ABA / Member Feedback on Review of the Amended Unfair Contract Terms (UCT) Protections

18 March 2026

Focus Area	ABA / Member Bank Feedback
Small Business / Small Business Contract definition	We consider the existing definition of "small business contract" is overly broad in the context of financial products and services. The current small business contract definition also adds significant complexity to financing arrangements for business groups. Looking at a business "group" from both an employee and turnover perspective is more appropriate to ensure that regulatory oversight is focussed on the smaller, more vulnerable customer cohort that the UCT regime is aiming to target rather than, for example, a subsidiary of a large domestic or international corporate group that may have fewer than 100 employees (or which may not meet the turnover threshold) but would otherwise be considered sophisticated. This is particularly the case given that it is common practice for a corporate group to use a single group entity to employ staff who perform duties for other group entities. This leads to a distorted application of the UCT regime to corporate entities receiving financial products and services that notionally have less than 100 employees, and where there is no practical difference in the bargaining power for all the collective subsidiaries in the corporate group. Similarly, the application of the turnover test individually to subsidiaries of large domestic or corporate groups with very large turnover at a consolidated group level leads to an application of the protections afforded by the UCT beyond what we understand to be its intended reach. To use a practical example, in a recent transaction a major bank was dealing with a financial subsidiary of an industrial company. While the subsidiary had fewer than five employees, its parent was an ASX 200 listed company with a market capitalisation of over $5 billion and employing over 25,000 people globally, yet the subsidiary was captured under the definition of a small business under the UCT provisions. This outcome is considered contrary to the intent of the regime, which should be directed to protecting actual small businesses and not large corporates or the subsidiaries of large corporates. We believe the above concerns would be addressed by amending the "small business contract" definition 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 in calculating whether a particular contract is a 'small business contract' for the purposes of the UCT regime (noting this approach is taken in the 2025 Banking Code of Practice).

	Addressing the concept of large domestic or corporate groups would simplify regulation and support productivity whilst maintaining the overall policy objective of protecting small businesses.
Wholesale Clients	We support legislating the relief provided by ASIC's "*Class no-action letter – s.12BF(2A) and (2C) of the Australian Securities and Investments Commission Act 2001 and s912A(1)(c) and 912D(1) of the Corporations Act 2001"* dated 2 February 2024 (and expiring 9 November 2027) as part of this review. We also support expanding the relief to exclude standard form contracts that are entered into with wholesale clients, as defined in s761G(4) of the Corporations Act, entirely from the UCT regime. Wholesale clients are, by definition, sophisticated counterparties with the financial capacity and expertise to understand and manage contractual risk and are already protected by a comprehensive regulatory framework. Codifying the relief in the primary UCT legislation as part of this review would simplify the relief (e.g. removes the time limit) and provides certainty for participants in the wholesale financial markets, while still providing appropriate protection for retail and small business clients.
Extraterritorial application	We have concerns about the potential breadth of the extraterritorial application of the UCT regime. As currently framed, the regime may apply to contracts used entirely offshore and entered into with non-Australian counterparties, solely because one party is incorporated in or carries on business in Australia. This outcome extends well beyond the policy intent of protecting Australian consumers and small businesses and creates unnecessary legal and commercial risk. We submit that the regime be limited to matters with a clear connection to Australia such as contracts entered into in Australia with Australian counterparties incorporated or carrying on business within Australia. The regime should not apply where there is no meaningful Australian nexus.
Unfair Term definition	Further guidance (including examples) on what contractual terms are considered "unfair" would be useful.

	In the absence of a universal "bright line" test, in many cases whether a term is unfair will depend on context, and reasonable views may differ across contracts and industries.
Legislative Flexibility	We would welcome amendments that allow greater legislative flexibility to address issues / consequences as they arise under the UCT regime. Specifically, consideration should be given to allowing regulations or empowering the Minister or ASIC to exempt specified classes of contracts from the UCT regime or make other changes to advance the regime's policy objectives.
Question 3 *Should paragraph 12GNF(1)(b) be extended to give ASIC the ability to seek orders for completed contracts?*	Regarding whether paragraph 12GNF (1)(b) should be extended to completed contracts, there is a concern this will open up cases retrospectively from 9 November 2023 when the UCT changes came into force. An extension to completed contracts may be acceptable if it were limited to completed contracts where: o the unfair term was relied upon in practice; o an identifiable financial detriment flowed from that reliance (e.g. variation of price); o the completed contract was completed within the last 12 months; and o the court's ability to make orders for completed contracts is limited to reversing that financial detriment caused by relying on an unfair contract term but not order other punitive penalties.
Question 7 *Is the upfront price payable threshold increased under the ASIC Act appropriate, or are further amendments required?*	We consider that the test of "upfront price payable under the contract" is too complex to determine in the context of financial services and produces different outcomes for different financial products that are not supported by the policy objectives of the UCT regime. Notwithstanding our preference for replacing the upfront price test, to the extent that this test remains, it would be useful as part of the review that further guidance on the calculation of the upfront price test for particular products be developed to ensure efficiency and consistency. Specifically, it would assist if guidance were provided in respect of: o how and when banks calculate the upfront price on financial markets products where the trades are often entered into at the market rate so there is no "upfront price" payable despite their significant size;

	○ contingent instruments, such as guarantees and standby letters of credit, standing indemnities, bill facilities, service products without a credit limit such as export / import documentary collections, export documentary letters of credit; and ○ asset financing products such as leases, rentals and hire purchases.
Question 10 *Do the amended provisions give sufficient clarity on whether a contract is a 'standard form' contract?*	In multi-party standard form contracts (for example in a novated lease where the Novation Deed involves the employer, financier, and employee), greater clarity is recommended as to whether the contract is considered a standard form contract of the party that prepared it, and which party bears responsibility for UCT compliance.