Australian Government
The Treasury

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*In the spirit of reconciliation, the Treasury acknowledges the Traditional Custodians of country throughout Australia and their connections to land, sea and community. We pay our respect to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples.*

# Contents

# Executive Summary

The unfair contract terms (UCT) regime plays an important role in protecting consumers and small businesses against unfair terms in standard form contracts.

Standard form contracts are widely used across the economy and can reduce transaction costs and enable efficient contracting practices. This benefits businesses by lowering their costs, which can then be passed on to consumers and business customers through lower prices.[1] The UCT regime preserves these benefits while improving equitable outcomes and reducing the exploitation of bargaining power. UCT protections also support productivity by reducing inefficiencies and encouraging fair and competitive market behaviour.

In 2022, Parliament passed legislation which extended UCT protections to a larger class of small businesses and sought to strengthen the UCT regime, including through the introduction of penalties. This Final Report of the *Review of the Amended Unfair Contract Terms Protections* details the amendments made by the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (the amending Act) and examines the effect of those reforms to ensure they are operating as intended in both the Australian Consumer Law (ACL), contained in Schedule 2 of the *Competition and Consumer Act 2010* (CCA) and the *Australian Securities and Investments Commission Act 2001 (*ASIC Act).

On 18 March 2025 the Government announced it would extend protections from UCT to businesses regulated by the Franchising Code, including automotive dealers, following consultation. While the consultation paper for this report, released in February 2026, also sought feedback on that extension, that policy sits outside the scope of this review report. The Government is now considering the outcomes of that consultation.

This review of the amended UCT protections has found that the 2022 reforms have been broadly successful at achieving their policy objectives, particularly by expanding the protections to a larger class of small businesses and by increasing compliance with the regime. However, opportunities have been identified to further enhance compliance with and strengthen the regime.

1 Productivity Commission, 'Review of Australia's Consumer Policy Framework', publication, 2008, p 149.

The report makes 15 findings:

### Finding 1

In addition to the 2022 amendments to the UCT provisions, there have been a number of recent changes to regulatory frameworks that operate alongside the UCT provisions, with some further changes under consideration. It will take time for the full impact of the amended UCT provisions, and the cumulative impact of those reforms on the use of UCT, to become known.

### Finding 2

A further review of the UCT protections in both the ACL and the ASIC Act, undertaken in five years, would enable a comprehensive examination of the UCT regime and its operation within the broader regulatory environment.

### Finding 3

The introduction of civil penalties has been an effective regulatory tool to strengthen UCT protections by increasing deterrence. Stakeholders reported that more businesses are reviewing standard form contracts and amending or removing terms that may be unfair.

### Finding 4

As the amendments are relatively recent, there has been insufficient time for a substantial body of case law to develop regarding the amended provisions. Regulators have nonetheless been engaging in compliance operations.

### Finding 5

Visible enforcement and clear industry guidance remain critical to effectively deter against using UCT.

### Finding 6

Stakeholders were divided on the question of whether ASIC should be able to make applications for orders to prevent and remedy UCT in completed contracts under paragraph 12GNF(1)(b) of the ASIC Act.

### Finding 7

The two-year review period has not provided enough time to assess whether the absence of completed contracts from paragraph 12GNF(1)(b) presents an obstacle to enforcement of the UCT regime in the ASIC Act. Treasury would welcome receiving further evidence as it comes to hand.

### Finding 8

The absence of infringement notice powers limits the ACCC's and ASIC's ability to respond to lower-level harm. Enabling the ACCC and ASIC to issue infringement notices for UCT contraventions under the ACL and the ASIC Act would enhance regulators' ability to support proportionate, timely and effective enforcement, while complementing the existing civil penalty regime.

### Finding 9

The amendments have meaningfully increased access to UCT protections for small businesses that are dependent on standard form contracts and lack countervailing bargaining power.

### Finding 10

Current thresholds are appropriate and should not be changed in the near term while impacts are monitored.

### Finding 11

The ACCC and ASIC should consider specific guidance on how the application of the small business threshold applies to corporate group entities and wholesale financial market participants.

### Finding 12

Stakeholder submissions show that the amended provisions in the ACL are generally operating as intended to provide sufficient clarity to determine whether a contract is a standard form contract.

### Finding 13

The amendments to make the standard form contracts provision clearer have simplified the ACCC's assessments and investigations of UCT matters.

### Finding 14

Further regulator guidance to provide greater educational support would be beneficial for businesses in understanding how the standard form contracts provision operates.

### Finding 15

Treasury is of the view there is insufficient evidence that life insurance policy linking and unlinking arrangements warrant further change at this time.

# Chapter 1: Introduction

## The Review

On 24 February 2026, the Australian Government announced a review of the operation of the 2022 reforms to the UCT provisions in both the ACL and the ASIC Act. These reforms were enacted through the amending Act and commenced on 9 November 2023. The amending Act mandates a review of the operation of the new UCT provisions within six months after the end of two years from commencement, with a report required to be tabled in Parliament.[2]

The reforms implemented an election commitment by the Albanese Government to make UCT illegal.[3] Among other things, the amendments introduced a civil penalty regime and increased the small business eligibility threshold to ensure more businesses can benefit from the UCT protections.

This review examines the effectiveness of the reforms to ensure they are operating as intended and delivering improved outcomes for consumers and small businesses.

A public consultation paper[4] was released for a three-week consultation period, which sought feedback on the following aspects of the strengthened UCT regime:

- the effectiveness of the new remedies, civil penalties and enforcement powers
- the expanded class of contracts covered by the regime including the impact of changes to the upfront price payable under the contract in the ASIC Act and its removal in the ACL
- the clarity of the amended provisions in identifying standard form contracts
- whether current exemptions and insurance-related definitions (including guaranteed renewable life policies) are operating as intended
- the application of the UCT provisions to the franchising sector.

As the amended provisions apply to new, renewed or varied contracts from 9 November 2023, the full impact of the amendments will only become apparent over time, as more contracts are renewed or varied, enforcement activity takes place, and the courts have further opportunity to consider the amended provisions.[5] This report therefore provides an assessment of the amended regime at an early stage of its operation, informed by submissions received in response to consultation which closed on 17 March 2026. A total of 43 submissions were received from a variety of stakeholders including academics, individuals and industry bodies.[6]

2 *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* Schedule 2, item 80.
3 Australian Labor Party (2022), *Greater Protections from Unfair Contract Terms*.
4 The Australian Government the Treasury (2026), *Review of the Amended Unfair Contract Terms Protections*, Treasury website.
5 ACCC submission, p 2; Queensland Law Society submission, p 1; Dr Howell, Mark Giancaspro and Jeannie Paterson submission, p 3.
6 This included 2 confidential submissions. Public submissions will be published on the Treasury website.

# History of UCT protections

In July 2010, the *Trade Practices Amendment (Australian Consumer Law) Act (No. 1) 2010* introduced UCT protections into the ASIC Act, and into the ACL in Schedule 2 of the CCA.[7] The introduction of UCT protections formed part of the response to the Productivity Commission's 2008 Review of Australia's Consumer Policy Framework which recommended incorporating a provision in the consumer law to address UCT-related issues, with equivalent provisions to be introduced into the ASIC Act for standard form contracts for financial products and services.

When first introduced, the UCT provisions applied only to standard form consumer contracts. Under this framework, unfair terms contained in standard form contracts were rendered void, but the regime did not allow the imposition of civil penalties or other sanctions for the inclusion of such terms. Businesses faced limited consequences for including unfair terms, beyond the risk that a term might later be declared void if challenged.[8]

In 2015, a Decision Regulation Impact Statement (DRIS) found that small businesses were being harmed by the use of UCT in standard form contracts and that existing industry mechanisms and voluntary codes while offering some protections, were insufficient.[9] To deal with the identified problem the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* amended the ACL and ASIC Act to extend UCT protections to include small businesses from November 2016. This reflected recognition that small businesses often face the same vulnerabilities and difficulties as consumers in contractual relationships.

Following these amendments, in 2018, Treasury released a discussion paper as part of the Review of Unfair Contract Term Protections for Small Businesses.[10] Information gathered through the 2018 statutory review suggested that while the UCT regime had improved protections for small businesses in certain industry sectors, it did not strongly deter against businesses using UCT in their standard form contracts.

