Law Council
OF AUSTRALIA

Enhancements to Unfair Contract Term Protections

The Treasury

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

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- Dr Jacoba Brasch QC, President-elect
- Mr Tass Liveris, Treasurer
- Mr Ross Drinnan, Executive Member
- Mr Greg McIntyre SC, Executive Member
- Ms Caroline Counsel, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

Introductory note

1. The Law Council of Australia (**Law Council**) welcomes the opportunity to make a submission to the Treasury regarding the *Enhancements to Unfair Contract Term Protections* consultation which provides options to enhance the unfair contract term (**UCT**) protections for small business, consumers, and insurance contracts.

2. The Law Council has received contributions from three of its committees in relation to this consultation, including from the:

   (a) Competition and Consumer Committee of the Business Law Section;

   (b) Small and Medium Enterprise Committee of the Business Law Section (**SME Committee**); and

   (c) Australian Consumer Law Committee of the Legal Practice Section (**ACL Committee**).

3. These committees have provided divergent views on many of the questions raised in the *Consultation Regulation Impact Statement* (**RIS**) reflecting the differing policy perspectives of each of the committees. Therefore, the Law Council provides the views of each of the contributing committees separately to ensure clarity of message.

Competition and Consumer Committee (Business Law Section)

Introduction

4. The Competition and Consumer Committee provides a forum through which lawyers, economists, academics and other interested parties can discuss competition and consumer law issues. The Competition and Consumer Committee meets regularly to discuss legal developments, policy issues and potential areas of competition and consumer law reform. It also actively participates in law reform processes such as the current consultation.

5. The substantive submission of the Competition and Consumer Committee in response to the 'key questions' raised in section 3 of the RIS is provided at **Annexure A**.

6. The Competition and Consumer Committee also takes the opportunity to make the below preliminary comments in relation to some of the key themes raised by the RIS.

Preliminary comments

Regulation must be simple and practical to implement

7. The Competition and Consumer Committee notes that the UCT regime originates from legislative provisions addressing contractual provisions as between consumers and business. It is important to ensure consistency and certainty of application of these provisions as between business and consumers in relation to any extension of the UCT regime to business terms. With this in mind, it is very important in considering the application of the UCT regime that all businesses are able to readily understand the laws and that they are simple and practical to implement.

8. The current UCT regime does not meet this standard. There are significant difficulties for businesses seeking to understand the application of the regime arising from:

    - the lack of any publicly available information to determine whether a counterparty employs 20 or fewer employees;
    - the lack of any compulsion on counterparties to confirm if they are a 'small business' in the relevant sense; and
    - difficulties in determining the 'upfront price' payable under a contract.

9. Additionally, there is a lack of clear guidance as to the circumstances in which clauses will be deemed unfair. This is in part due to the fact that there has yet to be any enforcement action brought by the regulator that has proceeded to a fully contested hearing. While there are now a number of judgments in connection with actions brought in the Federal Court of Australia by the Australian Competition and Consumer Commission (**ACCC**) alleging breach of unfair contract terms, these judgments have all been entered by consent, such that the Court has not had exposure to the full range of arguments that a contested hearing would elicit.

10. There is also a lack of practical guidance about what makes a term 'unfair' under the Australian Consumer Law (**ACL**). Clearer regulatory (as well as judicial) guidance is required to ameliorate this uncertainty.

Should unfair terms be illegal and subject to penalties?

11. The Competition and Consumer Committee has noted the calls by the ACCC for penalties in relation to the UCT regime with the aim of making more businesses compliant. Given that a provision may be fair in some circumstances, but not in others, care should be taken not to see regulatory overreach and penalties imposed where reasonable people may have different interpretations of the provisions.

12. The Competition and Consumer Committee does not consider that the inclusion of unfair terms in standard form contracts (**SFCs**) should be illegal and subject to penalties. The Competition and Consumer Committee accepts that there are concerns about the ongoing use of unfair terms in certain industries. However, the Competition and Consumer Committee considers that the introduction of financial penalties represents regulatory overreach and is not the appropriate regulatory response to address this issue. Further, the ACCC has recently noted that companies are changing provisions before the ACCC has the chance to take them to Court. That generally suggests to the Competition and Consumer Committee that the current regime is working, and that further enforcement mechanisms are not required.

13. Prohibitions which carry a penalty must be sufficiently certain to enable businesses to know, with a high level of certainty, what conduct will expose them to a financial penalty. The Competition and Consumer Committee's primary concern is that the test for unfairness is not sufficiently certain in this regard. This is largely due to the third limb of the test for unfairness – that the term is not 'reasonably necessary' to protect the legitimate interests of the party advantaged by the term. In the Competition and Consumer Committee's view, there is still a lack of clarity as to precisely what this limb means and how it applies. Accordingly, there can be differing but reasonable views as to whether a term is unfair. To illustrate this point, the Competition and Consumer Committee has identified below a number of examples which Competition and Consumer Committee members have considered in recent years when conducting ACL compliance reviews of SFCs:

    - Scenario 1 – a distributor can terminate supply for any reason with 30 days' notice. This flexibility enables the distributor to offer a broader range of products than it otherwise would. If customers can genuinely source alternative products within 30 days if the contract is terminated, is it reasonably necessary for the distributor to be able to terminate on notice without cause? Or must the business try to predict the particular circumstances in which it may wish to terminate in future?
    - Scenario 2 – a business supplies goods and services on a subscription basis. The contract automatically renews once per year unless the customer gives notice. Automatic renewal enables the company to minimise administrative costs, ensure continuity of service to its customers and recoup its costs over a longer period than would otherwise be the case. If customers have a genuine opportunity to cancel their subscription and therefore suffer no detriment, is it reasonably necessary for the terms to automatically renew? Or must the customer have a greater opportunity to terminate the subscription?
    - Scenario 3 – a company supplies an App to its customers in conjunction with other goods and services. It limits its liability to direct costs caused by its negligence, wilful misconduct or fraud. Limiting its liability in this way enables it to manage the risks associated with its reliance on various telecommunications and technology providers as well as a very large customer base of more than two million customers. If the company was unwilling to offer the App without limiting its liability to direct costs, is the

limitation reasonably necessary? Or must the supplier be liable for indirect costs also?

14. As the above examples illustrate, rational businesses will seek to reduce their risk exposure through the terms and conditions on which they contract. Doing so may enable that business to supply a greater range of goods and services (Scenario 1), supply goods or services at lower prices (Scenario 2) or innovate with new products and services (Scenario 3). For this reason, the party offering the term may legitimately believe that the term is sufficiently balanced and reasonably necessary to protect their legitimate interests, but the subjective nature of 'unfairness' is such that the regulator, and ultimately a court, may hold a different view. If a term is declared unfair and void, the business is already exposed to significant commercial consequences as the term cannot be relied upon. Going further and imposing a financial penalty on that business would, in the Competition and Consumer Committee's view, be excessive.

15. As detailed in the attached response, the Competition and Consumer Committee considers that a more appropriate response to the identified problem is targeted regulatory engagement with those industries of concern as well as additional regulatory guidance. The regulator would be well placed to conduct further targeted regulatory engagement based on the complaints it receives. The Competition and Consumer Committee appreciates that this would be an additional burden on the regulator. However, in the Competition and Consumer Committee's view, it would be preferable to imposing penalties for inclusion of unfair contract terms given the concerns identified above.

16. If, contrary to the Competition and Consumer Committee's submission, financial penalties are introduced, steps should be taken to ensure that they are only sought in exceptional circumstances. For instance, penalties should not be available unless:

    - warnings have been provided to the relevant party beforehand by the relevant regulatory agency;
    - the party has been given an appropriate and reasonable opportunity to consider their position and amend the relevant terms; and
    - despite those warnings, the party has failed to make the necessary amendments to address the regulator's concerns within a reasonable time.

17. This proposed approach does not prevent robust and appropriate enforcement, but is a measured approach in relation to this type of law that is suitable for allowing big and small business the opportunity to comply with the UCT regime, while not permitting businesses to avoid compliance or prevent the ACCC from seeking appropriate penalties for non-compliance.

General observations

18. Treasury's consultation is aimed at assessing various options to enhance the UCT protections for small business, consumers, and insurance contracts. The Competition and Consumer Committee believes that the starting point in assessing these options is to first consider current views as to the application of the UCT regime *and then* any extension of its operation.

19. In this respect, the Competition and Consumer Committee reiterates that the UCT regime should have clear application so that businesses (whether large or small) have a clear framework for compliance. In particular, there should be no ambiguity as to the operation of the regime which could see law-abiding companies

prosecuted, and subjected to significant penalties and reputational harm, for contraventions founded on unclear or ambiguous provisions.

20. This area does not always provide clear, bright lines of guidance, and as such the Competition and Consumer Committee now turns to the law and legislative guidance.

21. The Competition and Consumer Committee has concerns that the ACCC has overemphasised the need for penalties in relation to the UCT regime, particularly in situations which do not involve a flagrant contravention and clear flouting of the law, but are in fact balanced, alternative views of the reasonableness of particular clauses set against the context of a particular industry or sector. Reasonable minds can differ in relation to the interpretation of the UCT regime to particular cases and therefore the Competition and Consumer Committee suggests that there should be consideration of allowing a warning mechanism before the ACCC can resort to seeking penalties.

