Law Council
OF AUSTRALIA

Unfair trading practices—exposure draft

The Treasury

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Contents

Acknowledgements 1

Introduction 2

General comments 2

General prohibition - Unfair trading practices towards consumers 3
- Views of the Queensland Law Society and Competition and Consumer Committee 3
  - Unreasonable manipulation or unreasonable distortion of environment 3
  - Detriment 4
  - Protection of legitimate interests 4
  - Interaction with existing ACL provisions 5
- Views of the Australian Consumer Law Committee 5

Specific prohibitions—Unfair subscription practices and drip pricing 6
- *Views of the Competition and Consumer Committee* 6
- *Views of the Australian Consumer Law Committee* 7

Application to franchise businesses 7
- Division 4A—Subscription contracts 8
- General prohibition 8
- Small business requirement and franchises 8
- Exit arrangements 9
- Automotive dealers 9

Transition period for penalties 9

About the Law Council of Australia 10

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- the Queensland Law Society;
- the Competition and Consumer Law Committee of its Business Law Section; and
- the Australian Consumer Law Committee of its Legal Practice Section;

for their contribution to the preparation of this submission.

Introduction

1. The Law Council of Australia welcomes the opportunity to respond to the Treasury in relation to its consultation on an exposure draft of the Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026 (the **Draft Bill**).

2. We would like to note, at the outset, the challenges in engaging with the material in light of the constrained timeframes in which to provide feedback. We reiterate concerns the Law Council has raised across numerous recent Australian Government consultations regarding the number of important consultations that are being rushed through without adequate time for input and consideration.[1]

3. The Australian Government's Office of Impact Analysis indicates 30–60 days is usually the appropriate period for effective consultation;[2] consultation on the Draft Bill was open for 14 days.

4. Insufficient consultation with civil society threatens the quality of law-making in Australia, risks delegitimising the parliamentary process, undermines stakeholder capacity to engage in a robust and considered way, and increases the potential for unintended consequences and the failure of the legislation to achieve its policy objectives.

General comments

5. The Australian Consumer Law (**ACL**) plays a critical role in safeguarding consumer interests and maintaining fair market practices. The Law Council is supportive of the objectives of ensuring that there are appropriate consumer protections against unfair trading practices, including manipulative online tactics, subscription traps, and price dripping.

6. As the Law Council has highlighted in previous consultations, there remains a diversity of views across the legal profession on the development of measures to target unfair trading practices.[3] While the Law Council has endeavoured to produce a submission that reflects the aligned views of its constituent bodies, sections and committees, there are aspects of the current reform measures about which reasonable minds will differ. This submission therefore notes where the Law Council has received divergent views on aspects of the Draft Bill, and attributes those views accordingly.

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1 See Law Council of Australia, 'A call for transparent and sensible lawmaking' (Media Release, 3 September 2025) <https://lawcouncil.au/media/media-releases/a-call-for-transparent-and-sensible-lawmaking>.

2 Office of Impact Analysis, *Best Practice Consultation* (Guidance Note, July 2023) 7. See also Law Council of Australia, *Best Practice Legislative Development Checklist* (Policy Statement, 21 July 2025). <https://oia.pmc.gov.au/sites/default/files/2023-08/best-practice-consultation.pdf>.

3 See, Law Council of Australia, Unfair trading practices—Consultation on the design of proposed general and specific prohibitions (Submission, 20 December 2024), <https://lawcouncil.au/resources/submissions/unfair-trading-practices-consultation-on-the-design-of-proposed-general-and-specific-prohibitions>.

7. From a policy perspective, the Law Council is of the view that any general or specific prohibitions on unfair trading practices must be carefully refined to strike an appropriate balance between safeguarding consumers while enabling businesses to operate efficiently and effectively.

