Submission

# Unfair trading practices

## Submission from consumer advocates on Treasury's Consultation on the Unfair trading practices – exposure draft

23 February 2026

# About the submission

The development of the submission was led by the Consumer Policy Research Centre (CPRC) in consultation with various experts and consumer groups.

This submission is being jointly made by the Consumer Policy Research Centre and the following organisations:

- Australian Communications Consumer Action Network
- CHOICE
- Consumer Action Law Centre
- Consumer Credit Legal Service Western Australia
- Consumers' Federation of Australia
- Energy Consumers Australia
- Financial Counselling Australia
- Financial Counselling Victoria
- Financial Rights Legal Centre
- Justice and Equity Centre
- Queensland Consumers Association
- Mob Strong Debt Help
- National Seniors Australia
- Super Consumers Australia
- Way Forward
- Western Australia Consumer Advocacy Network
- Westjustice

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Submission made via: https://consult.treasury.gov.au/c2026-739506

**Statement of Recognition**

We acknowledge the Traditional Custodians of the lands and waters throughout Australia. We pay our respect to Elders, past, present and emerging, acknowledging their continuing relationship to land and the ongoing living cultures of Aboriginal and Torres Strait Islander Peoples across Australia.

# This is not a ban on unfair trading

The Federal Government has made an important commitment to legislate unfair trading. We see this as one of the most powerful consumer protections that, legislated clearly, will greatly benefit Australians. Consumer groups welcome the opportunity to work with Treasury and relevant Ministers to make these reforms as clear and effective as possible.

The proposed exposure draft on unfair trading has no general ban for unfair trading. This is an important element to get right.

Australians have waited for over a decade for this reform that consumers in other jurisdictions have taken for granted for years. However, compared to the UK, US and the EU, the proposed general prohibition in its current form would be the narrowest in the world. There are two overarching concerns we are raising in this submission.

## No general prohibition

The draft legislation is missing the most important element – a statement that a person or company must not engage in practices that are, or are likely to be, unfair. While the Explanatory Memorandum and statements from Government about the unfair trading ban indicate the intent of the reform is to have a general ban, this is absent from the specific legislation that will be relied upon by courts.

In addition to no broad statement, the exposure draft:

- focuses on the sales process, rather than ownership issues or consumer challenges post sale
- over-relies on prescriptive information disclosures instead of ensuring business practices are fair, and
- includes examples as a grey list which are limited and do not cover even the extent of practices that Treasury noted in its own Regulatory Impact Statements in 2025.

The aim of the unfair trading provisions should be to ensure that instances of businesses treating Australians unfairly are prohibited. However, the law, if implemented in its current format, overlayed with black letter readings of the law in court cases, would result in many unfair practices remaining unaddressed. Below are just some examples:

- Poor customer service or no access to customer service (e.g. ACCC vs Mazda or more generally car dealers making it difficult for consumers to exercise their consumer guarantee rights).
- Post sale purchase tactics such as changing of terms post sale (e.g. ACCC vs Medibank for allegedly failing to notify members of its decision to limit benefits for in-hospital pathology and radiology services, despite representing across a number of its communication and marketing materials that it would).
- Making unsubstantiated future environmental claims about a product (e.g. ACCC vs Woolworths on eco picnicware).
- Post sale pressure tactics once supply has ended (e.g. HelloFresh's use of the dark pattern known as nagging via email and phone communication even after a subscription has been cancelled).

- Personalised pricing or dynamic pricing (e.g. use of personal information to develop personalised pricing structures based on a person's capacity to pay at the time, such as pricing that is available via Instacart).
- Personalised offers, or product selections, designed to get the consumer to spend more than they ordinarily would, (e.g. an AI supermarket shopping agent that automatically selects products based on the customer's ability to pay to their cart, ensuring the cart total is just below the customer's individual pain point; or a loyalty program that only offers benefits like personalised discounts or points offers that require the customer to spend more than they ordinarily would to access them).
- Restricted access to the right to repair with restrictions placed on independent repairers.

Unfair business practices cost people time, money and wellbeing, and erode trust in markets. The legislation should be designed to make markets work for Australians, and not give lip service to the idea of an unfair trading prohibition.

