Law Council
OF AUSTRALIA

23 March 2026

Attention Tony McDonald
Assistant Secretary - Competition and Consumer Law Branch
The Treasury
Langton Crescent
Parkes ACT 2600

By email: consumerlaw@treasury.gov.au

Dear Mr McDonald

Review of the Amended Unfair Contract Terms Protections

1. This submission has been prepared by the Australian Consumer Law Committee of the Law Council of Australia's Legal Practice Section (**Consumer Law Committee**) and the Financial Services Law Committee of the Law Council of Australia's Business Law Section (**Financial Services Committee**) in response to the consultation paper titled *Review of the Amended Unfair Contract Terms Protections*, which Treasury released on 24 February 2026 (**Consultation Paper**).

2. Each respective Committee of the Law Council seeks to respond on specific aspects of the Consultation Paper.

Consumer Law Committee submissions

3. The Consumer Law Committee confines its submission to commentary in respect of the provisions of the *Australian Securities and Investments Commission Act 2001* (Cth) (the **ASIC Act**) that were amended and which relate to insurance contracts.

4. The Unfair Contract Term (**UCT**) regime insofar as it relates to insurance contracts was a reform sought by the consumer movement over a long period of time, but which only came into effect in relation to insurance in 2021 due to the *Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2019 Measures)) Act 2020* (Cth).

5. We note that this consultation arises at a time when ASIC's appeal of the Federal Court's decision in *Australian Securities and Investment Commission v HCF Life* [2024] FCA 1240 has begun to be heard by the Full Court but has yet to be decided.

6. Significantly, in that decision at first instance the Australian Securities and Investments Commission (**ASIC**) was not successful in arguing that the term in the relevant contract was an "unfair contract term" within the meaning of the ASIC Act.

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7. In another test case before the Full Court, ASIC was unsuccessful in arguing that a term in a general insurance contract was an unfair contract term (see *Australian Securities and Investment Commission v Auto and General Insurance Company Limited* [2025] FCAFC 76).

8. The above cases tend to suggest that there is an insurance specific issue in relation to the UCT regime, in that the courts are relying on provisions of the *Insurance Contracts Act 1984* (Cth) (the **ICA**) to ameliorate unfairness and cure unfair contract terms. The concern of the Consumer Law Committee is that the average consumer has no knowledge of the various consumer protection mechanisms contained within the ICA (such as s.47 or s.54 of the ICA). That is, a consumer who purchases a contract of insurance will in all likelihood rely upon the provisions of the policy they have purchased for protection as opposed to any other existing consumer protections (of which they are unaware).

9. It is understood by the Consumer Law Committee that it was always the intent of the UCT regime to be standalone consumer protection in addition to other consumer protections, including those contained within the ICA. It is therefore the view of the Consumer Law Committee that the UCT regime ought to be amended so as to ensure that an Unfair Contract Term cannot be found to not be unfair simply because another consumer protection, in the ICA or otherwise, ameliorates the unfairness.

10. The Consumer Law Committee's responses to questions 1, 3 and 4 of the Consultation Paper are set out below.

Question 1 - How effective have the new remedies and enforcement provisions been in discouraging the use of UCT? Please provide evidence where possible.

11. The Consumer Law Committee observes that the civil penalty regime has thus far had limited success as a deterrent of misconduct because as at the date of this submission there have not been any successful relevant prosecutions in relation to an insurance contract.

Question 3 - Should paragraph 12GNF(1)(b) be extended to give ASIC the ability to seek orders for completed contracts?

12. The Consumer Law Committee submits that paragraph 12GNF(1)(b) of the ASIC Act should be amended to enable ASIC to seek orders in relation to completed insurance contracts. This is particularly important in the context of general insurance contracts which are often annual contracts that provide an annual contract renewal. That is, the relevant contract will often not be extant by the time any prosecution could reasonably be prepared and filed.

13. It is the view of the Consumer Law Committee that there is a value in ASIC being able to seek orders in respect of contracts which were in force, and which contained unfair contract terms, even though the relevant contract may now have lapsed.

Question 4 - Has there been any increase or decrease in class actions related to UCT?