8. As such, there is broad consensus that clarity and certainty in the drafting of the Draft Bill is imperative, not only for the interests of businesses who are required to comply with the proposed legislation, but also for the role of regulators in taking steps to enforce such compliance, for the courts in the role of adjudicating on matters of compliance, and for consumers to be clear on their rights and potential remedies.

9. Regardless of the state in which these reform measures progress, it will be important for any reforms to be accompanied by clear guidance for all stakeholders, with adequate time given to prepare and adapt as required.

General prohibition—Unfair trading practices towards consumers

10. Proposed section 28B of the Draft Bill sets out a general prohibition on unfair trading practices towards consumers. This provision is intended to enhance consumer protections in the ACL and ensure that businesses engage in fair and transparent practices that allow consumers to make informed choices without undue influence or deceptive tactics.

Views of the Queensland Law Society and Competition and Consumer Committee

11. Feedback received from the Queensland Law Society and the **Competition and Consumer Committee** of the Law Council's Business Law Section has raised concerns about the scope and ambiguity of the proposed general prohibition as currently drafted. These bodies highlight that clarity will be critical so that businesses can understand their obligations and compliance can be achieved (and in turn, so that consumers can understand their rights), regardless of their scale or resources.

12. The Competition and Consumer Committee specifically notes that certainty is important given that businesses may be required to take extensive steps to ensure compliance, including redesigning websites and other IT systems, developing compliance programmes, reviewing sales practices and platforms, and training internal teams on compliance.

Unreasonable manipulation or unreasonable distortion of environment

13. The first limb of the general prohibition targets business conduct that "unreasonably manipulates" a consumer or "unreasonably distorts" the environment in which the consumer makes decisions.

14. The Competition and Consumer Committee considers that the term "unreasonable" is unclear when used in this context. While the concept of "reasonableness" appears elsewhere in the ACL, the Committee notes that it is unclear how this standard should be applied to concepts of "manipulation" or "distortion". For example, it is not clear from the Draft Bill or the Explanatory Material whether the legislative intent is that certain types or degrees of manipulation or distortion are "reasonable", and

therefore acceptable and, if so, how businesses should measure reasonableness to ensure they do not breach the general prohibition.

15. The Competition and Consumer Committee further notes that this uncertainty is compounded by the Explanatory Material, which states that the prohibition is not intended to capture "legitimate, generally accepted marketing practices", suggesting that some level of manipulation or distortion may be a feature of generally accepted marketing practices.

16. The Competition and Consumer Committee further suggests that there is a significant degree of overlap between the concepts of unreasonable manipulation and unreasonable distortion, raising questions about whether both concepts are required and, if so, how the conduct they capture is distinguishable.

17. As such, the Competition and Consumer Committee considers that "unreasonably" in the first limb should be replaced by an alternative metric (for example, "significantly", "materially" or "substantially") that can be more readily applied to concepts of "distortion" and "manipulation", and also be clarified so that it is clear that the test does not capture "legitimate, generally accepted marketing practices".

18. These concerns are also reflected in input received by the Queensland Law Society that suggests that the examples of conduct amounting to unfair trading practices currently contained in subsection 28B(5) are overly general and insufficient to guide businesses, advisers, regulators or courts on what would constitute "unreasonable manipulation" of consumers, or "unreasonable distortion" of the consumer environment. The Queensland Law Society raises a concern that these examples do not meaningfully clarify the boundary between legitimate marketing practices and conduct that would breach the new prohibition.

Detriment

19. The second limb of the general prohibition concerns business conduct that "causes or is likely to cause detriment (whether financial or otherwise) to the consumer". The Competition and Consumer Committee notes that this limb does not include a materiality threshold, which means that it risks applying to conduct beyond that which the prohibition is actually intended to capture: e.g. where any detriment is trivial, de minimis or a minor inconvenience. This is particularly so where corporate intention or fault is not a necessary element of the prohibition. As with the first limb, the Competition and Consumer Committee considers that a standard should be included, such as a "significant detriment" or "material detriment".

