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Review of the Amended Unfair Contract Terms Protections

March 2026

The Australian Retail Council (ARC) welcomes the opportunity to provide feedback to Treasury's statutory review of the 2023 amendments to the unfair contract terms (UCT) regime under the Australian Consumer Law (ACL) and the Australian Securities and Investments Commission Act 2001 (ASIC Act).

ARC represents a \$444 billion sector and employs 1.4 million Australians, one in ten workers, making retail the nation's largest private sector employer and a cornerstone of the Australian economy.

Our membership spans the full breadth of Australian retail: from family-owned small and independent businesses, which comprise 95 per cent of our membership, to the largest national and international retailers that support thousands of jobs and sustain communities across both metropolitan and regional Australia. Our industry operates more than 155,000 retail outlets nationwide, with the majority of those also represented by an online or e-commerce presence.

A strong retail sector delivers widespread benefits to all Australians, with a significant portion of every dollar spent in retail flowing back to employees, suppliers, superannuation funds, and local communities. We are united in advocating for the policy settings, reforms and collaboration that will drive growth, resilience, and long-term prosperity for Australian retail and the millions who rely on it.

Executive Summary

ARC supports fair and transparent contractual arrangements and recognises the importance of maintaining appropriate safeguards for consumers and small businesses who may be vulnerable to bargaining power imbalances.

Given the significant civil penalties now attached to UCT contraventions, ARC considers it important that the framework remains proportionate, practical to comply with, and supported by clear guidance to promote consistent application.

ARC's key positions are as follows:

- A measured, evidence-based approach is warranted, and further change should be pursued only where a material problem, uncertainty, or enforcement gap is demonstrated;
- Enforcement should remain harm-focused and proportionate, prioritising circumstances where a party applies, relies on, or seeks to enforce an unfair term;
- The small business thresholds are broadly appropriate for retail, and should remain stable in the near term while impacts and compliance costs are monitored; and
- The corporate group status of business claimant should be included in the assessment of coverage.
- ARC opposes the extension for completed contracts under the ASIC Act but that, if an amendment proceeds, it must be accompanied by clear guardrails to preserve certainty and avoid retrospective exposure.

Let's talk shop.

- Franchising should follow a 'wait and see' approach, allowing recent Code reforms and associated ACCC activity to bed down before considering additional intervention.

Regulatory context and practical implementation

Retail is a high-volume sector that contracts at scale across consumer and business-to-business settings. Standard form contracts play an important role in supporting operational consistency and reducing transaction costs across large and diverse retail operations.

At the same time, the amended UCT regime attaches significant civil penalties to the use of unfair terms. This elevates the importance of regulatory settings that are clear, proportionate and practical to comply with, particularly where businesses manage multiple contract suites across customer, supplier and service arrangements.

ARC considers the primary risks in the current environment include uncertainty in how "unfairness" is applied in practice across diverse commercial contexts; compliance burden and cost associated with broad repapering and defensive legal drafting; and risk of overreach, where enforcement settings unintentionally encourage conservative contracting behaviour that does not improve outcomes.

ARC's submission therefore focuses on principles that support consistent application and efficient compliance, while targeting conduct that causes real harm.

Guidance, clarity and practical compliance

The UCT regime is inherently context-specific. Compliance costs associated with the UCT regime are substantial, unavoidable and ongoing. The amendments to the regime have increased those burdens by adding the new requirements to estimate the "small business" status of trading partners to existing difficulties due to the lack of clarity in some core concepts. Clear guidance is essential to support consistent application, reduce uncertainty-driven compliance burden, and ensure the regime targets problematic conduct.

ARC recommends:

- continued regulator-led guidance and education focused on practical application of the amended provisions;
- increased industry consultation to ensure guidance is relevant and regularly updated;
- expanded worked examples that assist businesses to identify terms likely to raise concerns, and the types of safeguards or limitations that may be relevant in assessing fairness; and
- guidance that supports consistent application across common commercial contexts, including where standard form templates exist but certain schedules, pricing or operational details are negotiable.

ARC considers guidance and education will be particularly important while the amended regime continues to bed down and before significant further legislative change is contemplated. In ARC's view, complexity and

Let's talk shop.

uncertainty, rather than wilful non-compliance, are often the root cause of issues in this area, reinforcing the importance of practical guidance and education to support consistent compliance outcomes.

Remedies, penalties and enforcement approach

Civil penalties: proportionality and targeting harmful conduct

Civil penalties are an important deterrent for deliberate or systemic misuse. However, penalties should be directed to harmful conduct and outcomes, not technical non-compliance. ARC supports a proportionate approach that prioritises enforcement in circumstances where a business has applied, relied on, or sought to enforce a term that is unfair, particularly where this causes (or is likely to cause) material detriment.

The extraterritorial operation of the regime should also be reviewed. Currently, it is possible that foreign businesses or individuals can claim under the provisions on the basis of a tenuous connection with Australia. The provisions should be adjusted so that the UCT protections only apply to transactions (particularly commercial dealings) that have substantially connection with, or where any alleged harm is suffered in Australia.