22. The Competition and Consumer Committee believes these issues need to be considered particularly in more detail as the UCT regime also applies to consumer-to-small business situations. In these situations, appropriate provisions need to be put into place to allow the operation of UTC regime to have:

    (a) balanced operation given its application depends on particular circumstances;

    (b) checks and balances in enforcement given (a); and

    (c) restraint so that this does not become a form of de-facto regulation as to the prohibition of particular words and expressions that is not context dependent.

Small and Medium Enterprise Committee (Business Law Section)

Introduction

23. The SME Committee has as its primary focus the consideration of legal and commercial issues affecting small businesses and medium enterprises (**SMEs**) in the development of national legal policy in that domain. Its membership is comprised of legal practitioners who are extensively involved in legal issues affecting SMEs.

24. Before addressing each of the questions outlined in the RIS, the SME Committee provides some preliminary comments about UCT protections for small businesses.

25. The SME Committee was a strong supporter of the proposal in 2014 to extend the UCT laws to small businesses. The SME Committee believed that such a law was necessary to go at least some way to addressing the significant disparities in bargaining power which exist between large and small business.

26. While the SME Committee had argued in its submissions to, and consultations with, Treasury staff in 2014 for more far-reaching protections for small business than what was ultimately introduced by the Australian Government, the Committee believes that the laws which were introduced have addressed unfairness in SFCs.

27. Having said that, the SME Committee submits that further amendments are required. A primary reason why the Committee supports a number of the proposed amendments is due to what appears to the members of the Committee to be a low level of proactive compliance by large businesses in amending their SFCs to remove UCTs. The fact that many more powerful and large businesses have not been proactive in amending their SFCs to remove UCTs is evident by reference to the list of enforcement actions taken by the ACCC over the last three years on page 7 of the RIS. From this list, a significant number of large companies had apparently taken no or limited steps to amend their SFCs, even three years after the UCT laws for small business were introduced. Furthermore, many of these companies only amended their SCFs to remove UCTs at the insistence of the ACCC.

SME Committee's views regarding proposed options

28. The SME Committee's views in relation to the various options set out in the RIS are as follows:

Issue	Preferred Option
Legality and Penalties	**(varied) Option 3** – Make the inclusion of, or failure to remove, UCTs in SFCs illegal and attach civil penalties (para 4.5). Authorise ACCC/ASIC to define and list key UCTs, while maintaining court power to decide as between parties to a SFC whether a term is unfair. **Option 4** – Strengthen power for regulators by introduction of infringement notice power (para 4.6.4a).
Flexible remedies	**Option 2** – Courts to determine the appropriate remedy after determining a contract term to be unfair, or if a

Issue	Preferred Option
	defined and listed key UCT has been included or not been removed – UCTs not automatically void (para 5.4). **Option 3** – Align remedies for non-party small business (para 5.5). **Option 4** – Introduce rebuttable presumption for UCTs used in similar circumstances by a party, or by another party in the same or a similar industry (para 5.6).
Headcount threshold	**Option 3** – New alternative thresholds of 100 staff or $10 million annual turnover (para 6.5).
Contract value threshold	**Option 3** – Remove the contract value threshold (para 7.5).
Related bodies corporate	**Option 1** – Maintain the status quo (para 6.1.1).
Standard form contracts	**Option 2** – Make 'repeat usage' a mandatory factor which courts must consider (para 8.4) **Option 3** – Clarify 'effective opportunity to negotiate' to remove work-arounds (para 8.5)

29. It is the SME Committee's position that inclusion of an UCT in an SFC should be made illegal and that civil penalties should attach. In the SME Committee's view, this step is necessary due to evidence which suggests many large businesses are not being proactive in amending their SFC to remove UCTs, and that making the inclusion of, or failure to remove, UCTs in SFCs, illegal and attaching civil penalties will give large companies the necessary incentive to be pro-active in reviewing and amending their SFCs to remove UCTs.

30. Having said that, the SME Committee considers that the standard ACL civil penalties (i.e. $10 million, three times the benefit or 10 per cent of turnover) are too high to be applied should the party who issued the SFC itself be a small business. Rather, the SME Committee believes lower level penalties in the order of between $750,000 to $1 million per UCT inclusion would be more appropriate.

31. The SME Committee also believes that the relevant regulators, the ACCC and Australian Securities and Investments Commission (**ASIC**), should be authorised to issue infringement notices in relation to UCTs. This will give regulators the ability to sanction recalcitrant small and medium sized businesses in a quick and effective manner.

32. The SME Committee supports the proposed change to the headcount threshold. The SME Committee considers the current 20 employee headcount threshold is much too low, as it does not include many businesses treated for other purposes as small businesses, including those with large seasonal or casual workforces. The SME Committee supports the introduction of an alternative $10 million turnover threshold.

33. The SME Committee also believes that the requirement for a contract threshold should be removed as it is both unnecessary and cumbersome to apply in practice. As the law is currently applied there is a four-step process which needs to be

undertaken before reaching the step of applying the substantive test to determine unfairness, as follows:

(i) Is the contract an SFC?

(ii) Does the small business have less than 20 staff?

(iii) Is the contact value threshold met?

(iv) Do any exclusions or exemptions apply?

34. In the SME Committee's view, an amendment which removes one of these steps would make the UCT laws more effective and easier to apply which would benefit small businesses.

Specific questions

35. The following are the SME Committee's responses to the specific questions listed in the RIS.

Legality and Penalties

Question 1. Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.

36. Members of the SME Committee have had many experiences with *prima facie* UCTs in SFCs for small business. The most common of these UCTs are unilateral variation clauses which give the more powerful issuing party the ability to change essential terms of the contract without notice. Committee members have also seen penalty clauses which impose significant financial costs on small business for lost or damaged products, far in excess of the more powerful business's actual damages. Further example *prima facie* UCTs include terms providing indemnifications in favour of the supplier, even when the provider is negligent or in breach, and which extend to third parties via 'Himalayan clauses'.

37. Other common *prima facie* UCTs relate to whole of agreement clauses which seek to deem all pre-contractual representations to be effectively void and no legal effect, choice of law terms which require the application of a foreign law to contracts entered into in Australia, and compulsory arbitration clauses which nominate an offshore location (usually Singapore) for the conduct of arbitration hearings to determine disputes. Further examples include: significant reductions in standard limitation periods to bring a suit in contract or tort; requiring a party to submit a notice of claim within a short period after incident failing which the supplier is not liable for damage; and, provisions seeking to extend statutory limitations in circumstances in which they are not normally applicable.

Question 2. Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.

38. From the SME Committee's experience, in many cases the impact of a *prima facie* UCT imposes a significant cost on small businesses.

39. One large company imposed a very high penalty clause in relation to the supply of particular reusable storage products to small businesses. The small businesses were liable to pay a penalty for any lost or damaged products which was far in excess of the actual replacement cost of the products.

40. Many SFCs include indemnity clauses which make small business liable for any loss or damage whether or not they bear any responsibility for causing the loss or damage. Such clauses force small businesses to take out extra insurance to cover these risks.

41. SMEs which seek to negotiate terms in SFCs often fail to achieve any significant amendments, resulting in wasted legal fees.

Question 3. Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs).

42. Members of the SME Committee are aware that agreements in the information technology industry are often drafted by lawyers in foreign jurisdictions, often in the United States (**US**), and applied to sales in Australia. Accordingly, it is common to see *prima facie* UCTs such as a choice of laws term which identifies US laws as governing the relevant transaction, and mandatory arbitration clauses which require one-on-one mediation to occur in locations outside Australia. SME Committee members are also aware of a practice in the US of including in SFCs a class action exclusion clause which is *prima facie* an UCT. The SME Committee suspects that these types of terms may soon start to appear in Australian SFCs in the future.

43. Members of the SME Committee consider the use of *prima facie* UCTs to be both prevalent and widespread within transport and logistics sector SFCs. Potential UCTs include total limitation and exclusion of liability indemnifications in favour of the supplier, even when the provider is negligent or in breach, and which extend to third parties via 'Himalayan clauses'. Further *prima facie* UCTs include significant reductions in standard limitation periods to bring a suit in contract or tort; requiring a party to submit a notice of claim within a short period after incident, failing which the supplier is not liable for damage; and, provisions seeking to extend statutory limitations in circumstances in which they are not normally applicable. Foreign jurisdiction clauses are also commonly used in transport and logistics contracts (even where the provider has a place of business in Australia).

Question 4. As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business. Please do not include business names.

44. The SME Committee understands that many small businesses accept UCTs in SFCs because they are too time poor to read such contracts. Small businesses also often think that there would be little point reading the contract as they believe the more powerful business would not be receptive to amending the SFC to remove potential UCTs. Often small businesses are not aware of the existence of the UCT until either a dispute arises with the more powerful business or that more powerful business seeks to enforce the UCT against the small business.

45. The experience of members of the SME Committee is that some SMEs will enter SFCs which include prima facie UCTs due to the perceived risk of loss of contract or opportunity should the SME seek to negotiate terms. Where there is a significant

power differential between contracting parties, some SMEs may also perceive that the more powerful contracting party will not negotiate. Some SME Committee member's experience is that this is often the case.

Question 5. Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.

46. The SME Committee believes that the ACCC has done an exceptional job in terms of providing regulatory guidance and education in relation to UCTs. The steady stream of enforcement actions taken by the ACCC, as listed on page 7 of the RIS, has also increased awareness of UCT laws amongst small businesses. As ASIC has not been as active in terms of providing regulatory guidance and education in relation to UCT laws, the SME Committee considers it may be of benefit for ASIC to significantly increase its profile in this area.