Treasury subsequently released a Consultation Regulation Impact Statement (CRIS) in December 2019 that looked at options to increase protections for small businesses and strengthen enforcement of the UCT regime. In November 2020, the Commonwealth, state and territory Consumer Affairs Ministers considered a DRIS on enhancements to UCT protections and agreed that reforms were necessary to provide better protection to consumers and small businesses from UCT.[11]

7 At the time the ACL was included into Schedule 2, the CCA was known as the *Trade Practices Act 1974*. The Act was renamed by the *Trade Practices Amendment (Australian Consumer Law) Act (No. 2) 2010*.

8 The Australian Government the Treasury (2019) *Enhancements to Unfair Contract Term Protections: Consultation Regulation Impact Statement*, Office of Impact Analysis website.

9 The Australian Government the Treasury (2015) *Decision Regulation Impact Statement – Extending Unfair Contract Term Protections to Small Businesses*, Treasury website, page xi.

10 The Australian Government the Treasury (2018) *Review of Unfair Contract Term Protections for Small Business*, Treasury website.

11 The Australian Government the Treasury (2020), *Enhancements to Unfair Contract Term Protections*, Treasury website.

In 2019, the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry recommended extending UCT protections under the ASIC Act to insurance contracts. The *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020*, Schedule 1 of which commenced on 5 April 2021, implemented this recommendation.

In 2022, the Government amended the UCT regime through the amending Act, implementing the State and Territory agreed reforms.[12] The 12-month transitional period before those reforms commenced allowed for businesses to audit and revise their standard form contracts before the new civil penalty regime took effect.

## Operation of UCT provisions

Australia's UCT framework operates across two pieces of legislation, the ACL which applies across the economy (except for financial products and services), and the ASIC Act which regulates financial products and services.[13] This recognises that financial products and services warrant dedicated sector-specific oversight, administered by a specialised regulator. The UCT provisions in the ACL are designed to protect consumers and small businesses from unfair terms in standard form contracts. The UCT provisions in the ASIC Act largely mirror those protections for contracts involving financial products and services and insurance contracts. The intent is that both regimes operate in tandem to deliver consistent, economy-wide consumer protection, regardless of the nature of the product or service being supplied.

Standard form contracts are used across many sectors of the Australian economy. They reduce transaction costs by allowing businesses to contract at scale without negotiating the terms of each individual agreement. In practice, they are typically offered on a 'take it or leave it' basis, whereby the counterparty has little to no opportunity to negotiate the terms before signing.[14]

Neither the ACL nor the ASIC Act define what constitutes a 'standard form contract'. Instead, both regimes set out matters that a court must consider when determining whether a contract is standard form, without limiting the court's ability to have regard to other relevant factors. These include who prepared the contract, whether there was an effective opportunity to negotiate, and whether the terms took into account the specific characteristics of the other party or the particular transaction. Where a party asserts that a contract is standard form, the law presumes that it is unless the other party can prove otherwise.[15] The 2022 amendments also clarified that minor negotiated changes to an agreement do not necessarily exclude it from being a standard form contract.[16] These clarifications are discussed further in Chapter 4.

Standard form contracts are used in both consumer-to-business and business-to-business transactions. In the consumer context, the protections apply automatically. However, the application of the UCT protections to business-to-business arrangements depends on whether at least one of the parties to the contract qualifies as a small business under specific criteria. How those criteria differ between the ACL and the ASIC Act is addressed in Chapter 3.

12 *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* Schedule 2, item 80.
13 ACL Part 2–3; ASIC Act sections 12BF–12BM.
14 Australian Government the Treasury (2020), *Enhancements to Unfair Contract Term Protections*, p 5, Treasury website.
15 ACL section 27; ASIC Act section 12BK.
16 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) p 28.

### What makes a term unfair?

Under both the ACL and the ASIC Act, a term in a standard form consumer contract or small business contract is 'unfair' if all three of the following are satisfied:

- it causes a significant imbalance in the parties' rights and obligations arising under the contract;
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.[17]

The 2022 reforms did not change this test. Additionally, the ACL and the ASIC Act contain a non-exhaustive list of terms that may be considered unfair, depending on the circumstances.[18] These include, but are not limited to, the following examples:

- A term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract.
- A term that permits, or has the effect of permitting, one party (but not another party) to vary, renew or not renew the contract.
- A term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract. [19]

Certain categories of terms are excluded from the regime altogether, including terms that define the main subject matter of the contract, set the upfront price payable, or are required by law (these are discussed in Chapter 4).[20]

The Australian Competition and Consumer Commission (ACCC) enforces the UCT provisions in the ACL, alongside state and territory consumer protection agencies. The Australian Securities and Investments Commission (ASIC) enforces the UCT provisions in the ASIC Act.

The ACL and the ASIC Act also allow a party to the contract to commence private actions to enforce their rights.[21]

## UCT and the broader regulatory environment

The ACL and the ASIC Act together provide economy-wide protection against UCT in standard form contracts. That said, differences remain, which have significance for consumers and small businesses dealing with financial products and services. Several submissions to the review commented on these differences. For example, Emeritus Professor of Law, Philip Clarke, submitted that while there is generally close alignment, divergence between the two regimes risks undermining the protections. Areas of difference and their implications are examined throughout this report.

While some stakeholders called for the removal of existing gaps between the ACL and the ASIC Act, the relevant protections continue to operate within distinct regulatory frameworks that interact with different regulatory obligations. For example, there is a Bill currently before Parliament to introduce

17 ACL subsection 24(1); ASIC Act subsection 12BG(1).
18 ACL section 25; ASIC Act section 12BH.
19 ACL subsections 25(a), (c), (d) and (e); ASIC Act subsections 12BH(a), (c), (d) and (e).
20 ACL paragraphs 26(1)(a)–(c); ASIC Act paragraphs 12BI(1)(a)–(c).
21 ACL section 250; ASIC Act section 12GND.

unfair trading practices protections for consumers in the ACL. However, the Government is giving further consideration to whether unfair trading practices protections for financial services regulated by the ASIC Act are required.

Businesses complying with the ACL may also be required to comply with industry codes made under Part IVB of the CCA. These codes are sector-specific and regulate the conduct of industry participants towards each other (or consumers). While codes vary, they typically require parties to act in good faith towards each other, have written agreements to cover key commercial matters and use agreed dispute resolution mechanisms. A number of these codes have recently been subject to amendment, illustrating this evolving environment.

For instance, the Government's new mandatory Food and Grocery Code of Conduct came into effect on 1 April 2025. The new code is intended to better protect suppliers and improve supermarket behaviour by introducing heavy penalties for major breaches of the code, a prohibition against retribution, strengthened dispute resolution mechanisms, and other new obligations on supermarkets. The Department of Agriculture, Fisheries and Forestry completed the second review of the Dairy Code of Conduct in December 2025 and made 8 recommendations, which the Government is currently considering.[22] The new Franchising Code of Conduct, effective from 1 April 2025 with further mandatory changes from 1 November 2025, increased protections for franchisees.[23] On 28 January 2026, the Minister for Agriculture, Fisheries and Forestry, the Hon Julie Collins MP, launched an independent review of the Horticulture Code of Conduct, with a report expected mid-2026.[24]

Given this changing landscape, Treasury considers it is important to keep monitoring the UCT protections in their broader regulatory context to ensure they remain adequate for addressing harm across the economy. To enable more time for the effect of UCT protections to be better understood and tested in the courts, Treasury suggests a review be undertaken in five years.

### Finding 1

In addition to the 2022 amendments to the UCT provisions, there have been a number of recent changes to regulatory frameworks that operate alongside the UCT provisions, with some further changes under consideration. It will take time for the full impact of the amended UCT provisions, and the cumulative impact of those reforms on the use of UCT, to become known.

### Finding 2

A further review of the UCT protections in both the ACL and the ASIC Act, undertaken in five years, would enable a comprehensive examination of the UCT regime and its operation within the broader regulatory environment.

22 *Competition and Consumer (Industry Codes—Dairy) Regulations 2019*.
23 *Competition and Consumer (Industry Codes—Franchising) Regulations 2024* ('Franchising Code of Conduct'); ACCC (2026) *Franchising Code of Conduct*.
24 The Australian Government, Department of Agriculture, Fisheries and Forestry (2026) *Horticulture Code of Conduct*.

# Chapter 2: Remedies and Enforcement

This chapter considers the impact of introducing civil penalties to the UCT regimes under the ACL and the ASIC Act in 2023. It focuses on the effectiveness of the amended penalty regime and other compliance and enforcement activity since the reforms commenced.