Protection of legitimate interests

20. The Competition and Consumer Committee considers that the general prohibition in proposed section 28D should include an exception to the extent conduct is reasonably necessary to protect the legitimate interests of the supplier. This concept is already part of the ACL's application of the concept of "unfairness" in:

    (a) the unfair contract terms regime, where it forms part of the criteria for identifying whether a term is unfair; and

(b) the unconscionable conduct regime, where it forms a relevant matter in considering whether a supplier has contravened the prohibition.

21. As an example, the Competition and Consumer Committee suggests that the additional limb could adopt language similar to that used in paragraph 24(1)(b) of the ACL (in relation to unfair contract terms), such as "*is not reasonably necessary in order to protect the legitimate interests of the party engaging in the conduct*". The Committee notes that application of such a consideration is well practised by the courts, and that the inclusion of such an exception was supported by the Australian Competition and Consumer Commission (**ACCC**) in its submission to Treasury's 2023 consultation.

Interaction with existing ACL provisions

22. The Queensland Law Society notes that it remains unclear how courts will interpret the proposed general prohibition alongside existing ACL provisions, especially section 18. For example, the Draft Explanatory Material refers to the "unnecessary display of countdown timers" as an example of targeted behaviour, yet the misleading use of countdown timers is arguably already captured under sections 18 and 29 of the ACL.

23. Until a body of enforcement action develops, legal practitioners will face difficulty determining what conduct goes beyond reasonable marketing practice, especially given that the majority of marketing necessarily interacts with consumer biases. The Queensland Law Society emphasises that clearer, more specific examples, or a more targeted prohibition, would better support compliance, reduce ambiguity, and mitigate risks for both businesses and consumers.

Views of the Australian Consumer Law Committee

24. The **Australian Consumer Law Committee** of the Law Council's Legal Practice Section strongly supports the general prohibition on unfair trading practices in its current form, subject to the below comments. It notes that the proposed general prohibition is suitably situated in a new Part 2-4 of the ACL, rounding out the existing general protections in Chapter 2 of the ACL.

25. The Australian Consumer Law Committee notes, however, that the proposed section 28B departs from the existing pattern of language in the ACL, such as that found in the prohibitions in sections 21 and 29, in that the definite article—the word "the"—has been omitted from before the words "supply of … goods or services". This is also inconsistent with the language used in the Explanatory Materials published with this Draft Bill, which notably follows the ACL pattern in that it uses the word "the" before the words "supply of … goods or services".

26. The Australian Consumer Law Committee suggests that, if this omission was not intentional, the draft language in the Draft Bill be amended so as to be consistent with the existing ACL prohibitions and the intentions of the Parliament as expressed in the Explanatory Materials and that the definite article be inserted before the words "supply of … goods or services".

27. Further, the Australian Consumer Law Committee notes that the proposed section 28B appears to depart from the existing pattern of language in the ACL, such as that found in the prohibitions in sections 21 and 29, in that the words “an offer to supply” are used instead of the words “possible supply”. Paragraph 1.18 of the Explanatory Materials explains that “an offer to supply” is “intended to include promotion, advertising or marketing of a relevant good or service”, and further that “the prohibition is intended to be flexible and capable of adapting with evolving commercial practices and fast-paced digitisation”. The Australian Consumer Law Committee is concerned that this departure from the pattern of language found in similar provisions in the ACL may unintentionally limit the work the provision is intending to do.

28. The Australian Consumer Law Committee again suggests that the language in the Draft Bill be amended so as to be consistent with the existing ACL prohibitions and the intentions of the Parliament as expressed in the Explanatory Materials, and that the words “an offer to supply” be replaced with the words “possible supply”.

29. Finally, the Australian Consumer Law Committee notes the policy decision taken to exclude body corporate consumers and business consumers from the protection in section 28B. The Committee considers it likely that the operation of the unfair trading practices prohibition will prove to be of significant benefit such that it will eventually be considered that the protection of small business consumers is necessary and desirable as occurred in the development of the regulation of unfair contract terms.

