Law Council
OF AUSTRALIA

Business Law Section

Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026

Senate Standing Committees on Economics Inquiry

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Executive summary

1. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (the **Committee**) makes this submission to the Senate Economics Legislation Committee (the **Senate Committee**) in respect of its inquiry into the *Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026* (the **Bill**).

2. As noted in previous submissions in relation to this issue, the Committee acknowledges the Australian Government's objective of strengthening the Australian Consumer Law (**ACL**) to address unfair trading practices.

3. However, the Committee makes the following observations:

   (a) **Insufficient consultation time:** The Bill was referred to the Senate Committee on 14 May 2026 with submissions due by 27 May 2026, providing fewer than 10 business days for consultation. This follows a similarly truncated response period for earlier stages of policy development. The Committee reiterates its concern that this approach of compressed consultation does not allow for adequate or meaningful engagement with the complex issues raised by the Bill, and heightens the risk of unintended adverse consequences for the economy and particularly for consumer markets including digital markets.

   (b) **Absence of materiality threshold:** The General Prohibition (defined below) in proposed section 28B does not include a materiality threshold in its "manipulate" limb, creating significant uncertainty as to the prohibition's scope and a risk of over-capture of generally benign conduct. The Committee strongly submits that the prohibition needs to include a materiality threshold (for example, "significantly", "materially" or "substantially") to provide greater certainty for businesses and consumers. By merely removing the former reference to "unreasonable" but not replacing it with any other materiality threshold, the Bill creates real uncertainty and significantly increases the risk that the notion of "manipulation" will be applied across a wide range of conduct, much of which is common and benign. If this is not included in the statutory language (which would be preferable) then the concept must be clearly explained in the Explanatory Memorandum.

   (c) **Guidance on key concepts:** Relatedly, the Explanatory Memorandum deploys concepts such as "wrongful interference" and "generally accepted marketing or sales practices" without adequate guidance on their intended meaning. The Committee recommends that the Explanatory Memorandum be updated to provide additional guidance on these concepts.

   (d) **An exemption for conduct that protects the legitimate interests of a supplier.** The Committee reiterates its earlier submission that a "legitimate interests" exception, modelled on existing ACL provisions, should be included in the General Prohibition. If this is not included in the statutory language, the Committee submits that it should be included in the Explanatory Memorandum as a matter that should be assessed in considering whether the General Prohibition has been contravened.

(e) **Subscription contracts:** The proposed subscription contract requirements in Division 4A go beyond what is necessary to prevent consumer detriment. The Committee recommends that ongoing notification requirements not extend to small business contracts, that there be no separate notification requirement at the end of free trial or promotional periods, and that there be no mandatory online cancellation requirement where the Bill already obliges providers to offer an easy, straightforward cancellation process.

(f) **Construction issues:**

(i) **General prohibition**: The Committee has identified a number of drafting issues in the General Prohibition, including the omission of the definite article "the" before "supply of … goods or services" in subsection 28B(2), an incorrect cross-reference to "subsection (1)" rather than "subsection (2)" in subsection 28B(3), and the lack of particularity and definition in the examples set out in section 28B(6).

(ii) **Specific prohibition:** The Bill proposes to incorporate subscription contract provisions as Part 3-1 Division 4A rather than as a new Part 2-3 Division B, resulting in unnecessary duplication with existing provisions. The Committee recommends restructuring the subscription contract provisions within Part 2-3 to ensure consistency with the existing unfair contract terms framework.

4. As currently framed, the Committee is concerned that the framework lacks clarity in relation to provisions with very substantial legal penalties and will therefore impose new economy-wide regulatory risk, complexity and burden for businesses and especially for those that operate in consumer facing markets.

5. The Committee's specific observations and recommendations in support of each of these points are set out in the submission below.

Submission

Introduction

6. The Committee welcomes the opportunity to make submissions to the Senate Committee in respect of its inquiry into the Bill.