The ACL and the ASIC Act establish parallel enforcement frameworks for consumer and small business protections, which are administered by the ACCC and state and territory ACL regulators, and ASIC, respectively. Under both regimes, regulators may investigate conduct and seek court-ordered remedies, including declarations, injunctions and ancillary orders.

## Remedies pre-2023

Prior to the commencement of the UCT reforms in 2023, the remedies available in respect of the inclusion of a UCT in a contract were limited. Courts could declare a term unfair (and therefore void), but the regime did not have any civil penalties attached. While courts could make orders for the whole or any part of a contract or collateral arrangement, such orders could only be made when a person has suffered, or is likely to suffer, loss or damage.[25] The 2019 CRIS concluded that UCT remained prevalent in consumer and small business contracts, and that a regime based on voiding alone, without penalty, was insufficient to deter their ongoing use. In the absence of penalties, businesses lacked incentive to proactively remove unfair terms contained in contracts and were able to exploit their superior bargaining power, knowing that the only consequence was the loss of enforceability if, and when, a term was successfully challenged in court.[26] The inability to seek penalties limited the deterrent effect of the regime and constrained regulators' ability to address systemic use of unfair terms; these issues directly informed the 2022 reforms.

25 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) p 30. The amendment now allows the court to make orders to prevent or reduce loss or damage which is likely to be caused.

26 The Australian Government, The Treasury (2020), *Enhancements to Unfair Contract Term Protections: Consultation Regulation Impact Statement*, p 5, Treasury website.

### Case Study: Karpik v Carnival

A cruise operated by Carnival PLC and its subsidiary during March 2020 was cut short due to a COVID-19 outbreak. Following the cruise, Ms Karpik commenced a class action under Part IVA of the *Federal Court of Australia Act 1976* (Cth) against the operators of the cruise. Some passengers who were part of the class action (including Mr Ho, the representative of a "US subgroup") were subject to US standard form terms and conditions. The contract included:

- a class action waiver clause;
- an exclusive jurisdiction clause (California); and
- a foreign choice of law clause.

The Court considered, among other issues, whether the class action waiver clause was unfair under section 23. The Court held that the class action waiver clause was unfair, satisfying each requirement of section 24(1) of the ACL: it caused a significant imbalance in rights; there was no legitimate interest in a cruise operator seeking to prevent people from participating in a class action; it was a detriment to be denied the benefits of the class action regime; and the waiver was not transparent: [53]-[58]. Relevantly, the Court held the waiver was not transparent because consumers had to click through various links and navigate through multiple contracts, and the imbalance and detriment inherent in the term required a greater degree of transparency: [58].[27]

Under the old regime, the effectiveness of the UCT provision was limited because the plaintiff had to litigate the matter to have the clause invalidated, and there was no financial penalty for Carnival including the term in the first place; the only consequence was the inability to enforce that specific clause in that instance.

## Remedies post-2023

The amended UCT regime not only voids unfair terms automatically, but also introduces civil penalties and related court orders.[28] A person will contravene the UCT provisions in the ACL or ASIC Act if they make a standard form contract that contains a UCT that they proposed, or if they apply or rely on, or purport to apply or rely on, an unfair term, in a standard form contract. Civil penalties may be imposed where a court finds a breach and there is also a broader suite of remedial powers. The provisions set out below detail the civil penalty regime introduced by the amending Act to prohibit the use of and reliance on UCT in standard form contracts. Under the ACL, an individual may be liable for a maximum pecuniary penalty of up to $2.5 million per contravention of the UCT provisions.

27 *Karpik v Carnival PLC* (2023) 280 CLR 640; AGS (Australian Government Solicitor) (2023) *Legal update no. 319*.
28 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) p 30.

For a body corporate, the maximum penalty is the greater of:

- $100 million;[29]
- if the court can determine the value of the benefit reasonably attributable to the contravention, three times that value;
- if the court cannot determine the value of the benefit, 30 per cent of the company's adjusted turnover during the breach period for the relevant contravention.[30]

Under the ASIC Act, the maximum pecuniary penalty for an individual was introduced as greater of either 5,000 penalty units (currently $1.65 million), or if the court can determine the amount of the benefit derived and detriment avoided by the contravention, three times that value.

For a body corporate, the maximum is the greatest of:

- 50,000 penalty units (currently $16.5 million); and
- if the court can determine the benefit derived and detriment avoided because of the contravention, three times that amount; and
- either 10 per cent of the annual turnover of the body corporate for the 12-month period ending at the end of the month in which the body corporate contravened, or began to contravene, the civil penalty provision, capped at 2.5 million penalty units (currently $825 million).[31]

The court can also now make additional orders following a UCT finding, regarding the whole or any part of a contract or collateral arrangement, including to void, vary or refuse to enforce the contract whenever a person has suffered, or is likely to suffer, loss or damage due to the conduct of another. This provides the court flexibility to tailor remedies. For example, a court may now grant an injunction preventing the contract-issuing party from attempting to enforce a term that has already been declared unfair.[32]

## New remedies and enforcement provisions

Submissions to the consultation paper closed prior to the passage of the *Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026*, which increased maximum penalties for many key breaches of the ACL (including the UCT protections) to $100 million commencing on 28 March 2026. As such, stakeholder views reflect the maximum penalty amount that existed at the time under the ACL, which was $50 million in respect of the first limb of the penalty clause for a body corporate.

Submissions from academia, regulators, industry, legal bodies, and consumer and small business advocates, showed strong agreement that the 2022 reforms have strengthened the UCT regime. Several stakeholders expressed the view that the introduction of civil penalties and expanded enforcement and remedial powers have materially improved deterrence and redress. Professor Clarke highlighted the layered nature of the regime (e.g. automatic voiding of unfair terms, general enforcement provisions, and UCT specific remedies) as providing a comprehensive framework. Although there have not yet been contested court outcomes imposing civil penalties for UCT under

29 On 28 March 2026, the *Treasury Laws Amendment (Doubling Penalties for ACCC Enforcement) Act 2026* came into effect, increasing the maximum pecuniary penalties available for many key provisions of the ACL (including the unfair contract term protections) from $50 million to $100 million.

30 ACL section 224.

31 ASIC Act section 12GBCA.

32 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth), p 30.

the amended regime, Dr Nicola Howell, Dr Mark Giancaspro and Professor Jeannie Paterson noted in their joint submission that courts' demonstrated willingness to impose higher end penalties for contraventions of other provisions in the ACL reinforces the deterrent effect of the increased UCT penalties.

CHOICE submitted that lawyers assisting consumers have reported that the existence of penalties is a useful tool when negotiating with businesses to resolve individual matters. Similarly, the ACCC submitted that making the use of UCT subject to a pecuniary penalty has made more businesses willing to make changes to their standard form contracts, including where concerns are raised by the ACCC. This experience was echoed by the Australian Small Business and Family Enterprise Ombudsman (ASBFEO), which noted that, in its assistance work, parties are more open to addressing contractual issues once ASBFEO identifies that a clause may be an UCT.

A number of submissions argued that penalties should focus on situations where a business applies, relies on, or seeks to enforce an unfair term, rather than penalising the inclusion where there is no evidence of harm or bad faith.[33] However, it is worth noting that a UCT can still have a detrimental impact, even where the contract-imposing party never seeks to enforce the term. For example, a consumer or small business faced with a termination clause that is unfairly balanced may decide not to attempt to exit the contract at all, deterred by what the clause suggests the other party could do to them. In other words, the harm in such cases is that it may create a chilling effect on the other party's willingness to exercise their rights.

## Industry guidance

Regulators play a central role in supporting compliance with the UCT provisions and the ACL more broadly, not only through enforcement action but also through the guidance and education they provide to businesses. Since the amendments came into effect, the ACCC, ASIC and the state and territory ACL regulators have undertaken education and guidance activities to help businesses understand their obligations, and to identify and address potentially unfair terms in their contracts. For example, the ACCC's submission noted its compliance and education activities have included publishing guidance materials, engagement with specific industry groups, and providing practical tips for businesses to consider when reviewing contracts.

Submissions to the review reflected strong support for expanded and ongoing regulatory guidance to improve compliance outcomes.[34] In particular, the ASBFEO recommended that education efforts relating to the amendments should take a more 'systematic, strategic approach'. The HIA and the NSW Small Business Commissioner made similar points, emphasising that promoting greater awareness of the amendments is essential if the regime is to operate fairly and effectively.

