circumstances, 'unfairness' could arise not from the *manipulation of the consumer* or *distortion of the environment within which the consumer makes, or is likely to make a decision,* but manipulation of the properties of an agent; or system action processes or actions; or how systems are programmed or optimised; or how human control or limits are effected, or whether and how businesses allow consumers to use agents, for example, to shop around on their behalf.

The future trajectory is not entirely clear. We *can't necessarily predict* how or where unfairness could emerge within such AI systems or interactions. But it is appropriate that businesses implementing such systems to understand that fairness to the consumer, as well as the legitimate interests of the consumer, is relevant to the design and provision of their systems. It is important that businesses not believe that the prohibition in s 28B only applies where the effect of any manipulation, distortion or unfairness operates directly on the consumer. We want regulation to provide appropriately aligned *ex ante* incentives for businesses to proactively take account of, and prioritise the wellbeing of and fairness to the consumer in their system design.

Action needed: Adopt a principles-based approach by including in s 28B a general prohibition against unfair practices in trade or commerce. *Mechanisms* by which unfairness could occur, such as manipulating consumers or distorting consumer behaviour or the environment should be of **examples** of unfair conduct, not the full extent of the protection for Australian consumers.

Particular elements of s 28B

Whether or not s 28B is redrafted to include a general prohibition as recommended, the current draft of s 28B requires amendment.

Complexity

At the outset the **complexity** of the provision should be noted. For example, conduct directed at consumers (non-environment), the threshold is *unreasonably manipulates*. Establishing liability under this limb, drawing on the Exposure Draft Explanatory Materials (EM), could involve establishing with evidence:

1) exploitation of;
2) cognitive and behavioural biases, that;
3) results in a change which is;

4) against the consumer's best interest.[8]

This in addition to other requirements of the draft section, i.e.:

5) that such exploitation is unreasonable;
6) occurs in trade or commerce;
7) in connection with the supply of or offer to supply goods or services;
8) to a consumer; and
9) causes or is likely to cause detriment (financial or otherwise) to the consumer.

We have inserted the numbering to showcase (a) the number of elements for which (b) the onus of proof lies on the consumer or regulator. Unlike the unfair contract terms provisions, the consumer/regulator benefits from no presumptions.[9] The complexity is unnecessary and there is internal redundancy. For example, why separately require proof of a change/against the consumer's interests/that causes detriment? Why require specific proof of detriment given existing general principles against frivolous litigation as well as regulator discretion in choosing which cases to pursue, and the priority they place on pursuing cases where there is harm?

Remove the limitation to supply or offer to supply

Draft s28B only prohibits conduct in connection with the *supply of, or an offer to supply, goods or services to a consumer*, as opposed to all business conduct or practices. This could be read as limiting the prohibition to the point of supply rather than before or after that point. This may prevent the prohibition from applying to unfair business practices which:

- are not made in the course acquiring a product – i.e. not in the *supply* or *offer to supply*. This could include overcollection and use of data from individuals who were visiting the website, and post-sale tactics such as making it difficult for consumers to access support or communicate concerns or problems to the supplier, failure to update software, or making it hard to access repair;[10] and
- may impact multiple consumers beyond *a [singular] consumer* – for example systemic and collective harms from unfair uses of dynamic pricing.

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[8] EM 1.22.

[9] Cf *Australian Consumer Law,* s 24(4), which states that 'a term of a contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise'.

[10] See Review of ACL and AI p 22: "Barriers to accessing customer support, where businesses make it difficult for consumers to contact them about problems with goods or services, is also being considered as part of the Government's consultation on proposed reforms to address unfair trading practices".

Certainly any of these cases *might* be interpreted as 'in connection with' supply: but if that is true, what is the point of requiring proof of this additional element? What, exactly, is sought to be excluded (and again, what is sought to be excluded that cannot otherwise be addressed by general principles against frivolous litigation as well as regulator discretion in choosing which cases to pursue, and the priority they place on pursuing cases where there is harm?