Given Treasury's acknowledgement that the amended provisions have only been operating for a relatively short period, ARC considers it important that enforcement settings and expectations are carefully calibrated to the maturity of the regime, supported by clear guidance and consistent administration.

ARC recommends an enforcement posture that:

- prioritises systemic or intentional misuse and circumstances involving material detriment;
- supports remediation and prevention of recurrence; and
- avoids incentivising unnecessary legal churn, broad repapering exercises, or overly defensive contracting in response to uncertainty.

Completed contracts under the ASIC Act

ARC does not consider there should be any extension of powers to completed contracts. However, in the event that such an amendment proceeds, it should be narrowly confined and designed to preserve certainty. Any extension must be narrowly framed, to address a demonstrated enforcement gap for short-duration contracts that complete before a matter can be heard.

If Government proceeds, ARC considers guardrails should include:

- the term was relied upon in practice (not merely included);
- reliance caused, or was likely to cause, identifiable and material detriment;
- application limited to contracts completed within a defined, recent lookback period (for example, the previous 12 months); and
- remedies directed to reversing detriment and preventing recurrence, rather than creating broad retrospective punitive exposure for completed arrangements.

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Expanded class of contracts and compliance impacts

ARC recognises the amendments expanded the class of contracts covered and, under the ACL, removed the upfront price threshold. ARC expects these changes have increased the number of contracts captured, particularly in business-to-business settings.

Small business definition

ARC considers the current thresholds (fewer than 100 persons, or annual turnover below \$10 million) are broadly appropriate in the retail context. Retail is typically a high-turnover, low-margin sector, and a \$10 million turnover threshold does not necessarily indicate strong bargaining power or contracting sophistication.

Conversely, there are situations in which businesses that meet one or both criteria do not suffer from an imbalance of bargaining power. Local subsidiaries of large, international corporate groups may have fewer than 100 employees but could bring substantial negotiating power to commercial transactions and should not be entitled to invoke the small business protections under the UCT provisions. ARC suggests that the regime be amended to include appropriate consideration of corporate groups in the assessment of small business status.

Otherwise, ARC does not support near-term changes to the small business definition while the amended regime is still bedding down. Treasury should continue to monitor practical impacts and compliance costs, including whether the settings remain appropriately targeted across different sectors, before considering any further amendment.

Compliance costs and practical impacts

ARC members have incurred compliance costs associated with reviewing and updating standard form contract suites, obtaining legal advice, strengthening internal governance and template controls, and staff training. These costs are amplified where businesses operate at scale and manage multiple contract suites and counterparties.

ARC recommends maintaining stable settings in the near term while the regime beds down, and prioritising guidance and practical compliance support to ensure the regime achieves its objectives without driving unnecessary compliance churn.

Clarifying provisions (standard form and related concepts)

ARC acknowledges amendments intended to clarify operation of the standard form framework and related concepts. Clarification should reduce uncertainty and support consistent application.

ARC recommends:

- ongoing practical guidance, particularly for arrangements where templates exist but certain components are negotiable; and

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- regulator engagement with industry to identify areas of persistent uncertainty that may warrant targeted guidance rather than further legislative change.

Franchising

ARC notes the consultation seeks views on extending UCT protections to all franchisees. Any further intervention in franchising should be staged and evidence-based, recognising the comprehensive existing framework and the recency of Franchising Code reforms.

Franchising is already regulated under a comprehensive framework, and reforms to the Franchising Code have only recently commenced (with some provisions commencing in late 2025). ARC therefore supports a clear “wait and see” approach, allowing time for the Code reforms and associated ACCC education and enforcement activity to operate and be assessed before considering additional intervention.

ARC recommends Government first identify and quantify any evidenced gap cohort of franchisees who are not covered by existing UCT settings, and assess whether the recently reformed Code and current compliance and enforcement activity are adequately addressing the key risks and problematic clauses in practice.

If, following that staged assessment, additional measures are considered necessary, ARC recommends that any approach:

- be tightly scoped to an evidenced gap cohort;
- avoid creating duplication with existing Code protections and dispute resolution settings; and
- include clear transitional arrangements and practical guidance to minimise unnecessary repapering and compliance churn.

ARC does not support reopening core UCT concepts specifically for franchising at this stage.

Conclusion

ARC supports fair and transparent contractual arrangements and the importance of appropriate safeguards for consumers and small businesses who may be vulnerable to bargaining power imbalances.

Given the amended regime is still bedding down and now carries significant civil penalties, ARC encourages a measured and evidence-based approach to any further reform. ARC considers priority should be placed on guidance, clarity and proportionate, harm-focused enforcement that targets systemic misuse and conduct causing material detriment.

ARC welcomes continued engagement with Treasury as the review progresses. Any queries in relation to this submission can be directed to policy@retail.org.au.