# The most complicated ban on subscription traps

The ban on subscription traps is convoluted and full of loopholes. With so many examples worldwide of clear laws prohibiting subscription traps, it is disappointing to see the complexity that has been baked into this legislation.

- The over-prescriptive and over-complicated set of obligations will make it difficult even for businesses to comply and likely create regulatory arbitrage where the onus once again will be on consumers to show evidence of unfairness and harm than for businesses to show how they are treating people with care and respect.
- The ban excludes many sectors without clear reasons.
- Australia already has an example of simple subscription practices. The requirements for credit cards in the Credit Act are simple and easy to understand, without the many carve outs for specific sectors.

# Explanatory memorandum is just that – it's an explanation, not the law

Across several parts of the prohibition, it appears that the intent of what the law will capture, while covered in some form in the explanatory memorandum, does not adequately translate in the wording within the exposure draft. This creates a problem as no matter how detailed an explanatory memorandum may be, it is not the law.[1] Australia has already experienced the disappointment of laws such as unconscionable conduct that were introduced with the intention to be broad and capture a range of practices but a narrow lens via the courts has led to a much higher bar which has resulted in many harmful practices remaining unaddressed.

# Our recommendations

This submission includes a section-by-section analysis of the proposed changes. Below are the key changes which are imperative to ensure the unfair trading prohibition works for all

[1] Explanatory memorandums can only be used to aid interpretation of a law in limited prescribed circumstances as per Chapter 7 of the Legislation Handbook: https://www.pmc.gov.au/resources/legislation-handbook/chapter-7-preparing-support-material-explanatory-memorandum-and-second-reading-speech.

Australians and does not become a subject of international ridicule when compared to other unfair trading prohibitions:

- Include a clear overarching principle on not engaging in unfair business practices.
- Amend the definition to either remove the term 'unreasonably' in front of the words 'manipulate' and 'distort' or change the language to 'unreasonably influence'.
- Expand the list of examples to a detailed grey list. Ideally note in legislation for the grey list to be created and maintained via regulation so it can evolve over time.
- Remove the exclusions in the subscription contracts list from legislation. This can be included in regulatory guidance or regulation so it can evolve depending on how sectors move towards a subscription business model. Good law reform does not begin with exemptions.
- Simplify the information requirements for subscriptions.

We know unfair practices exist. We know these practices are not fully captured by current consumer protections. We know that bans on unfair trading practices are used effectively in other countries. We are at the precipice of significant reform for Australians and if implemented with care and respect, it will lead to markets working better for all, instead for a privileged few. Let's enhance the consumer protections so they align with global best practices.

# Essential changes required

| Section | Issue | Suggested amendment |
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| **28B Unfair trading practices towards consumers** | The definition under the prohibition is too narrow. While the intent of the law may be that it applies broadly, the current drafting reads as only applying at the point of supplying goods or services instead of throughout the business-customer relationship.<br><br>The business-customer relationship is far more than at the point of supply. This narrow focus directly contradicts the intention of a general prohibition. Given the intention is cover the entire course of the relationship, it would be valuable to ensure this is explicitly recognised in the legislation. | Include an overarching definition at 28B that is in line with the intention detailed in para 1.14 of the explanatory document that the Bill is to introduce *"a general prohibition on unfair trading practices towards consumers*".<br><br>Add the following line in 28B:<br><br>*A person must not, in trade or commerce, engage in conduct or practices that are, or are likely to be, unfair.* |
| **28B Unfair trading practices towards consumers – (1)(a)(i) and (1)(a)(ii)** | While the legislation does not include reasonable business interests, its use of the words 'unreasonably manipulate' or 'unreasonably distort' creates a loophole for businesses to potentially partake in unfair practices and define them as reasonable. | Remove the term "unreasonable".<br><br>OR<br><br>Replace the terminology with alternative wording such as 'unreasonably influence or unreasonably persuade'. |