"Unreasonably manipulate" and "unreasonably distort" could be too hard to prove; replace/supplement with "unfairly persuade" or "unfairly influence"

The current draft prohibits conduct that unreasonably manipulates consumers or unreasonably distorts consumer decision-making environments. As noted, these should be **examples** of a general prohibition on unfair trading practices. But whether as the prohibition or as examples, this particular language could be subject to interpretations which mean the prohibition fails its objectives:

- Both 'manipulation' and 'distortion' could be read by courts as focusing on the trader's intentions or goals, rather than the impact on consumers. **Intent or design** could be difficult for a consumer or regulator to prove, and complicate processes of document disclosure in litigation.
- *Manipulation* according to the draft EM appears to hinge on the trader being seen to exploit cognitive and behaviour biases.[11] Will every case require proof of some consumer bias, or worse, a consumer bias deliberately or directly targeted by the business?
- *Distortion of the environment* would seem to require some departure from an 'ordinary' or 'natural' environment for decision-making. How should this be proved in online environments which are increasingly complex and opaque; and which are entirely constructed and determined by the trader? Take advertising for example. The Australian Ad Observatory is an ADM+S project was has been pioneering the collection of social media advertising for the past few years. The research is led by a diverse and highly technical team utilising over 1900 volunteers and 300,000 unique ads to provide insights on an advertising environment which is notorious for its low visibility and lack of transparency. The research has shown the very different environments confronting different consumers. It is unclear to us how individual consumers or even the regulators are expected to understand, let alone prove that there is a distortion of environment in this context, or how a court would understand 'distortion' or any kind of baseline 'undistorted environment' where personalisation is the norm.

[11] EM 1.22 of definition of manipulate.

- The Exposure EM also suggests that distortion requires showing that consumers will be caused to make a decision they were unlikely otherwise to make: potentially requiring the consumer or regulator to prove a counterfactual and raising challenges where the consumer has limited options.

To avoid the implication of intention, and broaden the prohibition to cover a broader range of unfair behaviour, 'manipulate', at least, should be replaced (or as an example, supplemented) by such as 'unreasonably influence or unreasonably persuade' (note that each of these cases focuses on the impact on consumers, not the intent of the business).

We also note that the Draft EM does not refer to exploitation of consumer *vulnerability:* even, as might be appropriate, as a potential indicator of unfairness or an appropriate example for a grey list.

If current terminology of 'manipulation' and 'distortion' is retained, is unclear to us why the regulator should have to prove not only manipulation, but that such manipulation is *also* unreasonable. What is "reasonable manipulation" or "reasonable distortion" if the goal is fair and transparent markets? The Exposure Draft EM even suggests that adopting one dark pattern might be acceptable, but multiple dark patterns are not. Again, it is unclear to us why firms should be allowed to use dark patterns designed to exploit consumer cognitive or behavioural weaknesses of consumers at all. It sends entirely the wrong message to business to say that "manipulation or distortion is ok, provided it is not unreasonable" (let alone the message consumers receive).

Unconscionable conduct as example

Our concerns here are not just theoretical but are grounded in observing our previous attempts at implementing a broad prohibition in consumer law. The statutory prohibition on unconscionable conduct in section 21 of the ACL was initially intended to cover conducts beyond the equitable notion in 'the unwritten law'.[12] However, the courts have consistently observed the provision as one requiring a high threshold, a move which has resulted in the prohibition receiving limited application despite express legislative intent to the contrary.[13] We are concerned that the current drafting of the unfair trading practice provisions might be interpreted similarly narrowly and fail to mitigate the full range of harms intended by the government.

[12] We refer to CPRC's submission (pp 19-20) to the Treasury's Consultation Regulatory Impact Statement, Protecting consumers from unfair trade practices.

[13] See e.g. Senate, Standing Committee on Economics, *The need, scope and content of a definition of unconscionable conduct for the purposes of Part IVA of the Trade Practices Act 1974* (2008).

Action needed:

Amend language that could be interpreted as requiring **proven intent to manipulate or distort** on the part of business. “Unreasonably manipulate” and “unreasonably distort” should be replaced with “unfairly persuade” or “unfairly influence”. Alternatively, if the language of manipulate and distort is maintained, the notion of *unreasonableness* should be removed; and

Expand the grey list to include a much wider range of known problematic practices. We refer to lists provided by consumer organisations, such as the list contained in CPRC’s submission (pp 8-15) to the Treasury’s consultation of unfair trade practices.