7. The Committee acknowledges the policy objective of strengthening the ACL to address unfair trading practices and enhance consumer protection in evolving commercial and digital environments.

8. The Committee emphasises the importance of ensuring that any new legislation is sufficiently clear and consistent with existing ACL principles to provide certainty for businesses, regulators, courts and consumers. In particular, the Committee considers that clarity in drafting, appropriate thresholds for liability, and alignment with established statutory language and concepts are critical to ensuring the effectiveness of the proposed reforms and minimising unintended consequences.

Insufficient time given for consultation

9. The Bill was referred to the Senate Committee on 14 May 2026. The Senate Committee's reporting date is 18 June 2026 and submissions are required to be provided by 27 May 2026, allowing for a period of fewer than 10 business days for consultation.

10. As noted in the Law Council's submission to Treasury (**LC Exposure Draft Submission**) in relation to a similarly truncated consultation process for an exposure draft of this Bill (taking place between 9 and 23 February 2026) (**Exposure Draft Consultation**), the Committee reiterates its concern that limited timeframes for public consultation do not allow for adequate or meaningful engagement with the complex issues raised by the Bill.[1]

Absence of materiality threshold in section 28B

11. Proposed section 28B of the Bill sets out a general prohibition on unfair trading practices in relation to consumers (**General Prohibition**).

12. The General Prohibition captures conduct that does, or is likely to do, either or both of the following:

    (a) manipulate the consumer; or

    (b) unreasonably distort the environment in which the consumer makes, or is likely to make, a decision.

13. The exposure draft of the Bill which was released for consultation by Treasury in February 2026 included an element of unreasonableness in the "manipulate" limb of

[1] See the Law Council of Australia's submission to the exposure draft of the Competition and Consumer Amendment (Unfair Trading Practices) Bill 2026 (the **Draft Bill**) (26 February 2026) < https://consult.treasury.gov.au/c2026-739506/consultation/view/53>.

the General Prohibition, i.e. it would have been a contravention to "unreasonably manipulate" the consumer.

14. In response to that proposal, the previous LC Exposure Draft Submission noted 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"*.' The Committee further proposed that: '"*unreasonably" … 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*".'[2]

15. While the Bill *removes* any concept of unreasonableness from the "manipulate" limb of the prohibition, it is not replaced with any alternative and clearer materiality threshold. The Committee considers that the proposed amendment makes the operation of the General Prohibition less clear and significantly increases the risk of over-capture.

16. Without any materiality threshold, the notion of "manipulation" is capable of being applied across a wide range of conduct, much of which is common and benign and not associated with the kinds of consumer harms the General Prohibition is intended to address.

17. The Committee specifically notes that certainty is important given that businesses may be required to invest significant resources to ensure compliance, including redesigning websites and other IT systems, developing compliance programmes, reviewing sales practices and platforms, and training internal teams on compliance.

18. The Committee's concerns are compounded by several other factors.

Guidance on key concepts in the Explanatory Memorandum

19. First, the Explanatory Memorandum (**EM**) to the Bill provides that manipulation "*is intended to capture wrongful interference with a consumer that results in a change in the consumer's behaviour, decision-making or action that is against the consumer's interests*".[3] The EM goes on to state that manipulation is not intended to require dishonesty and the General Prohibition is not intended to capture "*legitimate, reasonable or generally accepted marketing or sales practices*".[4]

20. The Committee considers that, unless the EM is updated to include additional guidance on what is contemplated by the concepts of "wrongful interference" and "generally accepted marketing or sales practices", significant uncertainty about the application of the General Prohibition will remain. By way of example, is the fact that a practice is widespread sufficient for it to be a legitimate reasonable or generally accepted marketing practice? And, if not, what other factors are relevant?

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[2] LC Exposure Draft Submission at [14] – [17].
[3] EM at [1.25].
[4] Ibid at [1.26].