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| | General definitions of manipulate state that the term means to control or influence somebody, often in a dishonest way so that they do not realise it.<br><br>General definitions of distort state that the term means to pervert, deform or misrepresent.<br><br>In what scenario would it be ok for a business to "reasonably manipulate" or "reasonably distort" a consumer?<br><br>Use of the terms 'unreasonably manipulate' or 'unreasonably distort' create a much higher bar than intended for what may constitute an unfair business practice.<br><br>Further, the explanatory memorandum clarifies that unreasonable manipulation '*is not intended to capture legitimate, generally accepted marketing practices*.' This risks excluding a host of practices if they are widely used, or have been used for some time.<br><br>Businesses have already engaged in a race to the bottom on unfair business practices due to the current gaps in the law, so it would be a failure if the prohibition only sought to address outliers or more extreme conduct. For example, confusing supermarket promotions designed to | |

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| | increase sales are widespread across the industry and consumers have been exposed to them for a long time, but they may be unfair, nonetheless.<br><br>A handful of tech companies provide similar technology to most companies, meaning unfair practices can be rapidly deployed at great scale and quickly become accepted by business and reluctantly accepted by consumers, which will only accelerate with AI (e.g. personalised, dynamic and surge pricing). | |
| **28B (5)** | The examples of unfair practices are far too narrow and do not take into account a range of practices that would be considered unfair and should be captured by a general prohibition.<br><br>Given these are examples, it is a grey list, not a blacklist. The set of examples should be extensive, instead of limited. The examples here are narrower than the list that was provided by CPRC and the consumer organisations in their 2023 submission[2], as well as the list provided by the ACCC as part of the Digital Platforms Inquiry and also the | Expand the list of examples in 28B (5) to a grey list that covers the extent of practices that could be deemed unfair. A detailed list of over 50 unfair practices is provided in the CPRC joint submission with consumer organisations in November 2023.[3] At a minimum it should include the list of unfair practices outlined by the ACCC.<br><br>We also suggest that the Act be amended to enable the Government to quickly and effectively add to the grey list in response to practices that may be subsequently identified without needing to amend the Act. |

[2] CPRC et. al, 2023, *Make unfair illegal – Submission from consumer organisations on CRIS – Protecting consumers from unfair trade practices,* https://cprc.org.au/submission/make-unfair-illegal.
[3] CPRC et. al, 2023, *Make unfair illegal – Submission from consumer organisations on CRIS – Protecting consumers from unfair trade practices,* https://cprc.org.au/submission/make-unfair-illegal.

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| | consultation paper that was developed by Treasury.<br><br>There is also no inclusion of a mechanism to allow the list to be expanded to cover future unfair business practices.<br><br>For example, recent ACCC and ASIC reviews into manipulative lead generation practices are shining a light on the widespread use and harms caused by this practice. This warrants specifically adding to the grey list, the collection and use of such leads without a customer's explicit informed consent.<br><br>The draft and the explanatory memorandum also do not appear to capture vulnerability which should be explicitly recognised, both in how businesses may exploit vulnerability through unfair practices but also how people experiencing vulnerability are differently impacted. It is elements such as these that could be covered specifically through a more detailed grey list. | This will ensure that there is a mechanism for the grey list embedded in legislation to be expanded over time. |
| **28B Unfair trading practices towards consumers – (5)(a)** | The following clause is too limiting, especially if viewed via a conservative lens, as it can imply that is only applicable to two scenarios within a customer journey: | Include the following as an additional point in 28B(5):<br><br>*(5)(d) Adversely influencing a consumer to take a decision that the consumer would not have taken otherwise.* |

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| | • *Interference with the consumer's ability to exercise legal rights, or seek legal remedies, in relation to the supply*.<br><br>The term interference already has specific meaning via other laws and once again could create a higher bar than intended to capture relevant unfair practices. | This is in line with the UK's Section 225(4)(a) – Prohibition of unfair commercial practices. |
| **28B Unfair trading practices towards consumers – (5c)** | The following clause is too limiting and unlikely to capture dark patterns outlined in the explanatory document:<br>• *Creation of an environment which places the consumer under unreasonable pressure in relation to, or obstructs the consumer from, making or fulfilling the consumer's decision*.<br><br>By using the term 'unreasonable', the current wording could be read as indicating the presence of an 'average consumer'. The onus would be on the consumer to show that they were pressured, instead of the onus being on the business.<br><br>For example, in its current format, the dark pattern 'confirmshaming' is likely not adequately captured which can make a consumer feel under pressure through its use of guilt and shame in the language. (Example: | Change (5)(c) to:<br><br>*Creation of an environment that has the effect of making a consumer feel under pressure in relation to, or obstructs the consumer from, making or fulfilling the consumer's decision.* |