Specific prohibitions—Unfair subscription practices and drip pricing

30. In addition to the general prohibition contained at proposed section 28B, the Draft Bill contains specific prohibitions relating to unfair subscription practices and drip pricing. Like the general prohibition, these proposals have generated diverse views from those contributing to the Law Council’s response, as set out below.

Views of the Competition and Consumer Committee

31. The Competition and Consumer Committee acknowledges that the specific prohibitions on unfair trading practices in relation to subscriptions and drip pricing are intended to enhance consumer protection to enable informed decision-making.

32. However, the Committee is of the view that the specific prohibitions, as currently drafted, are not sufficiently certain in their application—for example, in terms of:

    (a) what specific types of conduct would be captured by the subscription obligations (noting this uncertainty could be addressed through express guidance in the Explanatory Memorandum); and

    (b) how the specific prohibitions would operate alongside, and potentially overlap with, existing provisions such as the unfair contract terms and unconscionability regimes.

33. The Competition and Consumer Committee is concerned that the introduction of these specific provisions will result in significant overlap in application with other provisions of the ACL[4] and the general prohibition. As noted by the ACCC in its submission to the Treasurer and Minister for Finance on Regulatory Reform Opportunities in August 2025, a goal of government ought to be the removal or reduction of overlapping regulatory functions and requirements, where appropriate, to minimise burdens on businesses, while preserving necessary consumer protections.[5] The Competition and Consumer Committee argues that consideration should be given to the inclusion of a specific anti-overlap provision.

Views of the Australian Consumer Law Committee

34. The Australian Consumer Law Committee welcomes and endorses the approach taken in the Draft Bill to the regulation of subscription services and, in particular, to the requirements that an exit method be easy to find, straightforward, require only reasonably necessary steps, and be online (when the subscription was entered online).

35. The Australian Consumer Law Committee notes that the subscription disclosure requirements in relation to "offers to supply" is not at risk of potential argument about "invitation to treat" because it is clear that the regulated offer to supply is an offer to supply "under a contract".

36. The Australian Consumer Law Committee also welcomes and endorses the approach taken in the Draft Bill to the regulation of "drip pricing" by requiring prominent and transparent disclosure of transaction charges. However, the Australian Consumer Law Committee notes that its concerns expressed above in relation to the proposed section 28B (refer paragraph 27), and the words "offer to supply", apply equally to the proposed section 48A.

Application to franchise businesses

37. Franchising involves complex, ongoing relationships characterised by standard form agreements, recurring fees, and network-wide supply arrangements, which may inadvertently fall within the scope of these provisions. The franchising industry has undergone a number of reviews in recent years. A new Franchising Code that materially enhanced and strengthened disclosure, including around costs, as well as return on investment requirements and exit and renewal pre-notification and requirements and restrictions, was implemented last year.[6]

38. The Law Council submits that further clarity is required as to how franchise arrangements are intended to be captured by the proposed measures and, where appropriate, consideration should be given to excluding franchise agreements that are already subject to regulation through the Franchising Code. These matters are discussed in further detail below.

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4 The ACCC has already successfully prosecuted both subscription-related conduct and drip pricing under existing provisions. See, eg, the enforcement action taken against Webjet, Economy Bookings, Dendy, Bloomex, Jetstar, Virgin, Airbnb and eDreams in relation to drip pricing.

5 ACCC Response to Treasurer and Minister for Finance Regulatory Reform Opportunities, page 3.

6 See, Competition and Consumer (Industry Codes—Franchising) Regulations 202.

Division 4A—Subscription contracts

39. The proposed Division 4A introduces disclosure, notification, and exit method obligations for subscription contracts.[7] While the Draft Bill excludes certain subscription contracts in proposed subsection 2(1), we note that franchise agreements are not expressly carved out.