14. Class actions have operated historically as a significant deterrent for poor corporate behaviour alongside and as complementary to ASIC prosecution, with the additional benefit of compensation for consumers. There have been a number of class actions which have recovered very large settlements on behalf of consumers, such as those in relation to add-on insurance, in circumstances where an individual case would not be financially viable to pursue.

15. The Consumer Law Committee submits that consumer class actions should be expressly facilitated by the UCT regime to ensure consumer access to justice.

Financial Services Committee submissions

16. The Financial Services Committee confines its submissions to Questions 5 and 6 of the Consultation Paper only in respect of the definition of 'small business contract'.

Background history of the legislative concept of small business contract

17. By way of background, the changes made to the Australian Consumer Law (the **ACL**) and the ASIC Act in 2022 expanded the class of contract covered by the UCT protections by amending the criteria for determining whether a contract is a small business contract.

18. A contract is now a small business contract if the upfront price payable under the contract does not exceed $5 million (ASIC Act only) (the **Upfront Price Payable Test**) and a party to the contract satisfies either or both of the following conditions:

    (a) the party makes the contract in the course of carrying on a business and at a time when the party employs fewer than 100 persons (the **Employee Number Test**);

    (b) the party's turnover, for the party's last income year that ended at or before the time when the contract is made, is less than $10 million (the **Turnover Test**).

19. Prior to the 2022 changes, the tests for determining whether a contract was a small business contract operated differently such that a contract would only be a small business contract if the Employee Number Test and either the Turnover Test or Upfront Price Payable Test were satisfied (with different thresholds in each case).

Question 5 - To what extent has expanding the definition of small business contracts increased the number of contracts subject to UCT protections?

20. The Financial Services Committee submits that the 2022 changes have greatly increased the number of contracts subject to the UCT protections as a result of expanding the definition of small business contracts.

21. The Financial Services Committee submits that, as the Employee Number Test and the Turnover Test only consider the employees and turnover of the party that enters into the contract, the 2022 changes resulted in the unintended outcome that the UCT protections may apply to contracts with entities that satisfy the relevant small business tests but form part of much larger businesses that would not ordinarily be considered to be small businesses.

22. It is not uncommon for businesses to structure their affairs in the form of business groups with several different legal entities for various reasons. For example, businesses may incorporate separate subsidiary companies for particular projects, functions or transactions (e.g. special purpose vehicles).

23. It is also not uncommon for employees to be shared across legal entities within the same business group with employees employed by different legal entities based on their role or business unit or for one entity in the group to be responsible for employing all employees required across the group.

24. In such cases, where an entity within the group enters into a contract at a time when it employs fewer than 100 employees or has a low turnover, the contract will be a small business contract and the UCT protections will apply, even if the entity is part of a very large business group.

25. Large businesses, including ASX-listed companies, can therefore obtain the benefit of the UCT protections simply by contracting through a subsidiary with fewer than 100 employees or less than $10 million in annual turnover.

Question 6 - Is the 100 full-time equivalent (FTE) and $10 million threshold established within the expanded definition under the ACL appropriate, or are further amendments required?

26. The Financial Services Committee notes that the intended outcome of the 2022 changes was to limit UCT protections to consumers and small businesses (albeit with an expanded concept of who would be considered a small business). For the reasons stated above, there have been unintended consequences which have made the UCT protections more widely available than was the original intention.

27. The Financial Services Committee therefore recommends that consideration be given to amending the Employee Number Test and Turnover Test to not only consider the number of employees and turnover of the party that enters into the contract, but also those of any related body corporate as defined in section 50 of the *Corporations Act 2001* (Cth).

Further contact

28. Each Committee thanks Treasury for the opportunity to provide this submission.

29. Should you wish to discuss any aspect of this submission:

(a) made by the Consumer Law Committee, please contact the Consumer Law Committee co-chairs (Dana Beiglari [redacted] and Ursula Noye [redacted]); and/or

(b) made by the Financial Services Committee, please contact the Banking and Credit Lead of the Financial Services Committee, Joshua Annese [redacted].

Yours sincerely



James Popple
Chief Executive Officer