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| | Option 1: Sign-up and get 10% off, Option 2: I don't care about my mental health). | |
| **Part 2-Subscription contracts**<br><br>**9 Subsection 2(1) of Schedule 2** | The exclusion list creates a loophole for specific entities to implement subscription traps in the future and be free from any recourse. While these sectors may not utilise a subscription style service at this stage, they may in the future. Why exempt them from doing the right thing? We consider there is no justification to exempt entire sectors seeking to do the right thing from complying with the law.<br><br>For example, the energy sector may not currently use subscription contracts but they may in the future. We are already seeing examples of this idea being surfaced overseas, such as in the UK.[4] The exclusion could mean the sector is able to use a version of subscription practices that would contradict with the prohibition but may not be held accountable.<br><br>The aim of the law should be to enforce the practice and not create carveouts for sectors. For example, we support the inclusion of the telecommunications industry being captured by | Remove excluded subscription contracts list from legislation or reduce it to only a small number of very targeted sectors. Treasury should publish further reasons behind the exemptions used, outlining why they are required. |

[4] E.On, 2024, *Energy on Subscription can help everyone play a part in the net zero transition*, https://news.eonenergy.com/news/energy-on-subscription-can-help-everyone-play-a-part-in-the-net-zero-transition.

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| | this prohibition. It is an essential service and we expect that other public utilities such as energy should also be included. | |
| **Division 4A—Subscription contracts**<br><br>**Subdivision A—Information requirements**<br><br>**48B, 48C, 48D and 48E** | The section is overly complicated and lengthy. The prescriptive nature of the legislation will mean that if the subscription business models evolve in any way over time, the obligations would easily become obsolete.<br><br>This will likely make it complex even for businesses who are already using good subscription practices as they will second-guess their current consumer-centric practices. For other businesses, the complexity will likely impede compliance that works for consumers, which is the intent of this legislation. | Simplify and merge the four sections and include key principle-based obligations on information disclosures that ensure consumers are aware of:<br><br>• time period<br>• discount/free periods<br>• amount across the life of the subscription<br>• notification periods where relevant, and<br>• how to exit the subscription.<br><br>Simplify the obligations relating to timing of notices.<br><br>Ensure that obligations enable consumers to terminate at any time, even if the cancellation may not be effective until next renewal. |

# Changes to be seriously considered

| Section / issue | Reason for concern | Suggested amendment |
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| **28B Unfair trading practices towards consumers – (2) and (3)** | Given many digital products and services do not differentiate between business customers and individual customers, creating this carve out only creates a loophole for rogue businesses to treat specific cohorts of consumers unfairly.<br><br>Adobe subscriptions are a clear example where individual and business customers are not differentiated – both are offered the same products and services and have to navigate a deeply unfair subscription cancellation process, including the potential to pay early cancellation fees.[5]<br><br>This also creates more work for the Government to create separate legislation to protect small businesses, when many, if not all of the protections aimed to be offered in the unfair trading prohibition would support them as well. | Remove (2), (3) and (4) |

[5] CPRC, 2024, *Let Me Out – Subscription trap practices in Australia*, https://cprc.org.au/report/let-me-out.

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| **Division 4A—Subscription contracts**<br><br>**Subdivision A—Information requirements**<br><br>**48G Exit method (d)** | In subsection (d) only online contracts are required to provide online cancellation.<br><br>In some circumstances, such as telco contracts, consumer organisations have found that while the subscription was purchased in-store, the consumer is forced to cancel online. This raises concerns for consumers experiencing vulnerability and have lower digital literacy where cancelling online on their own is not feasible.<br><br>A subscriber should have the option to end a contract online even if they subscribed via another method (e.g. in-person), if a business has an online presence. | Change (d) to:<br><br>*Subscriber is given the option to cancel a subscription contract online if an online presence exists for the entity (whether or not the person also allows the subscriber to end the contract in other ways).*<br><br>Include an additional (clause):<br>(e) provides the subscriber the option to cancel in-store if the subscription is offered in-store (in addition to the option to provide online cancellation options if the entity has an online presence). |
| **Division 4A—Subscription contracts**<br><br>**Subdivision A—Information requirements**<br><br>**48G Exit method** | The current exposure draft could include a clearer obligation on exiting.<br><br>Across EU, UK and states across the US, there are clear laws on exiting subscription contracts, making it as easy as it is to sign-up.<br><br>A clearer, easy opt-out cancellation option is already present in the National Consumer Credit Protection Act[6] which was amended to allow easier online credit cancellation in 2018. The concept is not new for Australia. The | Include an overarching obligation regarding exit:<br><br>*Exiting the contract must be at least as easy than entering into the contract.*<br><br>Or<br><br>*Cancelling must be as easy as signing up.* |