40. Feedback to the Law Council has noted that franchise arrangements often feature recurring liabilities (for example, royalties as a percentage of turnover, marketing levies, technology fees etc). In most situations, these recurring liabilities will be set out in standard form agreements alongside ancillary supply contracts for system services. These arrangements may qualify as "recurring or continuing supply" for an indefinite or fixed period, with automatic or conditional renewal unless terminated. The broad definition of "subscriber" in the framework means that franchisees may be captured, thereby triggering obligations such as pre-renewal agreements and ancillary agreements connected with the franchise operations. This approach has the potential to cause confusion for parties given the operation of the abovementioned Franchising Code.

41. Concerns have been raised with the Law Council that the current drafting risks extending to business-to-business franchising models, which are already highly regulated separately under the recently reviewed and implemented Franchising Code.

General prohibition

42. Similar to the above feedback on the application of proposed Division 4A to franchise arrangements, clarity is sought in relation to the extent to which the proposed general prohibition at section 28B may apply. While proposed subsection 28B(3) states that the general prohibition will not apply if the supply is in the course of the consumer carrying on a business, it has been suggested to the Law Council that there is scope to clarify this carve-out—namely, to confirm that the intent is to have consumers purchasing for use in their business excluded.

Small business requirement and franchises

43. Proposed section 48H extends protections to small businesses through a standard form gateway (fewer than 100 employees or where there is a less than $10 million turnover).[8] The rebuttable presumption of standard form and factors like bargaining power align with unfair contract terms precedents.

44. However, concerns have been raised as to whether the multi-entity structures in franchise arrangements (trading entities, trusts, master franchisees) may not be adequately addressed, leading to the potential for threshold disputes. By way of example, turnover calculations under proposed subsection 48H(4) apply to the specific "subscriber" and do not expressly provide for the aggregation of turnover for multi-unit franchisees operating via a group of related entities.

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[7] Proposed sections 48C to 48E.
[8] Proposed subsection 48H(2).

Exit arrangements

45. Proposed section 48G contains requirements to end a subscription contract. Building on the above comments on the application of the Franchising Code, it is noted that exit arrangements for franchises are heavily regulated under the Code.

46. Concerns have therefore been raised that, in the absence of an exclusion for franchise arrangements, the proposed regime has the potential to cause confusion with (and potentially undermine) the Franchising Code's approach to end-of-term notifications and compensation for early termination.

Automotive dealers

47. It has been raised with the Law Council that the existing regulatory framework under the Franchising Code explicitly recognises that the automotive sector is a distinct subset of franchising, with unique commercial characteristics and specific issues requiring tailored regulation. For example, the Franchising Code maintains a structural separation between general franchise agreements and "new vehicle dealership agreements". This approach ensures that regulation is targeted and appropriate.

48. It has been suggested to the Law Council that, to the extent that the proposed reforms are intended to apply to the automotive industry, a similar approach should be taken as currently exists in the Franchising Code, rather than imposing broad obligations on all franchise systems. This could be dealt with through the creation of a specialised section or schedule.

Transition period for penalties

49. The Competition and Consumer Committee notes that the Draft Bill proposes to introduce penalties immediately upon the commencement of the regime. This is a marked departure from the phased approach that was previously adopted for the unfair contract terms regime.

50. In the view of the Competition and Consumer Committee, the immediate introduction of penalties increases compliance risk for businesses and does not allow sufficient time for businesses to prepare compliance processes. This potential impact is particularly concerning in a context where (as discussed above) the proposed legislation is unclear and may result in confusion, and where businesses may need to take significant steps (and expend considerable funds) to align their practices to the specific requirements of the new regime.

51. Accordingly, the Competition and Consumer Committee considers that the legislation should adopt a phased approach by including a transition period (of at least 2 years) to allow sufficient time for an education campaign and for business readiness before substantial penalties apply.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 110,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2026, the Law Council Executive comprises:

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The Chief Executive Officer of the Law Council is Dr James Popple.

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