Detriment

21. Secondly, the General Prohibition is expressed to concern business conduct that "*causes or is likely to cause detriment (whether financial or otherwise) to the consumer*". Again, and as previously raised, the Committee notes that this limb similarly does not include any materiality threshold.[5]

Statutory examples

22. Thirdly, the statutory examples of conduct that may amount to unfair trading practices in proposed section 28B(6) are expressed at a high level of generality, deploy concepts that are unfamiliar and untested in the ACL context, and lack contextual guidance as to their application in practice.[6] This is in contrast to the statutory "grey list" provided in relation to unfair contract terms in section 25 of the ACL which offers a set of concrete and specific examples of terms that may contravene the unfair contract terms prohibition.

23. Two of the examples in particular involve "*failing to disclose material information to the consumer"* and *"disclosing material information to the consumer in a complex, ineffective, unclear, unintelligible, ambiguous, untimely or overwhelming way*", which is predicated on an assumption that consumers should be able to process all information provided. In reality, consumers may be subject to various biases, including "information overload" whereby they struggle to make decisions when presented with an excessive amount of information.[7]

24. The right level of information to provide to consumers will depend on the circumstances. Sometimes, a simple summary may be the best means to help consumers reach a decision. At other times, consumers may need more detailed information to properly understand what is on offer. Determining the appropriate level of information to share is likely to involve a careful balance between providing consumers with sufficient information while not overloading consumers with too much information. The examples provide minimal guidance to firms in how to manage this trade-off without risking being captured by the legislation for a failure to disclose or from disclosing too much.

Protection of legitimate interests

25. Fourthly, the Committee reiterates its previous submission that the General Prohibition in proposed section 28B should include an exception to the extent conduct is reasonably necessary to protect the legitimate interests of the supplier.

26. 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

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[5] LC Exposure Draft Submission at [19].
[6] EM at [1.26].
[7] See OECD, 'Applying Behavioural Insights to Consumer and Competition Policy and Enforcement" (2023), page 5 < one.oecd.org/document/DSTI/CP(2023)6/en/pdf>.

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

27. As an example, the 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 in its submission to Treasury's 2023 consultation.

28. The Committee notes that, if this standard approach to delineating conduct is not included in the statutory language, then it should be reflected in amendments to the Explanatory Memorandum.

Subscription Contracts

29. The Committee understands that the proposed reforms relating to subscriptions are directed at ensuring subscribers can make sufficiently informed decisions about whether to enter into and remain under a subscription contract, and to remove barriers to exiting subscription contracts. The Committee is concerned that certain proposed requirements go beyond what is necessary to prevent consumer detriment, will cause undue complexity for subscription service providers and are likely to increase the costs of providing these services.

Ongoing notification requirements should not extend to small business contracts

30. It is proposed that the notification requirements set out in section 48E will apply to all subscription contracts that are "in effect" when the legislation comes into force, and will apply to both consumer and small business contracts. In circumstances where the immediate operative effect of the regime will extend beyond new contracts to existing contracts, and for the further reasons set out below, the Committee considers that these notification requirements should not apply to small business subscription contracts.

31. The legislative rationale for imposing ongoing notification requirements for subscription contracts is based principally on evidence of harm to consumers, not commercial actors.[8] Moreover, the Government acknowledges that any benefit to small businesses has not been quantified due to a lack of data on business subscription use.[9]

32. It can be expected that what constitutes unfair trading practices in a business-to-consumer context is likely to be distinct from a business-to-business context. In particular, all businesses (including small businesses) can be expected to closely assess their expenses and the value of supplier contracts as part of running their business. They are unlikely to face any meaningful detriment in the absence of ongoing notifications in circumstances where they will already be comprehensively informed of key information (under section 48D) before entering the subscription contract.

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[8] EM at p 55-7.
[9] Ibid at p 89.

33. Confining ongoing notification requirements to consumer contracts only would also ensure closer alignment with the general prohibition against unfair trading practices (which applies to consumers only).