[6] See: National Consumer Credit Protection Act 2009: https://classic.austlii.edu.au/au/legis/cth/consol_act/nccpa2009377/s133bu.html.

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| | language is simple and ensures there is little to no room for confusion. | |
| **Division 4A—Subscription contracts** | There are currently no obligations to offer a grace period, especially for annual renewals.<br><br>UK DMCC currently includes obligations on subscription contracts to provide a cooling off period. A grace period is useful, especially for annual renewals where a consumer even after seeing notifications may miss the renewal period. | Add an obligation for grace periods to be included for at least annual renewals. |
| **Division 4A—Subscription contracts** | The reminder obligations are not enough to give consumers real choice on how they manage their subscriptions.<br><br>There is also no option for consumers to say no upfront to auto annual renewals. While some consumers may prefer a rolling annual renewal, consumers should be given the option at the time of purchasing or renewing an annual subscription to turn a rolling annual subscription to a fixed term subscription. | Add an obligation for annual renewals to be offered as both ongoing or fixed in a prominent way to the consumer at the point of purchase and renewal. |

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| | Some businesses are already doing this so technology can certainly accommodate the practice. For example, Hoyts Membership program offers the option for its annual subscription to lapse after one year or to continue rolling on. This helps reduce the mental load on consumers having to keep tabs on their annual subscriptions. | |
| **Part 3 – Drip pricing** | The overly prescriptive nature of the draft legislation means that it does not appear to consider issues such as personalised pricing and dynamic pricing. | Consider adding obligations that would cover personalised and dynamic pricing or provide a timeframe for when the Government aims to consider these issues. |
| **Part 3 – Drip pricing**<br><br>**48A Transaction based charges to be disclosed in certain circumstances** | The inclusion of 'method for calculating the transaction-based charge' over-complicates the obligation.<br><br>To truly help mediate the harms of drip-pricing, a total cost should be provided upfront so that a consumer can genuinely compare earlier in a purchasing decision. If a business is unable to calculate upfront transaction-based charges, it is likely that the charge is overcomplicated or dependent on a range of unknown factors. In these instances, entities should not have the ability to impose the charge till all costs can be provided. | The obligation should be amended with an overarching requirement that requires businesses to make every effort to show the full-cost of the product including fees upfront. |

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| **Excluding financial services from this prohibition** | The consumer movement has continued to raise concerns of the prohibition not applying to financial services.<br><br>• Exclusion of the ASIC Act in the prohibition may facilitate regulatory arbitrage and exploit gaps in financial services licensing.<br>• An unfair trading prohibition varies from the 'efficient, honest and fair' duty which is forward looking and does not give rise to any consumer right should there be non-compliance.<br>• Current financial services laws do not replicate an unfair trading prohibition. They do not respond to the full range of consumer concerns such as lead generators partnering with financial advisers to pressure people into switching their super into inappropriate investments and paying exorbitant fees, as happened with the Shield and First Guardian Master Fund collapses.<br>• Frontline consumer organisations often observe that the purchase of consumer goods like cars or solar panels happen in the same transaction with the purchase of warranties, insurance, installation and linked credit.<br>• Another example is the rise of the gamification of investment apps that | Include the ASIC Act in the prohibition so financial services are captured by the prohibition. |

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| | use a range of dark patterns to urge consumers to invest. While dark patterns will be captured in this legislation, the carveout means there is sector that can still implement them without recourse.<br>• An unfair trading prohibition can improve the operation of financial services codes and dispute resolution. | |