33 Business Council Australia (BCA) submission, p 2; Australian Retail Council (ARC) submission, p 3; Financial Services Council submission, p 4; Australian Institute of Credit Management (AICM), Australian Credit Forum (ACF) and Australian Collectors and Debt Buyers Association (ACDBA) submission, pp 2–3.

34 Queensland Law Society submission, p 2; Australian Chamber of Commerce and Industry submission, p 2; BCA submission, p 2; Housing Industry Australia (HIA) submission, p 6; FSC submission, p 1–2; ARC submission, p 2; Western Australia Small Business Development Corporation submission, p 5.

Treasury notes that developing and updating guidance materials is a continual process for regulators. In addition to existing regulator guidance and education, the ACCC, the states and territories, and ASIC, are working to update the joint ACL regulators' guide on UCTs, in collaboration and consultation with Treasury. Treasury expects the guidance and education materials that ASIC, the ACCC and the state and territory ACL regulators develop will provide greater clarity over time, particularly as the courts consider the application of the amendments. Treasury also considers ongoing regulatory guidance is likely to play a key role in embedding the amended UCT provisions and supporting consistent compliance across the economy.

# Enforcement

Submissions also addressed whether the introduction of civil penalties has reduced the prevalence of UCT.

While the amendments commenced on 9 November 2023, the transitional arrangements meant that the new provisions did not apply immediately to all existing standard form contracts. For contracts entered into before commencement, the previous law applies until those contracts are renewed or amended. As a result, the period since commencement has involved a gradual transition, with enforcement outcomes emerging over time.

Submissions consistently identified active regulator enforcement as being key to the success of the UCT protections. Stakeholder views varied in how they characterised the most effective approach to deterrence. For example, Dr Giancaspro emphasised deterrence through fear of detection, arguing that penalties will only be effective if supported by active and public investigation. He suggested that further regulatory resourcing is required to enable greater scrutiny of market participants and more communication of investigative efforts to the market. Council of Small Business Organisations Australia (COSBOA) and CHOICE emphasised the risk that slow or sporadic enforcement will erode deterrence over time, particularly for small businesses reluctant to pursue court action. In this context, small businesses rely heavily on timely and visible regulator enforcement to drive change and deter the ongoing use of UCT.

The Australian Lawyers Alliance (ALA) and the Law Council of Australia (LCA) highlighted the absence of concluded enforcement proceedings, especially in the insurance sector, as evidence that the regime has yet to exert meaningful behavioural pressure. Many stakeholders including Dr Howell et al. and Legal Aid Queensland focused on the need for visible regulatory action to reinforce the legitimacy of the increased penalties. The ACCC noted that many businesses have made changes to their standard form contracts following ACCC engagement and consider that this, along with its education activities, have assisted businesses to improve their compliance with the law. The ACCC acknowledged that although compliance behaviour has improved, enforcement outcomes remain essential to deterring prohibited conduct.

## ACCC Enforcement

Early regulatory outcomes have primarily involved compliance action and non-court enforcement outcomes by the ACCC. To date, no court has determined liability and imposed civil penalties for UCT under the ACL's new regime. It is worth noting that the ACCC has made UCT in consumer and small business contracts a compliance and enforcement priority each year since the reforms came into effect.[35]

35 ACCC, Compliance and enforcement priorities, date accessed 10 April 2026.

The ACCC currently employs a broad range of compliance and enforcement tools to promote adherence to, and prevent breaches of, the ACL. These tools include business and consumer education, court enforceable undertakings, and court proceedings. In determining the most appropriate response, the ACCC considers several factors including the size of the business, the nature of the conduct, and the extent of any resulting harm. However, in its response to the review, the ACCC submitted that one tool currently unavailable to it, in respect of UCT, is infringement notices. It noted that infringement notices could assist them in responding to matters involving lower-level harm, where a formal court process would be considered disproportionate. The extent to which the current enforcement settings, including the inability to issue infringement notices, are adequate to achieve the objective of deterrence is discussed in more detail below.

This issue aside, the ACCC submitted that it has conducted broader monitoring and compliance activities on an ongoing basis to address potential non-compliance. Where concerns have been identified, the ACCC noted that it has taken compliance or enforcement action.[36] This has included targeted industry-specific work, most notably the ACCC's proactive engagement with the franchising sector following commencement of the amended provisions.[37]

As one of its enforcement tools, the ACCC also has the ability to accept written court enforceable undertakings in addition to, or as an alternative to, other enforcement action in relation to a broad range of matters. An undertaking contains a series of commitments provided by a business or individual in writing to the ACCC and can be a cost-effective and timely enforcement tool to address compliance concerns. Recent cases where the ACCC has accepted court enforceable undertakings in relation to UCT are outlined below.

### Mable Technologies Pty Ltd

In June 2025, the ACCC accepted a court-enforceable undertaking from Mable Technologies Pty Ltd, an online support services platform, in relation to terms in its standard form Terms of Use that Mable admitted were likely to be UCT. The UCT were in place between 9 November 2023 and 22 August 2024, and included penalty clauses allowing Mable to claim a fee of $5,000 imposed from clients or support workers in certain circumstances. The terms also provided for a client's 'service log' (similar to an attendance record or timesheet) to be automatically deemed approved unless the client disputed it within 24 hours without providing a contractual right for the client to opt-out or dispute the invoice for the relevant services once the service log was deemed to have been accepted. Other terms allowed Mable to change some of its fees and terms without reasonable notice. Mable also included terms which sought to limit its liability for claims and losses. As part of the undertaking, Mable agreed to amend its standard form contracts, improve disclosure of significant terms, and establish and maintain an ACL compliance program.[38]

36 ACCC submission, p 4.

37 ACCC (2023), *Unfair contract terms in franchise agreements: Key findings of targeted compliance checks on franchisors*, ACCC website.

38 ACCC, *Disability and aged care support platform amends unfair contract terms* [media release], 12 June 2025, accessed 10 April 2026.

### Aidacare

In March 2026, the ACCC accepted a court enforceable undertaking from Aidacare, a NDIS registered provider of healthcare equipment. Aidacare admitted that it likely used UCT in standard form contracts entered into between 9 November 2023 and 21 May 2025, alongside making false or misleading representations about consumer guarantee rights.[39] The unfair terms included imposing short timeframes for reporting defects, restrictions on consumers' rights to reject faulty goods, and broad limitations of liability. Aidacare agreed to remediate affected consumers, cease using the terms, and implement a compliance program.[40]

## ASIC Enforcement

ASIC is responsible for enforcing the UCT law for financial products and services. ASIC has commenced legal proceedings in one matter since the commencement of the amending Act.

### CashnGo

In June 2025, ASIC commenced proceedings in the Federal Court against Venture 5 Group Pty Ltd (trading as CashnGo Australia), alleging unconscionable debt recovery practices, the use of unfair contract terms, and failures to comply with statutory direct debit default notice requirements. ASIC alleges between April 2022 and May 2025 CashnGo monitored consumers' bank account balances, obtained through internet banking credentials or third-party account connections and made unscheduled debits immediately upon funds becoming available following default, often leaving consumers with less than $5 in their accounts. The proceedings contend that CashnGo knew, or ought to have known, that these practices would likely cause significant financial hardship. The matter is before the court, with a hearing listed for August 2026. ASIC is seeking civil penalties.

39 The ACCC obtained this court outcome since submissions to the review closed.

40 ACCC, *NDIS provider Aidacare admits to misleading customers about their consumer guarantee rights* [media release], 20 March 2026, accessed 1 May 2026.

## Operation of section 12GNF of the ASIC Act

Submitters' views varied on whether paragraph 12GNF(1)(b) of the ASIC Act should be extended to include completed contracts in addition to existing and future contracts. The *Review of the Amended Unfair Contract Terms Protections* consultation paper noted concerns that should ASIC request orders to bring a suite of contracts forward that are of short duration, the contracts in question may all be complete before the case is heard, raising a question about ASIC's ability to seek a remedy under section 12GNF for contracts of that nature.