Question 6. Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.

47. It is the SME Committee's position that making the inclusion of, or failure to remove, UCT's in SFCs illegal, and introducing civil penalties for breaches, would strengthen the deterrence for businesses not to use UCTs in SFCs.

48. However, the SME Committee submits that for this position to be effective, ACCC/ASIC would need to be authorised to define and list key UCTs. The courts' power to decide as between parties to an SFC whether a term is unfair should also be maintained.

49. The SME Committee observes that to impose a civil penalty for including an UCT in an SFC, or for failing to remove an UCT from an SFC, it is essential that the party who issues the SFC is aware that the term is an UCT. Given that under the current legislation, the determination of whether a term is an UCT needs to be made by a court, taking into account the criteria listed in the current legislation and which essentially looks at the circumstances between the parties to the SFC, it is not always, or not generally, possible for the party who issues the SFC to definitively know at the time the SFC is issued, whether a term is an UCT. Consequently, the SME Committee considers it is essential that key UCTs should be defined and listed by APRA/ASIC so the party who issues the SFC can definitively know that if they include a defined and listed key UCT in the SFC, they will be in breach and liable for a civil penalty.

Question 7. Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.

50. None of the current members of the SME Committee have been involved in a court matter involving UCTs. Rather Committee members have represented clients in negotiations with more powerful businesses over potential UCTs.

Question 8. What do you consider are the additional costs and benefits for each of the proposed options?

51. In the event that the inclusion of, or failure to remove, UCTs from SFCs is made illegal and civil penalties for breach is introduced, the SME Committee considers that more powerful businesses will incur legal and compliance costs in terms of

reviewing and amending their SFCs to remove defined and listed key UCTs, or potential UCTs. Having said that, the Committee notes that these costs should have been incurred by these businesses when the UCT laws for small business were first introduced.

Flexible remedies

Question 9. Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?

52. None of the current members of the SME Committee have been involved in a court matter involving UCTs.

Question 10. If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business.

53. The SME Committee agrees with the option of giving the court a discretion as to whether to void an UCT, as it may not be appropriate to void the term such as where automatically voiding the term may cause inconvenience and disruption to both parties.

Question 11. Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.

54. The SME Committee believes that regulators should have the power to take court proceedings on behalf of a class of small businesses adversely effected by a UCT. This is appropriate where a class of small businesses has suffered a demonstrable and significant financial loss due to the application of a prima facie UCT to have that term determined as being an UCT and to enable those small businesses to recover damages.

55. The SME Committee also notes that this may become an area of interest for class action law firms and litigation funders in the future.

Definition of a small business

Question 12. What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including, costs, benefits, impact on business practices, etc.

56. It is the SME Committee's position that the employee headcount threshold has had the effect of excluding a significant number of businesses from benefitting from the UCT protections. This is particularly the case in relation to industries with a high level of seasonal (agricultural, events, etc.) and casual employees (restaurant industry, hotels, mid-sized supermarkets, etc.).

Question 13. If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.

57. The SME Committee supports increasing the employee headcount threshold to 100 which accords with the thresholds applied for a small business by both the

Australian Taxation Office and the Australian Small Business and Family Enterprise Ombudsman.

Question 14. If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?

58. The SME Committee is of the view that annual turnover should be introduced as an alternative to the 100-employee threshold so as to ensure that businesses with larger employee numbers but relatively low total revenue are able to take advantage of the protections offered to small businesses under the UCT laws.

Question 15. Do you consider $10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business.

59. The SME Committee believes that this threshold is appropriate as an alternative to the headcount threshold.

Question 16. If the annual turnover threshold were to be adopted, how might this impact your business? Include any estimates of potential costs and savings.

60. The SME Committee is uncertain as to whether the $10 million threshold will significantly increase the number of small businesses able to access the UCT protections. In the Committee's view, the more significant change will be the increase in the employee headcount threshold from 20 staff to 100 staff.

Question 17. In terms of determining which businesses should be covered by the UCT protections for small business, how should employee numbers for subsidiaries be counted? Please outline reasons for these views, including the potential impact on your business.

61. In the SME Committee's view, the employee numbers for parent companies and subsidiaries should be taken into account when applying the headcount threshold, as businesses that are part of a corporate group with more than 100 employees will not suffer the power imbalance otherwise suffered by businesses with fewer than 100 employees who are not part of a larger group.

62. Although the Committee acknowledges that including employee numbers for parent and subsidiary companies would make the application of the UCT laws more cumbersome as parties would have to identify all relevant subsidiaries and their staff numbers in order to determine whether the UCT laws apply, the Committee considers that this position is appropriate due to the basis for the UCT law being to address an imbalance of power.

Value threshold

Question 18. Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?

63. The SME Committee notes that contracts for the sale of high value items are not currently captured by, but would benefit from, the UCT protections due to the current value threshold. Examples of contracts that could benefit from inclusion the UCT protections are contracts for:

    - machinery and computer equipment;

- the purchase of retail stock (for example, by smaller supermarkets, which can often exceed the $300,000 turnover threshold, given that equates to only $25,000 of stock purchases per month); and
- energy (such as electricity and gas) used by some small manufacturers.

Question 19. Please provide information on how the current contract value threshold has impacted your business.

64. Not applicable.

Question 20. Are there likely to be any negative impacts if the current contract value threshold were to be increased to $5 million? Please provide details.

65. It is the SME Committee's position that the contract value thresholds are not relevant to consideration of whether an UCT exists and should be removed.

66. The Committee does not believe that a $5 million, or indeed any increased value threshold is sufficient, as such a threshold may still prevent many small businesses from being able to benefit from the UCT protections.

Question 21. Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details.

67. The SME Committee does not believe there are any negative impacts by removing the value threshold given the employee headcount or turnover thresholds will remain.

Clarity on standard form contracts

Question 22. What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.

68. The SME Committee considers that the concept of 'repeat usage' would add clarity around what constitutes an SFC. Making repeat usage a mandatory consideration would assist in establishing in an evidentiary sense that a contract was an SFC to which the UCT laws applied. Repeat usage is also, in practice, what SFCs are put in place for – to standardise the contract issuer's legal relationships with the other parties.

Question 23. If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?

69. The SME Committee believes that this is an important amendment to prevent businesses from attempting to work-around the UCT laws by claiming that elements of the contract have been subject to negotiation. The SME Committee notes the statement made by a participant at the Sydney consultation that he had seen contracts which had included a clause to the effect that the relevant contract had been subject to negotiation between the parties when this had not in fact happened. Accordingly, it is important to implement measures which will prevent parties from seeking to avoid the UCT laws by claiming effective negotiation has occurred when it has not occurred.

Question 24. In addition to the types of actions outlined in option 3, are there any other types of actions that may appear to be 'negotiation' but which you consider do not constitute 'an effective opportunity to negotiate'? What effect have these actions had on your business?

70. The SME Committee believes the list of actions set out under this option are appropriate. The most significant action is to clarify that making a selection from a pre-existing list of possible terms is not 'an effective opportunity to negotiate' for the purposes of the UCT laws.

Question 25. Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.

71. The SME Committee believes that the guidance provided by the regulators in relation to what constitutes an SFC is appropriate given the current wording of the legislation. The Committee notes that if the proposed amendments in relation to Option 3 are made law, regulators would be able to provide business with more specific guidance on this issue.

Minimum standards

Question 26. If minimum standards under state and territory laws could be challenged as being unfair, what impact is this likely to have on your business (or those businesses you represent)?

72. It is the SME Committee's view that a state or territory minimum standard should not be assessed as an unfair term.

Application of any enhanced protections to consumer and insurance contracts

Question 27. What would be the impact of applying any of the options around illegality, penalties and flexible remedies to consumer and insurance contracts?

73. The SME Committee believes that consistency is vitally important. Accordingly, any changes to UCT laws for small business in relation to illegality, penalties and flexible remedies should also be applied to consumer and insurance SFCs.

Question 28. What are the other policy options that would be appropriate to apply to consumer and insurance contracts?

74. The SME Committee does not have a view on other possible policy options.

Question 29. What would be the impact on consumer and insurance contracts of applying those requirements?

75. The SME Committee considers that implementing similar changes to consumer and insurance contracts in terms of illegality, penalties and flexible remedies would make those laws more effective and should also encourage businesses to be more proactive in terms of reviewing and amending their SFCs to remove UCTs.

Application to franchising agreements

Question 30. How would the options for defining small business (in section 6) apply to franchisees and franchisor businesses, and what proportion of franchisees would be a small business under each of the options?

76. The SME Committee notes that the proposed changes to defining a small business set out in section 6 would have an impact on the number of franchise groups subject to the UCT laws. There would be numerous franchisees which employ more than 20 employees, such as many larger restaurant franchise operations, although there would be few which have 100 or more employees.

Question 31. Will changes to the value thresholds for contracts (section 7) apply to franchise agreements, and what proportion of franchising agreements would be captured under each option?

77. The SME Committee considers that the proposed changes to the value threshold set out in section 7 would expand the scope of protections to a number of franchise systems with larger value contracts, particularly in relation to farm equipment sales, car retailing and the provision of some financial services, although the Committee does not believe that there will be a significant number of additional franchise systems which become subject to the UCT laws as a result of this change.