There should be no separate notification requirement at the end of free trial or promotional periods

34. The Committee understands from previous consultation, explanatory materials and the Government's impact analysis that the ongoing notification requirements to be prescribed under regulations made for the purpose of section 48E may include notification at the end of a free trial or promotional period, before the consumer incurs liability to pay for the relevant goods or services. This would be in addition to the upfront disclosure requirement when offering the free trial or promotional period. However, without any express requirement in the bill itself, it remains unclear whether it is still intention of the Government for there to be an additional notification requirement at the end of a free trial or promotional period.

35. The Committee is concerned that compulsory notification at the end of a free trial or promotional period goes beyond what is reasonably necessary to prevent consumer detriment. This is because the subscriber will already be notified of key information at the start of the trial or period (including information regarding the length of any free trial or promotional period). This addresses the concerns raised in the consultation around renewal or the automatic rollover of contracts from free trials or promotional periods to a paid or full price subscription, *without the customer's awareness*.[10]

36. Further, as acknowledged by Government in the Decision Regulation Impact Statement, multiple reminders and emails on a repetitive basis may be a nuisance to consumers and may give rise to notification information fatigue.[11] This has the potential to undermine consumers' willingness to review the notifications required under the balance of the notification and disclosure requirements, with little countervailing benefit.

37. Importantly, free trial and promotional periods are an important marketing tool for businesses that provide significant benefits to consumers. Requiring notification at the end of the trial or period would increase administration costs and could deter businesses from being prepared to offer free trials and promotional periods, to the detriment of consumers.

There should be no mandatory online cancellation requirement

38. The broad support from a range of stakeholders in favour of removing barriers to cancelling subscriptions was centred on requiring businesses to provide customers with an easy to find, clear and accessible cancellation process.[12]

39. Section 48F mandates an *online* cancellation option for all subscription contracts where the subscriber has entered, or has the option to enter, the contract online. In

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[10] Ibid at p 56-7.
[11] The Treasury, Decision Regulation Impact Statement – Protecting consumers from unfair trading practices, December 2025, page 34. Available at https://treasury.gov.au/sites/default/files/2025-12/p2025-723145-dris-unfair-trading-practices.pdf.
[12] EM at p 35.

circumstances where section 48F obliges a subscription service provider to provide an easy to find and straightforward way for a subscriber to end the contract, there is little justification for also mandating an online cancellation option.

40. Further, it should not be assumed that online cancellation is always the most beneficial manner in which to exit a contract. As Treasury has acknowledged, what is reasonably necessary to end the contract depends on the nature of the subscription product or service and the relevant industry.[13] For example, a consumer considering ending certain subscription services may need to return equipment, or may be experiencing issues (eg, technical or operational difficulties) that are more easily resolved by speaking to a customer service operator. While a compulsory online cancellation option does not prevent a service provider from providing other types of exit options, it could encourage consumers to 'default' to online cancellation and discourage the availability and use of other exit options which may provide greater consumer benefit in certain circumstances.

Construction issues—General prohibition

'The'

41. Proposed section 28B(2) fails to adopt 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'*.

42. Indeed, *'the'* appears before *'supply'* in subsection 28B(4), but not subsection 28B(2).

43. Further, it is noted that Explanatory Materials published with the Bill, does adopt the existing pattern of language in the ACL, in that it repeatedly adopts the word *'the'* before the words 'supply of … goods or services'.

44. The Committee suggests the inclusion of *'the'* before the words '*supply of … goods or services*' in section 28B(2) to ensure consistency.

Cross-reference to 'consumer'

45. Section 28B(3) states as follows:

    Subsection (1) does not apply if the consumer is a body corporate.

46. Section 28B(1) states as follows:

    A person must not, in trade or commerce, engage in unfair trading practices.

47. There is no reference in section 28B(1) to the concept of a consumer. Rather, the concept of a consumer appears in section 28B(2). The reference in section 28B(3) therefore needs to be corrected.

[13] Ibid at [1.143].