Those supportive of the extension viewed it as consistent with the intention of the regime to protect consumers and small business from UCT while acknowledging those parties' lack of time, experience and resources to negotiate or challenge terms in standard term contracts.[41] While ASIC did not make a formal submission to the review, ASIC supports extending section 12GNF to include completed contracts, noting that the ability for courts to make orders in relation to completed contracts has been a consistent element in the UCT regime since its commencement. In ASIC's view, extending section 12GNF in this way would make the provision consistent with other provisions that pre-date section 12GNF. A number of submissions considered that an extension with narrow statutory limits could be supported.[42] Professor Clarke was of the view that such an extension should only be considered if an equivalent was actioned in the ACL.

Several stakeholders including the BCA, Australian Banking Association (ABA) and the Financial Services Council (FSC) raised concerns with opening up contracts for consideration that predate the commencement of the 2022 amendments, allowing in effect retrospective enforcement. The Council of Australian Life Insurers (CALI) raised the risk of legal certainty and commercial finality of life insurance contracts while also noting it would be inconsistent with the policy intent on the existing exemptions of life insurance products. Some stakeholders[43] raised concerns about the findings in recent UCT cases *ASIC v Auto and General*[44] and *ASIC v HCF Life*[45] in which the Federal Court drew upon the protective provisions of the *Insurance Contracts Act 1984* – including provisions such as sections 47 and 54 – as a basis for finding that the relevant terms did not cause sufficient imbalance or detriment to meet the unfairness threshold. Treasury is cognisant that *ASIC v HCF Life* is under appeal, and the Federal Court has yet to deliver its judgment.[46]

Treasury notes the mixed stakeholder opinions on the need to extend paragraph 12GNF(1)(b) to completed contracts. From the information received, it is not clear that the current provision presents a practical challenge to enforcement. More time and case law development is needed to confirm any impact on enforcement. Treasury also notes the concerns over retrospective application, but considers any action would need to comply with the relevant limitation period, as all regulatory action does, and that the commencement of the 2022 amendments (as discussed in Chapter 1) limits the scope for retrospective action.

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41 NSW Small Business Commissioner submission, p 1; VOFF submission, p 1; Michael Sanderson submission, p 3; Craig Caulfield submission, p 1.

42 HIA submission, p 7; NSW Small Business Commissioner submission, p 2.

43 ALA submission, p 5; LCA submission, p 2.

44 *Australian Securities and Investment Commission v Auto & General Insurance Company Ltd* [2025] FCAFC 76 ('*ASIC v Auto and General Insurance*').

45 *Australian Securities and Investment Commission v HCF Life* [2024] FCA 1240 ('*ASIC v HCF Life*').

46 Recent cases related to UCT in insurance contracts are *ASIC v HCF Life* and *ASIC v Auto and General Insurance,* with *ASIC v HCF Life* currently awaiting an appeal judgment. However, both commenced prior to the amending Act taking effect.

## Class actions

A limited number of stakeholders provided feedback on the number of class actions that have commenced since the 2022 reforms. A joint submission observed that there has been no evidence of changes in class action activity in the trade credit sector since the reforms.[47] Another stakeholder noted their members have observed an increase in class actions related to UCT claims.[48] Some stakeholders including the ALA and LCA commented that class actions should be expressly facilitated within the UCT regime, considering them the most effective mechanism for deterring corporate misconduct. However, class actions are already available in relation to Commonwealth laws under Part IVA of the *Federal Court of Australia Act 1976,*[49] and also set out in various state based legislation.[50] As such, Treasury notes it would be uncommon for the UCT regime to include express provision for class actions.

## Reports of conduct

As noted in the *Review of the Amended Unfair Contract Terms Protections* consultation paper, the number of UCT-related contacts received by the ACCC (including both reports of alleged misconduct raising UCT concerns, as well as enquiries from the public about their rights or obligations in relation to UCT) slightly increased after the legislation commenced in November 2023.[51]

### Table 1.1: UCT contacts to the ACCC (1 November 2021 to 31 October 2025)

| Time Period | Business-to-business contacts | Business-to-consumer contacts | Total number of contacts |
|---|---|---|---|
| **1 November 2021 – 8 November 2023** (approximately two years prior to the UCT reforms) | 566 | 1348 | 1914 |
| **9 November 2023 – 31 October 2025** (approximately two years after the commencement of the UCT reforms) | 710 | 1365 | 2075 |
| **Total number of contacts** | 1276 | 2713 | 3989 |

The number of Reports of Misconduct (ROMs) received by ASIC that included a reference to UCT (in reference to either small businesses, consumers or others) also saw a significant increase in the same period.

47 AICM, ACF and ACDBA submission, p 3.
48 Queensland Law Society submission, p 2.
49 *Federal Court of Australia Act 1976* (Cth).
50 *Supreme Court Act 1986* (Vic) Part 4A; *Civil Procedure Act 2005* (NSW) Part 10; *Civil Proceedings Act 2011* (Qld) Part 13A.
51 In the same period for context, the ACCC received a total of 218,479 contacts (excluding scam reports) over the period 1 November 2021 to 8 November 2023, and a total of 203,860 contacts (excluding scam reports) over the period 9 November 2023 to 31 October 2025.

Table 1.2: ROMs contacts referencing UCT to ASIC (1 November 2021 to 31 October 2025)

| Time Period | Business related ROMs | Consumer related ROMs | Other related ROMs | Total number of ROMs |
|---|---|---|---|---|
| **1 November 2021 – 8 November 2023** (approximately two years prior to the UCT reforms) | 21 | 24 | 7 | 52 |
| **9 November 2023 – 31 October 2025** (approximately two years after the commencement of the UCT reforms) | 43 | 68 | 7 | 118 |
| **Total number of ROMs** | 64 | 92 | 14 | 170 |

Stakeholders drew differing conclusions on the increase in UCT and ROMs contacts to the ACCC and ASIC. The Telecommunications Industry Ombudsman (TIO) submitted that it continues to receive complaints, suggesting that UCT remain in use following the reforms. Dr Howell et al. considered the increase in contacts reflects a greater awareness of the provisions and greater confidence amongst small businesses and consumers in identifying and challenging UCT. The HIA raised concerns about the limitations of complaints data, noting that it lacks sufficient detail to assess seriousness or merit and may reflect changes in awareness or reporting behaviour, rather than the underlying prevalence of UCT.

COSBOA highlighted that some small businesses are being required, as a precondition to entering a contract, to sign additional declarations which state that they have sought legal advice or that they accept the associated risks, weakening confidence of the affected party in raising UCT concerns. Legal Aid NSW, NSW Small Business Commissioner, TIO and the WA Small Business Development Corporation (WASBDC) submitted they continue to receive complaints about the prevalence of UCT. The TIO and Legal Aid NSW provided the following examples of terms they have seen since November 2023:

- Early contract termination fees being almost the full value of the contract.
- Onerous termination clauses.
- Significant contingency fees charged by businesses for minimal work.

## Infringement notices

On balance, feedback on the introduction of the UCT penalty regime suggests it is achieving its intended policy objective of strengthening consumer and small business protections, with penalties providing a clear signal that non-compliance does carry greater consequences. However, Treasury considers that a range of regulatory tools are necessary to provide strong protection from UCT under the ACL and ASIC Act. This includes tools that allow the regulator to address conduct posing a lower risk of harm, without having to engage in litigation. While the ACCC and ASIC can issue infringement notices where they have reasonable grounds to believe that a person has contravened protections against unconscionable conduct or various other provisions, they do not have the power to issue infringement notices for breaches of the UCT provisions.

The 2020 DRIS recommended consideration of the appropriateness of infringement notices once penalties were introduced, following further development of the law. The DRIS considered that the level of discretion exercised in determining whether a term is unfair may reduce over time, making infringement notices a more appropriate enforcement option at a later stage.[52]

Infringement notice penalty amounts for equivalent breaches of the ACL are:

- if the person is a listed corporation – 600 penalty units ($198,000);[53]
- if the person is a body corporate other than a listed corporation – 60 penalty units ($19,800); or
- if the person is not a body corporate – 12 penalty units ($3,960).[54]

Infringement notice penalty amounts in the ASIC Act for equivalent provisions are set at 60 penalty units if the person is a body corporate, and 12 penalty units if the person is not a body corporate.[55]

For minor contraventions or contraventions by small businesses, infringement notices can provide a timely and efficient method of dispute resolution without resorting to litigation.[56] As outlined in its 2020 infringement notice guidelines, the ACCC typically utilises infringement notices in cases involving conduct that is relatively minor, non-systemic or uncontested, where there have been lower-levels of consumer harm or detriment, or as part of a broader industry or sectoral compliance and enforcement program.[57] ASIC provides similar guidance on when it is more likely to utilise infringement notices in the financial sector.[58]

In practice, the ACCC and ASIC already undertake assessments of actual or likely breaches of UCT provisions and use that as a basis for other enforcement tools, such as accepting court enforceable undertakings. However, having no ability to issue infringement notices may potentially be constraining the flexibility of the ACCC and ASIC to respond swiftly to minor breaches of the UCT provisions. Introducing these powers would provide the ACCC and ASIC with a timely and proportionate enforcement option, enabling prompt regulatory intervention without the cost and complexity of court action. Moreover, Treasury believes the risk of inconsistent or arbitrary enforcement is low. This is because the UCT provisions contain a grey list of terms that can be considered unfair, which may be used to guide their assessment.[59] Further, if the business does not agree with the finding they can request that the infringement notice be withdrawn or choose not to pay the infringement notice. The regulator would then need to decide how to address the conduct in another way, such as by taking the matter to court.