78. Having said that, it is the SME Committee's position is that the contract value thresholds should be removed.

Question 32. How would the options for clarifying a standard form contract (section 8) apply to franchise agreements and what proportion of franchisee agreements would be a standard form contract?

79. The SME Committee believes that the proposed changes to clarify what constitutes an 'effective opportunity to negotiate' will have significant impacts in the franchise industry. In the Committee's view, most franchise agreements would be SFCs.

Question 33. How will the different penalties, infringement notices and enforcement options (section 4) apply in the franchising sector? Would they be appropriate for franchise agreements?

80. As previously mentioned, the SME Committee believes that consistency in the application of the UCT laws is of vital importance. The Committee also believes that the introduction of penalties, infringement notices and enforcement options, as set out in section 4, should significantly enhance compliance with UCT laws in the franchise industry.

Question 34. What proportion of franchise agreements are perpetual or evergreen, and how could UCTs in these agreements be addressed?

81. The SME Committee is aware that whilst the proportion of perpetual or evergreen franchise agreements in Australia is not high as a proportion of total franchise systems, there are a number of large franchise groups which are made up largely of perpetual or evergreen agreements.

82. The SME Committee also understands that the relevant franchisors have relied on the fact that their agreements were entered into prior to the enactment of the UCT laws for small businesses in order to avoid having to review and amend their franchise agreements to remove UCTs.

Australian Consumer Law Committee (Legal Practice Section)

83. The ACL Committee is a special interest group of the Legal Practice Section. The ACL Committee takes a specific interest in legal developments affecting consumers and liaises with government and non-government bodies involved in consumer law. Accordingly, the submission of the ACL Committee is limited to the UCT regime as it affects consumers.

84. The ACL Committee makes the following recommendations:

    (a) UCTs should be made illegal and financial penalties introduced for the inclusion of a UCT in an SFC;

    (b) the range of remedial options that flow from a term being found to be unfair should be expanded;

    (c) the Australian Financial Complaints Authority (**AFCA**) should be empowered to make determinations concerning UCTs; and

    (d) enhancements to the UCT provisions should apply to insurance contracts.

Improving access to justice

85. The ACL Committee considers that explicitly prohibiting and attaching a financial penalty for the use of UCTs in SFCs will see the UCT regime operate as intended – to protect vulnerable consumers and small business. The ACL Committee agrees with the statement at page 17 of the RIS that:

> *This option is likely to be the most significant deterrence against using UCTs in a small business standard form contract. It places the onus on the contract-issuing party to ensure the contract does not contain UCTs, or risk facing a financial penalty. In turn, businesses may be more likely to take proactive action to revise their existing contracts and contract templates to remove any potential unfair terms (including those terms found by a court to be unfair) to avoid being taken to court for the same terms in other scenarios.*

86. Consumers and small businesses face significant barriers to accessing justice under the present UCT regime. As it stands, only a court can declare a contract term unfair and therefore void. Litigation is both timely and expensive. Given the complexity of the UCT regime, consumers and small businesses are not be able to bring proceedings in their own right without legal assistance. Obtaining legal assistance for consumer issues, and practical matters impacting small business, particularly those of low value, can be difficult as:

    (a) capacity restraints of Legal Aid Commissions and Community Legal Centres mean consumers are only rarely able to obtain free legal advice or ongoing legal representation and small business is ineligible for legal aid;

    (b) the cost of private legal representation may be disproportionate to the dispute, and it is only when substantial damages are at stake that lawyers are worth engaging or that they will be willing to act on a conditional fee basis;

(c) there are a limited numbers of lawyers specialising in consumer protection or small business contract law who, even if there are substantial damages at stake, are willing to act for consumers and small business on a conditional fee basis; and

(d) class actions in the consumer field, while welcomed, are limited to recovery of substantial damages caused by mass breaches of consumer protection laws, and these are limited in number. Class actions for small business are rare due to the need for common issues to be at the heart of the dispute.

87. Consequently, the financial burden of pursuing a UCT dispute in court most often far outweighs the benefit to the consumer or small business. As discussed in Part 5 of the RIS, the only available remedy is to have an unfair term declared so and thereby voided. This 'one-size-fits-all' approach can have harmful outcomes, most significantly in deterring consumers or small businesses from challenging an unfair term as to take expensive legal action only to end up with no contract to enforce is a risk not worth taking. This is exemplified by the reports of the ACCC not pursuing action against potential UCTs where the outcome might leave a small business worse off.

88. The ACL Committee supports Option 3 (section 4.5) of the RIS to make UCTs illegal and attach penalties for non-compliance. In determining the appropriate penalty to impose, Treasury should consider the risk of a relatively nominal penalty being absorbed as a business cost, rather than acting as a deterrent. Contract-issuing businesses are more likely to proactively reduce the use of UCTs where there is a tangible financial impact of not doing so.

89. The ACL Committee also supports Option 2 (section 5.4) of the RIS to give courts flexibility to order an appropriate remedy for a consumer once it declares a contract term unfair. This will encourage consumers and small businesses to challenge potentially unfair terms. It also allows consumers and small businesses to obtain fair outcomes, rather than merely having an unfair term voided.

90. External dispute resolution bodies play an important role in identifying systemic issues and appropriate remedies. It is noted most consumers will pursue disputes against insurers through AFCA. Authorising AFCA to assess whether a contract term is unfair would, in the view of the ACL Committee, significantly improve access to justice for vulnerable consumers.

ACL Committee Recommendations:

- **Unfair contract terms should be made illegal and financial penalties introduced for the inclusion of an unfair contract term in a standard form contract.**
- **The range of remedial options that flow from a term being found to be unfair should be expanded.**
- **The Australian Financial Complaints Authority should be empowered to make determinations concerning UCTs.**

Applying enhancements to insurance contracts

91. The ACL Committee considers it important that enhancements to UCT laws also apply to consumer and insurance contracts to prevent compliance issues and inequity.

92. The ACL was developed to reduce complexity, confusion and compliance costs and to provide clarity on rights and obligations where goods and services are bought or sold. This is in recognition of the inherent imbalance of power in contractual relationships involving consumers. To exclude insurance contracts from enhancements to UCT laws would result in a fragmented consumer policy framework that is complex, confusing and antagonistic to the founding principles of the ACL to protect consumers.

93. The ACL Committee notes that the insurance sector has not been known for its consumer-focused approach to insurance contracts. It has taken significant resources and numerous government and independent reviews (including most recently the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services) to close the loophole that saw insurance contracts excluded from the UCT protections. The considerations that render enhancements to the UCT regime necessary to protect the legitimate interests of consumers and small businesses apply equally to contracts for good and services, financial services and products and insurance contracts.

ACL Committee Recommendation:

- **Enhancements to the UCT provisions should apply to insurance contracts.**

Annexure A - Competition and Consumer Committee (Business Law Section)

The following table provides the substantive submission of the Competition and Consumer Committee of the Law Council of Australia's Business Law Section in response to the 'key questions' raised in section 3 of the *Consultation Regulation Impact Statement* (**RIS**).

No.	Question	Response
Legalities and Penalties		
1.	Please provide any relevant information or data you have on the use of UCTs in contracts involving small businesses, including where possible, the types of UCTs (or potential UCTs) used and the characteristics of businesses affected by UCTs.	The Competition and Consumer Committee does not have any specific data it can provide. However, it notes that it is inherently difficult to determine whether any given contract term is an Unfair Contract Term (**UCT**), as this is often a highly fact-dependent question. Any contract term may be perfectly reasonably in some circumstances, but not reasonably necessary in order to protect the legitimate interests of a party in other circumstances. For example, in relation to provisions which allow one party only to vary a contract term, this might be reasonable in certain circumstances. In the agricultural industry, a company dealing with a farmer may reasonably need to have an ability to require a farmer not to use a particular chemical or to produce products within certain specifications – which terms it may need to be able to unilaterally change to ensure compliance with health and safety standards or to meet requirements imposed by overseas customers or nations. Those changes may need to be made almost immediately to protect against contamination of Australia's exports for a particular product. In that situation, the unilateral change clause may be perfectly reasonable – while in other circumstances the very same clause may in fact be unfair. Accordingly, care needs to be taken in assessing terms in the particular circumstances. Further, the Australian Competition and Consumer Commission (**ACCC**) may not always have the coverage or experience across sectors to

No.	Question	Response
		undertake such an appropriate assessment of the reasonableness or otherwise of a particular clause. It is important to recognise, in assessing whether a term is unfair, how particular commercial terms may operate across sectors, and across whole supply chains and not simply consider clauses in isolation with one part of a supply chain. Reasonableness may also be affected by external supply chain factors. It is important not to have a mismatch of rights and obligations as this may stultify dealings at one side of these supply chains. Looking at individual contract terms in isolation may create disincentives for investment and dealing with small business where there are already significant costs in doing business. It is also an important consideration not to unnecessarily increase costs or create inflexibility, where on balance it is not a pressing issue.
2.	Please provide any relevant information or data you have on the impact of UCTs on small business, including where possible on costs, and any impacts on business practices or processes. Information and data can relate to individual small businesses or small business as a whole.	No comment.
3.	Are you aware of any industries in which UCTs (or potential UCTs) are regularly included in standard form contracts? If so, please provide details including which industries, the types of UCTs (or potential UCTs) and the prevalence of UCTs (or potential UCTs).	No comment.