Ambiguity of examples in section 28B(6)

48. Whilst section 28B(6) attempts to outline examples of conduct that may be unfair trading practices, the examples are high level and lacking in any particularity.

49. For example, it is not clear what the following terms mean:

    (a) 'impeding': subsection (a)

    (b) 'material': subsection (b)

    (c) 'complex', 'ineffective', 'unclear', 'unintelligible', 'ambiguous', 'untimely' or 'overwhelming': subsection (c)

    (d) 'unreasonable pressure' or 'obstructs': subsection (d)

50. The Committee has an appreciation of the intention behind the introduction of a general prohibition against unfair trading practices. It is noted that the proposed general prohibition is also intended to be complementary to other general prohibitions, including misleading or deceptive conduct, unconscionable conduct and unfair terms of consumer contracts and small business contracts.

51. However, it is noted:

    (a) The concepts of 'misleading' and 'deceptive' in the Trade Practices Act and the various Fair Trading Acts were introduced with precedent having already been developed regarding the similar concept of 'misrepresentation'.

    (b) 'Unconscionability' (or 'unconscionable conduct') was already a familiar concept in equity. Subsequently, section 22 of the ACL was introduced to provide matters to which a court should have regard to.

    (c) The introduction of 'unfair terms' in the ACL was guided by not only its precursor in the Fair Trading Act 1999 (Vic) but also other legislation that regulated contracts, for example, the Contracts Review Act (NSW) 1980. When introduced, the unfair terms provisions of the ACL also incorporated a meaning of 'unfair' (in section 24) and examples (in section 25).

52. Section 28(6) introduces a number of concepts that lack definition and which will provide uncertainty in application.

53. The examples in 28B(6) lack the particularity or the guidance that are afforded to general prohibitions relating to unconscionable conduct or unfair terms.

54. The Committee suggests that sub-section 28B(6) adopt examples or guidance in a structure similar to those provided either by section 22 or 25. As noted above, at very least, clearer guidance should be included in the Explanatory Memorandum.

Recommendations

That the Senate Committee recommends the following:

- **That the Government allow further time for public consultation on significant consumer protection legislation, and that, in the present case, the reporting date be extended to allow sufficient engagement with the complex issues raised by the Bill.**
- **A materiality threshold be included in the General Prohibition in proposed section 28B to provide clarity and certainty for businesses and consumers as to what constitutes "manipulation" of a consumer—to reduce the risk of over-capture of generally accepted trading practices.**
- **The Explanatory Memorandum be updated to include additional guidance on key concepts, including "wrongful interference", "generally accepted marketing or sales practices", and the statutory examples in section 28B(6), and that section 28B include an exception for conduct reasonably necessary to protect the legitimate interests of the supplier (or, if this is not done in the statute, that this concept be incorporated into the Explanatory Memorandum).**
- **Confine the ongoing notification requirements for subscription contracts to consumer contracts, and consider whether additional notification at the end of free trial or promotional periods is necessary and the mandatory online cancellation requirement is justified where the Bill already requires an easy and straightforward cancellation process.**
- **Otherwise undertake the specific suggested drafting changes set out in paragraphs 41 to 54 of this submission.**

About the Business Law Section

The Business Law Section of the Law Council of Australia provides a forum through which lawyers and others interested in all matters pertaining to business law can discuss current issues, debate and contribute to the process of law reform in Australia, and enhance their professional skills.

The Section:

- prepares almost half of the Law Council's submissions each year, putting the views of the business community and the legal profession directly to the Federal Government and its agencies, and Federal Parliamentary Committees;
- provides a forum for debate of current issues, and assists lawyers to develop and maintain their professional skills and knowledge, through a schedule of regular conferences, workshops and seminars;
- represents the Law Council on a number of bodies—for example, the National Taxation Liaison Group and its sub-committees, the Customs and Border Protection National Consultative Committee and its sub-committees and the ASX Corporate Governance Council; and
- gives its members the opportunity to develop a network of professional contacts in their fields of practice.

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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.

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