52 Australian Government the Treasury (2020), *Enhancements to Unfair Contract Term Protections Regulation Impact Statement*, p 50–51, Treasury website.

53 Penalty amounts for infringement notices are calculated by reference to the value of a penalty unit prescribed by the *Crimes Act 1914*. The current value of a penalty unit is $330 for offences or contraventions committed on or after 7 November 2024.

54 CCA section 134C, item 1, 2.

55 ASIC Act section 12GXB.

56 ACCC (2020), 'Infringement notices – Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission', p 3; The Australian Government, Attorney-General's Department (2026), *Introduction to infringement notices*.

57 ACCC (2020), 'Infringement notices – Guidelines on the use of infringement notices by the Australian Competition and Consumer Commission', p 4.

58 ASIC (2023), *Infringement notices: Your rights*, website, accessed 6 May 2026.

59 ACL section 25; ASIC Act section 12BH.

### Finding 3

The introduction of civil penalties has been an effective regulatory tool to strengthen UCT protections by increasing deterrence. Stakeholders reported that more businesses are reviewing standard form contracts and amending or removing terms that may be unfair.

### Finding 4

As the amendments are relatively recent, there has been insufficient time for a substantial body of case law to develop regarding the amended provisions. Regulators have nonetheless been engaging in compliance operations.

### Finding 5

Visible enforcement and clear industry guidance remain critical to effectively deter against using UCT.

### Finding 6

Stakeholders were divided on the question of whether ASIC should be able to make applications for orders to prevent and remedy UCT in completed contracts under paragraph 12GNF(1)(b) of the ASIC Act.

### Finding 7

The two-year review period has not provided enough time to assess whether the absence of completed contracts from paragraph 12GNF(1)(b) presents an obstacle to enforcement of the UCT regime in the ASIC Act. Treasury would welcome receiving further evidence as it comes to hand.

### Finding 8

The absence of infringement notice powers limits the ACCC's and ASIC's ability to respond to lower-level harm. Enabling the ACCC and ASIC to issue infringement notices for UCT contraventions under the ACL and the ASIC Act would enhance regulators' ability to support proportionate, timely and effective enforcement, while complementing the existing civil penalty regime.

# Chapter 3: Expanded Class of Contracts

This chapter considers the implications of the expanded class of contracts captured by the UCT regime. It focuses on the types of contracts now covered, the operation of the revised thresholds under the ACL and ASIC Act, and stakeholder views on whether the current settings appropriately protect businesses with limited bargaining power. This chapter also identifies implementation issues that have emerged and whether there may be a case for further adjustments.

## Scope and scale of contracts captured

The 2022 reforms expanded the class of contracts captured by the UCT regime. Specifically, under the ACL, the upfront price payable under the contract was removed to increase coverage of small businesses protected by the UCT regime, and the small business threshold was increased.[60] Under the ASIC Act, the upfront price payable under the contract was retained but increased to $5 million from $300,000. The UCT protections in both the ACL and the ASIC Act now apply if one party to a small business contract is a business that either:

- employs fewer than 100 persons; or
- has an annual turnover of less than $10 million for the previous income year.[61]

Stakeholders noted that, given the higher employee and turnover thresholds, it follows that a larger number of contracts now fall within scope.[62] Stakeholders observed that standard form small business contracts are commonly used in supply chains and commercial networks where smaller counterparties have little opportunity to influence terms, even where the contract is not consumer facing, as they are typically offered on a 'take it or leave it' basis.[63] Many submissions reflected positively that the reforms have closed gaps that previously left some businesses exposed to unfair terms despite being, in practice, in a weaker negotiating position.

Stakeholder submissions revealed mixed views about whether the current thresholds strike the appropriate balance between expanding protections and maintaining certainty for contracting parties. A number of stakeholders supported the expanded thresholds and considered them appropriate.[64] Dr Howell et al. made the point that the current thresholds are also consistent with definitions in other consumer protection areas of law, including:

- The employee threshold to make a complaint to the Australian Financial Complaints Authority (AFCA).
- Entitlement to protection under the Scams Protection Framework (less than 100 employees, annual turnover of less than $10 million).

60 Prior to the amendments, the ACL offered protections to small businesses under the UCT regime, only where the upfront price payable under the contract did not exceed $300,000, or $1 million if the contract runs for more than 12 months. Businesses also needed to have a headcount of 20 or fewer employees.
61 ACL subsection 23(4); ASIC Act paragraph 12BF(4)(b).
62 Dr Giancaspro submission, p 2; Dr Howell et al. submission, p 3.
63 Stephen Palyga submission, p 1.
64 NSW Small Business Commissioner submission, p 1; Queensland Law Society submission, p 2; Master Electricians Australia submission, p 2.

- Entitlement to protection under the Banking Code of Practice (100 full-time equivalent (FTE) employees or less, annual turnover of less than $10 million, less than $5 million in debt to credit providers).

Other stakeholders, including Dr Giancaspro, noted that increasing the employee count for the purposes of the small business threshold in the ACL, and the equivalent provisions in the ASIC Act, was a sensible and pragmatic step that better reflects contemporary business structures.[65] In the financial services sector, AFCA was strongly in support of the expanded small business threshold while noting their limited visibility over small business contracts.

By contrast, several stakeholders argued that the thresholds may be capturing businesses that were not intended to benefit from the regime. Currently, the thresholds operate at a single entity level.[66] This means that, in some cases, a subsidiary of a large, global corporate group may qualify as a small business under the regime. Several submissions argued that such entities may have access to significant capital, legal advice, procurement leverage and have a high level of experience and capability in managing commercial transactions, notwithstanding that they meet the formal entity level thresholds.[67] The HIA suggested that where large organisations are able to access the same protections that were designed for smaller, vulnerable and under resourced businesses, this undermines the original intent of the regime.

Similar concerns were raised about subsidiaries of large corporate groups qualifying as small businesses for the purposes of the UCT regime under the ASIC Act.[68] In the financial services sector, ANZ, FSC and the Australian Financial Markets Association (AFMA) raised this as a particular concern in the context of structured and corporate group transactions. One stakeholder proposed that the threshold could be amended to allow a party to take into account a counterparty's membership of a corporate or business group, or the size of its related entities.[69]

Stakeholders from the wholesale financial market sector advocated for a legislative exemption from the UCT regime.[70] This sector has been issued a 'class no-action letter'[71] by ASIC to provide temporary and limited regulatory certainty in relation to the application of the UCT regime to certain wholesale market participants that are institutional or professional in nature, which is in place until 9 November 2027. The class no-action letter also carves out template industry contracts which underpin liquidity, speed and certainty of execution and global standardisation in certain financial markets. The class no-action letter was issued by ASIC, in consultation with Treasury, based on representations made as the amending Act was well progressed through the legislative process and with a view to avoiding any unintended effects of the legislative change to this sector.

In proposing their exemption, stakeholders also proposed expanding the scope of any considered future regulatory relief to broaden the classes of wholesale market participants to whom it applies. It was proposed to fully exclude standard form contracts entered with wholesale clients, as that term is defined in section 761G(4) of the *Corporations Act 2001*[72] or alternatively to adopt the

65 Dr Giancaspro submission, p 2.
66 FSC submission, p 3.
67 BCA submission, p 2; International Swaps and Derivatives Association (ISDA) submission, p 6, ANZ submission, p 5.
68 ISDA submission, p 6.
69 ABA submission, p 1.
70 AFMA submission, p 3; ASF submission, p 2; ISDA submission, p 1; ABA submission, p 2; ANZ submission, p 2.
71 Class no-action letter – sections 12BF(2A) and (2C) of the ASIC Act and sections 912A(1)(c) and 912D(1) of the *Corporations Act 2001*, 2 February 2024.
72 ABA submission, p 2; AFMA submission, p 2; ANZ submission, p 5.