No.	Question	Response
4.	As a small business, have you accepted, or would you be willing to accept, a potential UCT in a standard form contract? If so, provide details including, reasons for doing so and any impacts on your business. Please do not include business names.	No comment.
5.	Do you have any suggestion as to how regulatory guidance and education campaigns could help reduce the use of UCTs? This includes any suggestions on improvements to current guidance or areas where further guidance is needed.	The Committee believes that there is considerable uncertainty among contracting parties and their lawyers about what makes a term 'unfair' under the Australian Consumer Law (**ACL**). Clearer regulatory and judicial guidance is required to ameliorate this uncertainty, enabling parties to avoid UCTs in standard form contracts. A key reason for the uncertainty is that the threshold test for an unfair term in a standard form consumer contract under the UCT regime focuses on the substantive fairness of the term. The test in section 24(1) of the ACL is concerned with the *effect* of the term (whether it is imbalanced, is reasonably necessary to protect the legitimate interests of the trader and would cause detriment to the consumer). This requires a fact-specific subjective assessment of the term and is a significant departure from the approach taken by the common law of contract, which assesses the *process* through which the contract has been made. Rather, the principle of 'freedom of contract' operates, unless certain circumstances can be established, such as misrepresentation, unconscionable dealing, duress or undue influence. It is this shift to the focus on the substantive fairness of the term, and the effect of the term, that has created uncertainty for parties in their assessment of terms within the context of the UCT regime.

No.	Question	Response
		In addition, the guidance currently provided by the legislation,[1] and regulators,[2] covers a limited number of situations, with examples being clearly unfair and accompanied by little context (e.g. not including details of the entire contract). Further, courts have had limited opportunity to explain in detail the clauses, contract and circumstances relevant to the determination of a particular unfair term. One case where these factors were explored by the court was *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224, but this only provides a single example of an issue that is relevant to a broad cross-section of the community. As the regulators take increasing legal action on unfair terms, each providing an additional example that can be assessed by market participants, the impact of the UCT regime will become more widely acknowledged, recognised and applied so that fewer unfair terms are included in a broader range of future contracts. Ultimately, the Competition and Consumer Committee considers that increased judicial consideration of the provisions will assist to resolve the uncertainty. While the Committee recognises that the guidelines provided by regulatory bodies may not ultimately reflect where the law is, in the absence of increased legal action, the Committee's view is that there should be increased regulatory guidance and education campaigns with a focus on removing the uncertainty around what

[1] *Competition and Consumer Act 2010* (Cth) sch 2 ('*ACL*') s 25.

[2] Australian Competition and Consumer Commission guidance includes:

- 'Unfair contract terms' (Web Page) <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms#types-of-terms-that-may-be-unfair>;
- 'Unfair contract terms FAQs' (Web Page) <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/unfair-contract-terms-faqs>;
- 'Determining whether a contract term is unfair' (Web Page) <https://www.accc.gov.au/business/business-rights-protections/unfair-contract-terms/determining-whether-a-contract-term-is-unfair>; and
- 'Unfair contract terms: New protection for small businesses' (Fact Sheet, 1 June 2017) <https://www.accc.gov.au/system/files/1117_Small%20Business%20Factsheet_FA4.pdf>.

Australian Securities and Investments Commission guidance includes:

- 'Unfair contract term protections for consumers' (Web Page, 16 October 2019) < https://asic.gov.au/about-asic/what-we-do/our-role/laws-we-administer/unfair-contract-terms-law/unfair-contract-term-protections-for-consumers/>; and
- 'Unfair contract term protections for small businesses' (Web Page, 16 October 2019) <https://asic.gov.au/about-asic/what-we-do/our-role/laws-we-administer/unfair-contract-terms-law/unfair-contract-term-protections-for-small-businesses/>.

No.	Question	Response
		makes a term unfair. The Committee is of the view that where parties are more readily able to identify UCTs, there will be a corresponding reduction in the use of UCTs in standard form contracts. Regulatory guidance or education campaigns to help reduce the use of UCTs should include providing further material to assist with the identification of UCTs. This further material should include: • examples of situations where a term will and will not be considered unfair, in order to show how the circumstances, and contracts as a whole, can impact the assessment of the term; • examples that have clear and consistent analysis of how the circumstances, and contracts as a whole, may be relevant for determining whether a term is unfair;[3] • entire sample contracts to provide context to the examples and demonstrate how the potentially unfair clause may interact with the entirety of the contract in order to reach a determination that a clause is or is not unfair;[4] and • examples of amendments to unfair terms that would result in the term no longer being unfair but still achieve the parties' intended outcome.
6.	Do you consider making UCTs illegal and introducing financial penalties for breaches would strengthen the deterrence for businesses not to use UCTs in standard form contracts? Please provide reasons for your response.	The Competition and Consumer Committee does *not* consider that the inclusion of UCTs in standard form contracts should be illegal and subject to financial penalties, for the following reasons: • First, and most significantly, the Competition and Consumer Committee is concerned about the imposition of penalties in circumstances where the

[3] See, eg, *Jetstar Airways Pty Ltd v Free* [2008] VSC 539. In the proceedings the Supreme Court of Victoria ordered that the Victorian Civil and Administrative Tribunal (**VCAT**) be reconstituted for the rehearing of the matter. However, VCAT's observations that a term could be fair in some contexts and unfair in other contexts were not disturbed (see *Free v Jetstar Airways Pty Ltd (Civil Claims)* [2007] VCAT 1405 [35], as compared to [39]).
[4] ACL s 24(2)(b).

No.	Question	Response
		upfront obligations under the UCT regime are uncertain. Members of the Committee are commonly instructed to review standard form contracts for compliance with the ACL. In practice, Committee members find that there are many instances where reasonable minds may differ as to whether or not a clause is reasonably necessary to protect a business's legitimate interests and therefor unfair. This differs to other prohibitions in the *Competition and Consumer Act 2010* (Cth) (**CCA**) subject to a penalty such as cartel conduct or misuse of market power where the field of uncertainty is significantly narrower. • Second, the Competition and Consumer Committee considers that the existing consequences for using UCTs are sufficient. Including UCTs in contracts exposes a business to challenge by its customers and/or the regulator, reputational damage, costs and business distraction. Moreover, once a term has been declared unfair and void, it cannot be relied upon, which carries significant commercial consequences (for example, for clauses relating to variation, termination or limitations on liability). Finally, seeking to rely upon a clause which has been declared unfair can also lead to private actions for damages. In the Committee's experience, these consequences already incentivise businesses to review and amend their standard form contracts to comply with the UCT regime. • Third, the Competition and Consumer Committee submits that the original policy intent of the UCT regime and the reasoning as to why financial penalties were not included in the regime from the outset, must be considered. The problem to be addressed was a concern that consumers and small business may lack the resources, skills and sophistication to fully understand the implications of standard form terms and to negotiate amendments. Enabling unfair terms to be declared 'void' was determined to be the best mechanism to reduce the incentive for businesses to include and rely on fair terms. It was considered that such an approach would achieve 'an appropriate balance between protecting those businesses most likely to lack

No.	Question	Response
		sufficient resources and bargaining power, while preserving contractual freedom and certainty, and encouraging businesses to take reasonable steps to protect their interests'.[5] The Competition and Consumer Committee considers that this remains sound policy and that introducing financial penalties for including unfair contract terms would amount to regulatory overreach. • Fourth, the original policy intent for the UCT regime was to prevent reliance on terms found to be unfair, in the absence of unconscionable conduct. Importantly, these standards are very different. As noted by Keane J in *Australian Securities and Investments Commission v Kobelt*,[6] the term unconscionable imports the 'high level of moral obloquy' associated with the victimisation of the vulnerable.[7] Justice Keane further noted, as five members of the High Court of Australia (**High Court**) observed in *Thorne v Kennedy,*[8] a finding of unconscionable conduct requires the unconscientious taking advantage of a special disadvantage, which has 'been variously described as requiring 'victimisation',[9] 'unconscientious conduct',[10] or 'exploitation'.[11] Justice Keane also noted that in in *Kakavas v Crown Melbourne Ltd*, the High Court unanimously confirmed that '[h]eedlessness of, or indifference to, the

[5] Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) paragraph 3.18.
[6] [2019] HCA 18, [118] (Keane J).
[7] Ibid citing *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 258 CLR 525, 587; *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 583. See also *Earl of Chesterfield v Janssen* (1751) 2 Ves Sen 125, 155-6; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462, 467; *Louth v Diprose* (1992) 175 CLR 621, 638; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 400-1, 439-40.
[8] Ibid citing *Thorne v Kennedy* (2017) 91 ALJR 1260, 1272.
[9] Ibid citing *Hart v O'Connor* [1985] AC 1000, 1028; *Louth v Diprose* (1992) 175 CLR 621, 638; *Bridgewater v Leahy* (1998) 194 CLR 457, 479; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 401-3, 439-40.
[10] Ibid citing *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 461 (Mason J), 474 (Deane J); *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64.
[11] Ibid citing *Louth v Diprose* (1992) 175 CLR 621, 626; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 63-4]; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 439-40.