Professional Investor definition in section 9 of the same Act.[73] In supporting expansion of the exemption, the ABA observed that wholesale clients are, by definition, sophisticated counterparties with the financial resources and expertise to understand and manage contractual risks. Stakeholders maintain while they may meet the small business test thresholds, they are generally entities who are not within the description of small businesses the regime was established to protect.[74] Absent the assurance the no-action letter provides, stakeholders are concerned that the expanded small business contract threshold could create unintended regulatory and commercial risk for these entities and the operation of wholesale financial markets.[75]

In the submissions to the review, some stakeholders proposed targeted improvements to the operation of the small business threshold. Several stakeholders noted there are also practical difficulties when seeking to determine if a counterparty is captured under the ASIC Act UCT protections as employee numbers may not be publicly disclosed.[76]

A number of stakeholders requested continued regulator guidance and education on the practical application of the amended provisions to address areas of persistent uncertainty.[77] The FSC suggested tailored advice to industries that use high-value standard contracts, particularly financial services.

Treasury further reiterates that the policy intent of the amending Act was to expand coverage of the UCT regime to a broader range of small businesses who face countervailing bargaining power imbalances. As was evident throughout the submissions received, the expanded coverage increases access to protections for a greater number of small businesses. However, this does not mean that all entities falling within that threshold receive the benefit of the UCT protections in respect of every contract.

There are multiple elements to the UCT protections, including that the contract in question, as discussed in Chapter 1, must meet the test for a standard form contract. Specifically, where a business has genuine bargaining power and has negotiated the terms of the agreement, the contract may not be classified as a standard form contract. If the contract in question is standard form, then whether a term is ultimately unfair is assessed through a 'three-limb' test. This ensures UCT protections are targeted at circumstances where there is genuine imbalance and detriment, and mitigates the risk that the UCT regime is applied inappropriately to relatively sophisticated or better resourced entities.

In this context, it may be argued that while such entities may fall within the expanded definition of a small business contract, they may face difficulty in applying the protections in their circumstances or establishing a term is unfair. While some stakeholders have raised concerns over the small business threshold being too broad, there is no evidence that this has resulted in contracts with such entities having been found to contain unfair terms. Overall, regulators are supportive of the small business threshold, and the reforms are achieving their goal of expanding protections to a larger class of participants. However, further targeted regulatory guidance may assist stakeholders' understanding of the various elements that comprise a standard form contract and the limbs of the unfairness test.

73 AFMA submission, p 2; ISDA submission, p 4.
74 ASF submission, p 2; AFMA submission, p 3; ISDA submission p 2.
75 ISDA submission, p 2.
76 AICM, ACF and ACDBA submission, p 4; FSC submission, p 3; ANZ submission, p 7.
77 ABA submission, p 2; BCA submission, p 4; ARC submission, p 1; FSC submission, p 2.

## Removal of the upfront price payable under ACL

Stakeholders provided a range of perspectives on the removal of the upfront price payable under the contract as a criterion for determining whether a contract is a small business contract under the ACL.

Some submissions, including Queensland Law Society and Legal Aid Queensland, indicated that the removal of the threshold has not given rise to any unintended consequences. COSBOA supported the change as a positive development that extends the availability of UCT protections for small businesses. On the other hand, Professor Clarke raised concerns about the lack of alignment between the ACL and the ASIC Act, noting that while the upfront price payable has been removed under the ACL, it remains in place under the ASIC Act for small business contracts. This was said to result in different outcomes depending on whether a contract relates to financial or non-financial products and services, even where the relevant contract terms are otherwise identical.

In contrast, some industry stakeholders questioned the extent to which the amendments have resulted in any positive outcomes. For example, the HIA submitted that, given the breadth of the revised threshold for a small business contract, the removal of the upfront price payable is unlikely to have delivered significant practical benefits. Treasury acknowledges the policy rationale for the removal of this threshold from the ACL reflected broader concerns that the previous monetary thresholds had become increasingly outdated in light of inflationary pressures and in some cases, failed to capture contracts that were high value but low margin.[78] This created outcomes that did not align with the intent of the regime. On this basis, Treasury considers that having no upfront price payable in the ACL ensures the regime remains appropriately responsive to a range of small business contracting practices.

## Upfront price payable under the ASIC Act

The amending Act increased the upfront price payable in the ASIC Act from $300,000 to $5,000,000.[79] This amendment extended UCT protections to a larger proportion of financial products and services and aligned with the AFCA's exclusion of complaints about small business credit facilities that exceed $5,000,000.

Several stakeholders commented on the complexity of applying the $5,000,000 price threshold for financial services noting the upfront price payable excluded contingent or uncertain amounts, such as where trades are entered into at market rates.[80] This potentially allowed high value contracts to be misclassified as small business contracts.

ANZ also noted difficulties arising from multiple interrelated contracts and master agreements, which are assessed individually rather than as part of a single commercial transaction, potentially capturing standard market arrangements within the UCT regime.

78 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth) p 39.
79 *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* section 49.
80 AFMA submission, p 4; ISDA submission, p 8; ASF submission, p 2; ABA submission, p 3.

## Compliance impacts

Stakeholder feedback indicated that the expansion of the class of contracts subject to the UCT regime has triggered a range of compliance activities for affected businesses. These include expenses related to reviewing and updating contracts, legal advice, updating internal procedures and retraining staff.[81] The Franchise Council of Australia's (FCA) submission contained survey data on sector-wide compliance efforts, including the systemic review and amendment of franchise documentation across its membership.

Industry bodies emphasised that these activities are resource intensive and often require coordination across legal, operational and commercial teams. The ARC added that this burden is likely to be more acute for businesses managing multiple contract suites or operating at scale, where changes must be implemented consistently across a large volume of standard form contracts. A joint submission from the bodies representing credit and debt professionals submitted that the costs of complying with the regime are 'materially higher than typical regulatory impact assessments would suggest, and extended well beyond legal review'.[82] By way of illustration, the submission noted that for a 'mid-sized trade credit operation', operational changes were estimated to accumulate between $15,000 to $100,000 or more, with further reform expected to generate similar costs. Most submissions did not provide quantitative information, limiting the extent to which compliance costs with the amended regime can be estimated in this report.

In light of this, the AICM, ACF and ACDBA cautioned against further legislative changes, arguing that the regime needs a period of stability so that businesses are able to manage their compliance costs effectively. ARC took a similar view, recommending that attention should instead turn to delivering practical guidance and compliance support to businesses. In contrast, Legal Aid Queensland considers that where compliance costs may have increased, this is outweighed by the benefits delivered to consumers and small businesses through the strengthened protections.

Treasury notes the distinction between one-off transition costs and ongoing compliance costs, and that some impacts may only become apparent over time as businesses adjust their contracting practices. Consistent with the estimated regulatory burden set out in the DRIS, ongoing compliance costs are expected to be moderate as revised processes and standard terms become embedded. Given the recency of the reforms and the limited body of judicial interpretation, Treasury considers that maintaining stability in the near term would allow the effectiveness and practical impacts of the expanded regime to be assessed more comprehensively. While concerns about the thresholds being overinclusive warrant ongoing monitoring, particularly as the regime matures, the evidence to date does not point to a clear case for further adjustment of the thresholds.

81 COSBOA submission p 2; ARC submission, p 4; AICM, ACF and ACDBA submission, p 4.
82 AICM, ACF and ACDBA submission, p 4.

### Finding 9

The amendments have meaningfully increased access to UCT protections for small businesses that are dependent on standard form contracts and lack countervailing bargaining power.

### Finding 10

Current thresholds are appropriate and should not be changed in the near term while impacts are monitored.

### Finding 11

The ACCC and ASIC should consider specific guidance on how the application of the small business threshold applies to corporate group entities and wholesale financial market participants.

# Chapter 4: Clarifying and Strengthening Provisions

This chapter examines whether the changes introduced by the amending Act provided sufficient clarity on the UCT provisions. It focuses on the amendments made to guide the court's determination of whether a contract is a standard form contract, and the exemption of certain clauses and categories of contracts from the UCT provisions.