No.	Question	Response
		best interests of the other party is not sufficient' to establish the 'predatory state of mind' that must be shown.[12] In contrast, 'unfair' is a 'less morally freighted' term than 'unconscionability'.[13] This difference is reflected in the legislation importing the 'unwritten [general] law' of unconscionable conduct in section 20 of the ACL,[14] as compared to the lower moral or ethical standard reflected in the meaning of unfair in section 24 of the ACL.[15] The distinction between unconscionable conduct and unfair conduct is an important one that should be reflected in the differences between the provisions in Part 2-2 (unconscionable conduct) and Part 2-3 (UCT regime) of the ACL, particularly in relation to the remedies available for breaches of the provisions in those parts. The Competition and Consumer Committee believes that changing the ACL so that a breach of the UCT provisions is subject to penalty provisions would be a shift that does not reflect the traditional difference, or policy intention to distinguish, between unfair and unconscionable conduct and their associated remedies. • Fifth, following the decision of the High Court in *Kobelt*,[16] there has been commentary suggesting that there may be limited deterrent effect of provisions such as those in Part 2-2 of the ACL due to the difficulty faced by individuals in predicting with any certainty whether particular conduct could be said to be ''against conscience by reference to the norms of society', especially in novel or unforeseen circumstances'.[17] Further, the Hon Chief

[12] Ibid citing *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, 439.
[13] *Australian Securities and Investments Commission v Kobelt* [2019] HCA 18, [119].
[14] *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51.
[15] *Australian Competition and Consumer Commission v CLA Trading Pty Ltd* (2016) ATPR 42-517; *Director General of Fair-Trading v First National Bank* [2002] 1 AC 481; *Jetstar Airways Pty Ltd v Free* [2008] VSC 539; *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 223 ALR 346.
[16] [2019] HCA 18, [118]. It is important to note that the UCT regime was not considered in *Kobelt*.
[17] The Hon Chief Justice Bathurst AC, 'Law is a reflection of the 'Moral Conscience' of society' (Speech, Opening of Law Term (NSW), 5 February 2020) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2020%20Speeches/Bathurst_20200205.pdf>.

No.	Question	Response
		Justice Bathurst AC, Chief Justice of the Supreme Court of New South Wales, has noted that:[18] *It could be said that the legislation is contrary to constitutional principle, since it vests a wide and unconfined power in the judiciary to proscribe conduct which they deem to be 'unfair' or 'unjust'. It could be said that it has a deleterious effect upon commerce because it generates uncertainty about whether or not particular conduct will be found to be 'unconscionable'.* Similarly, these criticisms would be equally relevant to the assessment of the deterrent effect of any penalty provision for breaches of Part 2-3 of the ACL. For the reasons outlined above, the Competition and Consumer Committee is of the view that making UCTs illegal and introducing financial penalties for breaches would not strengthen the deterrence for businesses not to use UCTs in standard form contracts. • Sixth, the Committee considers that the deterrent effect of penalties has been overstated. In the experience of the Committee's members, the existing consequences for UCTs already deter most business from including terms in their contracts which are clearly unfair (see above). Moreover, businesses which deliberately include unfair terms in their contracts are unlikely to be deterred by the introduction of penalties in any event. The Competition and Consumer Committee acknowledges the concerns raised about the ongoing use of unfair contract terms in certain industries. However, the Committee does not consider that the introduction of financial penalties is an appropriate regulatory response to this concern for the reasons identified above. The Committee considers that a more appropriate response is further targeted regulatory engagement with those industries of concern as well as additional

[18] Ibid [31] citing *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557 at 583 [120] (Spigelman CJ) (cf *ACCC v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 64 (Gleeson CJ)); Justice Bell, 'An Australian International Commercial Court – Not a Bad Idea or What a Bad Idea? (Speech, Australian Bar Association Biennial International Conference, 12 July 2019) [66]–[78] (cf Mark Leeming, 'The Role of Equity in 21st Century Commercial Disputes' (2019) 47 *Australian Bar Review* 137, 151-5.

No.	Question	Response
		regulatory guidance about clauses likely to be unfair. The Committee considers that the ACCC's industry consultations undertaken prior to the consumer-to-business and business-to-business UCT regimes coming into force were highly effective both in generating awareness of the UCT regime but also in creating new norms for standard form contracting in those industries. In addition, the reports published at the conclusion of both consultations provided useful practical guidance to businesses in other industries. The Committee notes that the ACCC would be well placed to conduct further targeted regulatory engagement based on any complaints it receives. The Committee appreciates that this would be an additional burden on the regulator. However, in the Committee's view, it would be preferable to imposing penalties for inclusion of unfair contract terms given the concerns identified above. The Competition and Consumer Committee does not consider that penalties are appropriate in circumstances where a party genuinely considers that a term is balanced and reasonably necessary but a court ultimately has a different view. Accordingly, should UCTs be illegal and subject to penalties, the Committee recommends that a warning system should be introduced into the CCA so as to allow the relevant party a reasonable opportunity to consider its position, understand the regulator's concerns in detail and amend the relevant terms as a precondition to proceedings being commenced. This system could be modelled off mechanisms already used, for example, for breaches of the Australian Privacy Principles. Under the privacy regime, the Office of Australian Information Commissioner (**OAIC**) will generally notify the parties in writing about a decision to make a determination in relation to act or practice that may be in breach of the Australian Privacy Principles. The OAIC must then allow interested parties (including the respondent) the opportunity to make submissions or provide further information to address OAIC's concerns. The Competition and Consumer Committee considers that option 2 should be pursued. The small number of cases brought by the ACCC and other regulators suggests that there is considerable scope for the regulators to take a stronger

No.	Question	Response
		enforcement role and seek remedies already available (as set out in the response to question 10). This option should be explored, and its effect on compliance assessed, before resorting to more extreme options, such as attaching civil penalties (as in option 3) or shifting power to issue remedies away from the courts to the regulators themselves (as in option 4). If penalties are to be introduced, the Committee also emphasises the importance of strengthening the regulatory guidance on terms that may be unfair. See further the Committee's response to Question 5 above.
7.	Have you experienced any difficulties with challenging a possible UCT through a court process? If yes, please provide details.	The Committee has consulted with its members (through its monthly State-based Committee meetings) and apart from regulator-initiated challenges to UCTs, there was only one example identified of a business challenging another's contract for alleged UCTs in litigation (in other words, a private action). That matter recently resolved at mediation. The principal issue in that case was establishing whether the contract was caught within the threshold criteria of a contract being 'rolled over' or 'automatically renewed' post 12 November 2016. If it was held that the contract had been 'rolled over' or 'automatically renewed', in the relevant sense, then it was likely that each of the terms alleged were likely to be 'unfair' as they fell within the example terms found in section 25 of the ACL and section 12BH of the *Australian Securities and Investments Commission Act 2001* (Cth) (**ASIC Act**), and within the case law decided to date in the regulator space.[19] The UCTs included unlimited liability clauses, unilateral variation of terms (including price), termination rights, limiting defences available in a proceeding, and assignment of the contract. The subject contract was for trade supply in the building industry.

[19] See, eg, *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224; *Australian Competition and Consumer Commission v Servcorp Ltd* [2018] FCA 1044.

No.	Question	Response
8.	What do you consider are the additional costs and benefits for each of the proposed options?	No comment.
Flexible remedies		
9.	Has your business been impacted by a court determining that a small business contract term was unfair and therefore automatically void? If so, what was the impact?	No comment.
10.	If a court determines a term or terms in a standard form small business contract are unfair, should it also be able to determine the appropriate remedy (rather than the term being automatically void)? Please detail reasons for your position, including the possible impact this might have on your business.	The Competition and Consumer Committee considers that the remedies available to be ordered by the courts within the current legal framework are sufficiently flexible to accommodate the interests of injured parties and to deter parties from including UCTs in their standard form contracts. There is no need to change the primary remedy of an unfair contract term – that it is automatically void – because the range of available secondary remedies is wide and effective. For a party to access these remedies, the court must first make a declaration under section 250 of the ACL, that the term of a contract is unfair. Parties that can seek a declaration include a party to the consumer contract, a small business that employed fewer than 20 persons at the time the contract was entered into, the ACCC, a state or territory regulator or the Australian Securities and Investments Commission (**ASIC**). *Primary remedy* If the court declares that a term is unfair, the primary remedy is that the term will be void.[20] This means that it is unenforceable and treated as if it did not exist.

[20] ACL s 23(1).

No.	Question	Response
		The contract will continue to bind the parties if it can operate without the unfair term. However, if the unfair term goes to the root of the contract, the whole contract is invalid.[21] *Secondary remedies* Beyond this primary remedy, if a person attempts to enforce a term of a contract that the court has declared is unfair, the court may order a range of other remedies. • First, the court may order compensation orders under section 237 of the ACL. Section 243 of the ACL details examples of compensatory orders that the court might make, including: (a) varying contracts or arrangements; (b) refusing to enforce a contract; (c) directing the person who engaged in the contravening conduct to refund money or return property to the injured party; (d) directing the contravening party to provide services, at its own expense, to the injured party; or (e) create or transfer an interest in land. These orders are in favour of the person who has suffered, or is likely to suffer, loss or damage. The orders must be aimed at compensating the injured person or preventing or reducing the loss or damage suffered. Separately, the court can make compensatory orders of this kind in favour of consumers who are not parties to the enforcement proceedings but who have suffered loss or damage in relation to the unfair term in the particular contract (section 239 of the ACL).

[21] ACL s 23(2).