As noted above, the UCT provisions in the ACL and the ASIC Act are designed to protect consumers and small businesses from unfair terms in standard form contracts. Standard form contracts are commonly relied upon by many sectors across the economy, and the matters a court must take into account in determining whether a contract is a standard form contract are set out in the ACL and the ASIC Act.[83]

The amending Act introduced several targeted changes to the UCT provisions in the ACL and the ASIC Act with the aim of clarifying and strengthening the UCT regime by:

- adding the repeat usage of a contract as an additional matter that a court must take into account when determining whether a contract is a standard form contract[84]
- clarifying that a contract may still be a standard form contract despite there being an opportunity for:
  - a party to negotiate changes that are minor or insubstantial in effect
  - a party to select a term from a range of options determined by another party
  - a party to another contract or proposed contract to negotiate terms of the other contract or proposed contract.[85]
- clarifying that remedies for a breach of the UCT provisions are available to all non-parties, regardless of whether they are consumers or small businesses[86]
- exempting certain categories of contracts from the UCT regime including certain life insurance contracts.[87]

Numerous stakeholders submitted that the amended provisions in the ACL provide sufficient clarity to assess whether a contract is a standard form contract and found that the list of indicative examples capture all the essential indicia of a standard form contract. The ACCC noted that the amendments to the standard form contract provision have simplified the aspects of its assessments and investigations of UCT matters. It considers these changes have reduced the number of occasions where a business has tried to argue that its contracts are not standard form contracts purely because they have allowed very minor and insignificant changes to be made, or where customers could select a term from a range of pre-set options. The ASBFEO similarly noted that clarifications about standard form contracts have provided greater certainty, with parties being more open to addressing issues where a clause may be identified as being a UCT.

83 ACL section 27; ASIC Act section 12BK.
84 ACL paragraph 27(2)(ba); ASIC Act paragraph 12BK(2)(ba).
85 ACL subsection 27(3); ASIC Act subsection 12BK(3).
86 ACL sections 239, 240; ASIC Act sections 12GNB, 12GNC.
87 ASIC Act sections 12BLA, 12BLB.

Dr Howell et al. noted that the issue of standard form contracts has primarily been contested in private litigation involving small business contracts, with courts applying the factors in subsection 27(2) of the ACL in a holistic manner and consistent with the intent of the provisions.[88] They further noted that given the variety of circumstances in which a small business contract is entered into, provision of any more specific definition or guidance would be difficult, and that the current approach appears to be appropriate. The FCA also supported the current framework noting that it is important not to interfere with the freedom of the parties to make commercial bargains in business-to-business dealings.

In the telecommunications industry, the TIO found that the amended provisions and additional guidance have been helpful in determining standard form contracts in their complaints handling and investigations. However, it submitted that some smaller telcos have disputed that UCT protections do not apply to their contracts as they claim that their services are not offered under standard form contracts because the customer had the opportunity to negotiate and change the terms of the contract before entering into it. The TIO noted, however, that in effect, the small business is only able to negotiate minor or insubstantial changes, and despite the additional clarity in the amending Act on what constitutes a standard form contract, some telcos continue to argue the ability to negotiate minor or insubstantial changes constitutes the customer having had an effective opportunity to negotiate the terms of the contract.[89]

Other stakeholders considered that changes were needed or that the definition of a standard form contract is complex. For instance, Professor Clarke submitted that the standard form contract requirement should be amended so that the UCT provisions apply to contractual terms regardless of whether the contract containing them is a standard form contract. He posits that this would not preclude businesses from using standard form contracts and that it is better to cover all contracts, leaving the issue of negotiation to be a factor to be considered when the court determines whether the term is unfair. The HIA noted that the amendments introduced multiple factors to the standard form contracts provision resulting in additional complexity.

Regarding the amendments in the ASIC Act, a joint submission from AICM, ACF and ACDBA, were of the view that while clarifications to the definition of standard form contract are workable, the issue for trade credit providers is more around identifying whether a counterparty qualifies as a small business. CALI noted that determining whether a life insurance policy is a standard form contract remains challenging, with uncertainty often resulting in cautious interpretation and an assumption that most contracts are standard form.

The BCA and the ABA submitted that while the amendments provide useful clarification, further guidance is needed for multi-party arrangements to clarify whether the contract is considered a standard form contract of the party that prepared it and which party bears responsibility for UCT compliance.

88 Dr Howell et al. submission, pp 3–4. The submission mentions two cases (*AIBI Holdings Pty Ltd v Virtual Technology Services Pty Ltd* [2022] FCA 696; *DCZ Early Learning Pty Ltd v Semper Mortgage Management Pty Ltd* [2024] QSC 120) where it notes that the courts have been applying the factors holistically to address the problem of consumers or small businesses facing the alternative of either accepting terms without negotiation or not contracting at all.

89 TIO submission, p 3.

Treasury considers that the changes introduced by the amending Act have clarified the UCT provisions, particularly around determining whether a contract is a standard form contract. While there appears to be instances of confusion on how to apply some of the amended provisions in specific cases, stakeholder feedback did not indicate unintended consequences resulting from the amendments. Greater awareness and guidance for businesses, along with increased judicial consideration, would likely help address uncertainties around the standard form contracts provision.

## Exemptions from the UCT regimes

Prior to the 2022 amendments, both UCT regimes under the ACL and the ASIC Act exempted a term of a standard form consumer or small business contract from being declared an unfair term if it is a term required, or expressly permitted, by a law of the Commonwealth or of a state or territory.[90]

However, the regimes did not clearly exempt terms that are read into a contract by the operation of a law of the Commonwealth, a state or a territory. In some cases, a law only requires certain contract terms be included in a contract if other types of terms have already been included in that contract.[91]

Therefore, in addition to the existing exemptions to the UCT provisions, the 2022 amendments clarified that the UCT provisions do not apply to:

- Contract terms that are taken to be included in a contract by operation of a Commonwealth, state or territory law, to the extent that the relevant law mandates their inclusion.
- Contract terms that result in other contract terms being included in a contract because of the operation of another law of the Commonwealth, state or territory, insofar as the provisions would prevent the other terms from being included or operating as required by the law.

The amendments were to ensure that the UCT regimes do not cover terms that other laws require parties to include in their contracts while still ensuring consumers and small businesses are appropriately protected from UCT.[92]

Of those who submitted on this issue, a number considered that the exemptions in the ACL are operating as intended. Based on the limited stakeholder feedback received, Treasury considers that the current exemptions in the ACL are operating as intended with no significant issues with its operation.

The amending Act clarified exclusions of two kinds of long-standing life insurance contracts from the UCT provisions. These are:

- guaranteed renewable life insurance policies,[93] contracts whereby the insurer agrees to continue to provide cover on the terms of the original contract so long as the policy holder continues to pay premiums; and
- life insurance policies that have been replaced, linked or unlinked.[94]

These exclusions were intended to provide certainty for consumers and insurers in relation to legacy contracts, and to support the continued operation of these products.

90 ACL paragraph 26(1)(c); ASIC Act paragraph 12BI(1)(c).
91 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth), p 41.
92 Explanatory Memorandum, Treasury Laws Amendment (More Competition, Better Prices) Bill 2022 (Cth), p 42.
93 ASIC Act section 12BLB.
94 ASIC Act section 12BLA.

CALI was the only submitter to raise concerns, noting the exemption is framed by reference to unlinking that results in two or more contracts, which may not reflect standard industry practice, especially long-standing guaranteed renewable policies.

AFCA noted it has limited evidence of the practical operation of the exclusions, noting the impacts of legacy life insurance policies often only emerge at the claims stage and suggested the need for ongoing regulatory oversight of excluded legacy policies.

In considering these submissions Treasury is of the view that there is insufficient evidence to support any further changes to the current provisions at this time.

### Finding 12

Stakeholder submissions show that the amended provisions in the ACL are generally operating as intended to provide sufficient clarity to determine whether a contract is a standard form contract.

### Finding 13

The amendments to make the standard form contracts provision clearer have simplified the ACCC's assessments and investigations of UCT matters.

### Finding 14

Further regulator guidance to provide greater educational support would be beneficial for businesses in understanding how the standard form contracts provision operates.

### Finding 15

Treasury is of the view there is insufficient evidence that life insurance policy linking and unlinking arrangements warrant further change at this time.