No.	Question	Response
		• Second, the court may order an injunction under sections 232-234 of the ACL or section 23 of the *Federal Court of Australia Act 1976* (Cth). The injunction may, for example, require the contravening party to refund money, transfer property or honour a promise. In *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* and *Australian Competition and Consumer Commission v Servcorp* Ltd, the respondents were required to establish and maintain a compliance program directed towards preventing the inclusion of 'undeclared' unfair contract terms in future contracts.[22] • Third, the court may order non-punitive orders under section 246 of the ACL. Some examples of non-punitive orders include publishing corrective advertising, instituting a compliance program and revising internal business operations. The Competition and Consumer Committee considers that the pre-requisite for access to these secondary remedies, being the requirement of a declaration under section 250 of the ACL, remains appropriate for a party that has, or is likely to suffer, loss or damage. There is no need for the court to protect consumers or small businesses if they are unlikely to suffer loss. To the extent that injured parties may be disincentivised to bring proceedings under the current regime due to the burden of demonstrating their loss, the ACCC should seek to take on that burden by bringing more proceedings for unfair contract terms, as it is entitled to do under sections 239 and 250 of the ACL. *Tertiary remedies* Beyond the available remedies set out above, a consumer or small business, or the ACCC for itself or on behalf of other parties, may also seek remedies such as pecuniary penalties, disqualification orders, community service orders and infringement notices, wherever a business has asserted a right to rely upon or to

[22] See *Australian Competition and Consumer Commission v JJ Richards & Sons Pty Ltd* [2017] FCA 1224; *Australian Competition and Consumer Commission v Servcorp* Ltd [2018] FCA 1044 (the injunction in this case was made under the *Federal Court of Australia Act 1976* (Cth) s 23).

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		enforce the unfair contract term. In each case, asserting such a right or seeking to enforce an unfair contract term may be (among other possibilities): • conduct which contravenes section 18 (misleading or deceptive conduct) or paragraph 29(1)(m) (false or misleading representations as to the existence or effect of a contractual or other right) of the ACL; and • unconscionable conduct, contrary to section 21 of the ACL. Indeed, in its engagement with large businesses in relation to potentially unfair contract terms in recent years, the ACCC has regularly asserted potential concomitant contraventions of sections 18, 21 and 29 of the ACL (and the remedies that flow from them) as arising in the circumstances. Another issue of concern to market participants is that it is possible to envisage a situation in which consumers or small businesses may want to keep a contract on foot that has been rendered automatically invalid because of a central clause being unfair. However, the parties themselves are free to re-contract after the conclusion of proceedings in a way is not unfair. There is no need for the court to order that an unfair contract *not* be void so that it can vary the contract because that variation essentially can be carried out by the parties themselves. Further, the court may already have the power to make such orders due to its power to vary contracts provided in section 243 of the ACL. For the reasons disclosed in its response to this question, the Competition and Consumer Committee considers that option 1 should be pursued rather than option 2. Option 3 is likely already applicable because of the reasons detailed in Question 11 below and should continue to be part of the current law. We consider that option 4 should not be pursued because it is a drastic step that is likely to introduce considerable legal uncertainty, which would disrupt a large amount of existing standard form contractual arrangements between individuals and businesses. Further, the benefit option 4 aims to achieve (i.e. deterring

No.	Question	Response
		unfair contract terms) could be attained by the ACCC and other regulators taking a more proactive enforcement role within the current legal framework.
11.	Do you consider a regulator should be able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage? Please detail reasons for your position, including the possible impact this might have on your business.	The Competition and Consumer Committee considers that the regulator is already able to commence court proceedings on behalf of a class of small businesses on the basis that an unfair term has caused or is likely to cause the class of small businesses to suffer loss or damage. This should not be changed. Subsection 239(1) of the ACL empowers the court to make orders in favour of *non-party consumers*. The court may make these orders following an application of the regulator (i.e. the ACCC) on behalf of a *class of persons* that includes the *non-party consumers* who have suffered, or are likely to suffer, loss or damage as a result of an unfair contract term. In the ACL, 'non-party consumer' means a person who is not, or has not been, a party to an enforcement proceeding in relation to the term (section 2 of the ACL). The Competition and Consumer Committee considers that the references to a 'class of persons' and 'non-party consumers' in section 239 include references to small businesses. • First, in any statute, the expression 'person' ordinarily includes a body corporate as well as an individual.[23] • Second, under amendments to the ACL in 2016 designed to extend the UCT provisions to small businesses, subparagraph 239(1)(a)(ii) was changed to cover 'a party to a contract', whereas before it covered 'a party to a consumer contract'. • Third, the Federal Court of Australia (**Federal Court**)has previously made remedial orders under section 239 of the ACL in favour of small businesses

[23] *Acts Interpretation Act 1901* (Cth) s 2C(1)

No.	Question	Response
		who were not parties to the relevant enforcement proceedings and who suffered loss due to false and misleading conduct in relation to business entries in a phone directory.[24] Although these orders were made under a section contained in legislation that has now been repealed, section 239 is the current counterpart of that section and would likely be interpreted similarly.[25] • *Fourth,* the Federal Court has previously made statements about the purpose of section 239 of the ACL which support the interpretation that it would cover small businesses as well as individuals. These include that section 239 'is designed to allow the Court to undo damage to *third parties* caused by contravening conduct.'[26] Similarly, the Federal Court has described the purpose of the section as 'to allow non-party consumers to recover loss or damage where they might not take action individually because of cost and inconvenience… to prevent businesses from profiting through contraventions just because the amount of loss or damage is small or the harm is widely spread.'[27] However, as paragraph 239(1)(c) refers specifically to the class including 'non-party consumers', it could be read to impose a restriction in particular circumstances. This is because 'consumer' is a defined term under section 3 of the ACL. To the extent there is any doubt, section 239 could be amended to clarify that 'non-party consumer' in that section includes small businesses. To the extent that any loss or damage is suffered by a consumer or a business, compensation orders can be pursued by those suffering loss or damage or by the regulator, pursuant to sections 237 and 239 of the ACL, respectively. As

[24] *Australian Competition and Consumer Commission v Yellow Page Marketing BV (No 2)* [2011] FCA 352.
[25] *Australian Competition and Consumer Commission v Ashley & Martin Pty Ltd (No 2*) [2019] FCA 1739 [22]; *Australian Competition and Consumer Commission v AGL South Australia Pty Ltd* [2015] FCA 339.
[26] *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (No 2)* [2016] FCA 62 [293].
[27] *Department of Consumer Affairs Victoria v Domestic Register Pty Ltd (No 2)* [2018] FCA 2008.

No.	Question	Response
		stated above in response to Question 10, the Committee does not support an expansion of the existing remedies for those that have suffered loss or damage.
Definition of small business		
12.	What impact has the current headcount threshold had on your business (or those businesses you represent)? Please include any relevant information including, costs, benefits, impact on business practices, etc.	*Inability to determine if threshold is met* The current employee headcount threshold makes it difficult for contract-issuing parties to determine whether a counterparty is a small business. The issue is not the threshold *per se*, but the fact that there is no reliable way for a firm to assess whether a counterparty is within the threshold. Even where a contract-issuing party seeks confirmation of a counterparty's headcount, this confirmation may be incorrect. Competition and Consumer Committee members have reported that contract-issuing parties have previously raised this difficulty with the ACCC, and the ACCC's response has been to confirm that the UCT regime will apply even where a counterparty falsely declares that they employ more than 20 employees. The Committee agrees with this statement by the ACCC as a matter of law, but notes that the effect is to deprive firms of the ability to know with any certainty whether they are, in fact, dealing with a 'small business' to which the UCT regime applies. Whatever threshold applies, if it is not readily ascertainable whether the threshold is met, the Committee submits that there should be a defence available to a contract-issuing party to any UCT claim where they have requested confirmation from the counterparty as to whether they fall within the threshold and either: • received no response to that request; or

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		• received a response which asserts that they fall outside the threshold (and are therefore not a 'small business' to which the UCT regime applies), irrespective of whether that response is in fact correct. *Inadequacy of the current headcount threshold* The Competition and Consumer Committee is also concerned that the current headcount threshold (which requires that 'at least one party to the contract is a business that employs fewer than 20 persons') is poorly adapted to identifying 'genuine' small businesses. For instance: • The test makes no distinction between full-time employees and part-time employees (or casual employees employed on a regular and systemic basis). The UCT regime treats a business that employs 20 persons on a full-time basis identically to a business that employs 20 casual employees who each work one day per fortnight (when, in practice, there would likely be a significant difference in sophistication between these businesses). • The test is specifically directed towards employment relationships, rather than other forms of relationships. A restaurant or retail outlet that employs more than 20 persons on a casual basis will be excluded from the UCT regime while a large business that employs fewer than 20 persons, but engages hundreds of individual contractors, will fall below the threshold and enjoy the protection of the UCT regime. Irrespective of whether the required headcount threshold changes, in the Competition and Consumer Committee's view, the Treasury should consider revising the UCT provisions to address these issues.

<table>
<tr><th>No.</th><th>Question</th><th>Response</th></tr>
<tr><td>13.</td><td>If the headcount threshold were to be increased, how might this impact your business? Include any estimates of potential costs and savings.</td><td>The Committee is of the view that the headcount threshold should not be increased. The threshold already captures a very high proportion of Australian businesses. Indeed, in 2016 the Australian Small Business and Family Enterprise Ombudsman calculated that 97.4 per cent of Australian businesses have less than 20 employees (and therefore would be captured by the threshold):[28]
<table>
<tr><th>Business Size</th><th>Count</th><th>Percentage (%)</th></tr>
<tr><td>Small (0-19 employees)</td><td>2,066,523</td><td>97.4</td></tr>
<tr><td>Medium (20-199 employees)</td><td>50,995</td><td>2.4</td></tr>
<tr><td>Large (200+ employees)</td><td>3,717</td><td>0.2</td></tr>
<tr><td>Total</td><td>2,121,235</td><td>100</td></tr>
</table>
Further to the comments made in relation to Question 12, the Committee notes that any increase in the headcount threshold may not increase UCT uncertainty for contract-issuing parties. However, this is principally because of deficiencies with the headcount measure, whereby the inability of contract-issuing parties to determine the headcount of counterparties results in prudent businesses having to assume that they are dealing with a ‘small business’ in substantially all of their dealings.

It is also not clear whether the problem raised in section 6.1 of the discussion paper in fact impedes small businesses from relying on the UCT regime. While small businesses may fall outside the headcount threshold during certain periods of the year, the discussion paper provides no information on whether those business are in fact likely to enter standard form contracts during those periods.</td></tr>
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[28] Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts: Small Business in the Australian Economy* (Report, 2016) <https://www.asbfeo.gov.au/sites/default/files/Small_Business_Statistical_Report-Final.pdf> citing Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits, Jun 2011 to Jun 2015* (Catalogue No 8165.0, 26 February 2016).

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		For example, an agribusiness may regularly fall outside the headcount threshold during harvest or vintage, but still be consistently protected by the UCT regime if it usually enters into grower contracts at a different time (such as the beginning of each season). If the headcount threshold were increased, this might also capture many businesses that do not require the protection of the UCT regime. One of the original rationales for the UCT regime was that '[small] businesses are less likely to have robust risk management policies or be in a position to absorb the costs associated with a risk if it eventuates'.[29] Increasing the UCT threshold merely to address fluctuating labour requirements may inadvertently capture a number of larger businesses, that are more likely to be able to access in-house legal resources, or to refuse to accept UCTs.[30] More significantly, it will expose contract-issuing parties to heightened risk in dealings with counterparties for whom there is no need on policy grounds to provide the additional protection that the UCT regime affords.
14.	If annual turnover was used to determine whether a business should be covered by the UCT protections for small business, what impact might this have on your business?	*Introduction of a threshold based on annual turnover* The Committee is broadly supportive of the introduction of annual turnover as a threshold for determining whether a business should be covered by the UCT regime. However, the Committee considers that this should be *in addition to*, and not in place of, or as a mere alternative to, a threshold based on headcount. In section 7 of the Committee's 5 August 2014 submission to Treasury in connection with the original extension of the UCT regime to small business contracts, the submission outlined a range of considerations to be considered in

[29] Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) 15 [2.3].
[30] Ibid 85; 90-91.

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		defining what should appropriately be considered a 'small business'.[31] At paragraph 7.6(d) of that submission, a three-part qualitative assessment was proposed, such that the UCT regime would be deemed not to apply in instances where the business supplying or acquiring the goods or services: (a) had a turnover of $2 million or more for the full financial year preceding the relevant acquisition of goods or services (this is similar to the gross turnover test applied by the ATO under the *Income Tax Assessment Act 1997* (Cth)); (b) held, or its related bodies corporate held, a total asset value greater than $6 million at the time when the contract commenced (again similar to the deeming restriction applied by the ATO); or (c) employed 15 or more persons (this is a middle ground to the number of employees required to be considered a small business under a number of Acts, and is similar to the definition applied under the *Fair Work Act 2009* (Cth)). The Competition and Consumer Committee continues to be of the view that a threshold incorporating multiple metrics such as these is the most appropriate way to ensure that genuine small businesses are protected, while the scope of the provisions does not overreach. *Transparency of annual turnover as compared to headcount* The RIS makes the statement that 'the turnover of a business is normally readily available', as compared with employee headcount. While this is true in the case of businesses that are required to lodge financial reports, the Committee submits that is not the case in relation to many small

[31] Competition and Consumer Committee, Business Law Section, Law Council of Australia, Submission to The Treasury, *Extending Unfair Contract Term Protections to Small Businesses* (5 August 2014) <https://www.lawcouncil.asn.au/docs/e5526f0a-fa18-e711-80d2-005056be66b1/140805-Submission-2872-Extending-Unfair-Contract-Term-Protections-Small-Businesses.pdf>.

No.	Question	Response
		businesses (and no non-corporate entities are required to do so). Moreover, obtaining financial reports to undertake such an assessment requires payment of a fee to the ASIC (or an authorised third-party reporting business). As such, in most cases, a threshold based on annual turnover will be susceptible to the same issues regarding transparency as exist in relation to the current headcount threshold (refer to the Committee's comments in Item 12). *Inadequacy of the three options proposed* The RIS proposes three alternative options in relation to the threshold test for determining what is a small business, namely: 1. leave the test unchanged; 2. change the test from one based on headcount to one based on annual turnover; or 3. change test from one based on *either* headcount *or* annual turnover. For the reasons outlined, the Competition and Consumer Committee does not support any of these options. The Competition and Consumer Committee submits that a fourth option should instead be considered, which requires that in order to be classified as a 'small business', the threshold test of *both* headcount *and* financial turnover should be met. This would be consistent with the test applied by the ATO under the *Income Tax Assessment Act 1997* (Cth)), where a business must have fewer than 20 employees *and* less than $10 million in turnover (or, if the business has more than 20 employees, less than $2 million in turnover). If option 3 were instead introduced, the inevitable result would be that many businesses with very high annual turnover but low overall employee numbers (such as franchisors that do not operate company-owned stores), or very large

No.	Question	Response
		numbers of staff but relatively low annual revenue (such as businesses operating in high-margin businesses with significant sales forces, or large, well-funded technology companies in a development phase, which may have substantial assets but limited short term revenue), would be inappropriately deemed 'small businesses'. In the view of the Competition and Consumer Committee, the only way to avoid these anomalies is to utilise a test which requires both metrics to be met.
15.	Do you consider $10 million annual turnover to be an appropriate threshold? Please detail reasons for your position, including the impact this might have on your business.	The Committee queries whether $10 million annual turnover is consistent with the policy intent to protect only 'small business' through the UCT regime. As noted above, whatever threshold is ultimately assessed to be appropriate, the Committee is of the view that the UCT regime should require that the small business meet both the annual turnover threshold *and* a headcount threshold. Coupling any annual turnover requirement with a headcount requirement will more closely align the UCT regime with equivalent size-based tests in other legislation. For example, the test for a small (or large) proprietary company under the *Corporations Act 2001* (Cth) (**Corporations Act**) involves an assessment of consolidated revenue, gross assets, *and* headcount.[32] In the absence of any such coupling, the proposed amendment will merely expand the category of businesses entitled to UCT protections (and so make it more difficult for contract-issuing parties to determine whether or not the UCT provisions apply).
16.	If the annual turnover threshold were to be adopted, how might this impact your business?	No comment.

[32] *Corporations Act 2001* (Cth) s 45A(2)-(3).

No.	Question	Response
	Include any estimates of potential costs and savings.	
17.	In terms of determining which businesses should be covered by the UCT protections for small business, how should employee numbers for subsidiaries be counted? Please outline reasons for these views, including the potential impact on your business.	The Competition and Consumer Committee supports the grouping of related entities in determining either headcount or turnover. As the RIS acknowledges, the current UCT regime may permit special purpose entities that are subsidiaries of large companies to benefit from UCT protections (even though those special purpose entities have the capacity and resources to appropriately negotiate a contract, should they wish to do so). Moreover, the current regime may permit large businesses to bring themselves within the UCT regime by deliberately incorporating a special purpose vehicle to contract with other parties. Accordingly, the Competition and Consumer Committee considers that option 2 should be pursued, as set out at paragraph 6.6.2 of the RIS (noting, however, that the Committee does not support the proposal to use *either* the headcount *or* annual turnover threshold, but instead suggests that both these thresholds must be met (see comments at item 14 above)).
Value threshold		
18.	Do you have any specific examples of contracts that would benefit from, but which are not currently captured by, the UCT protections due the current value threshold?	The Competition and Consumer Committee is not aware of any specific examples of contracts that would benefit from, but are not currently captured by, the UCT protections due to the contract value threshold. However, the Committee notes that an example of such a business might include a dealership or similar business where there is a large up-front expense incurred in establishing premises, or a business which distributes high value goods such that the financial outlay for such goods is high but the profits derived from resale may in fact be minimal.

No.	Question	Response
		Nonetheless, in the majority of cases the Committee considers that the current value threshold is likely to be appropriate. Accordingly, to the extent that there are concerns about specific contracts that are not currently captured by the UCT regime, the Committee considers that these contracts should be addressed by regulations (or specific regulation, such as prescribed industry codes), rather than increasing the contract value threshold for all businesses under the UCT regime. Addressing specific contracts in this manner will allow any anomalies in the UCT regime to be addressed, while avoiding broader issues of overreach.
19.	Please provide information on how the current contract value threshold has impacted your business.	The Committee notes that the observation of its members has been that it is often difficult for a contract-issuing party to determine the 'upfront price payable' for any given contract, and that the 'upfront price' may not have any relevance to the true contract value. Subsection 26(2) of the ACL provides that (emphasis added): *The upfront price payable under a contract is the consideration that:* *(a) is provided, or is to be provided, for the supply, sale or grant under the contract; and* *(b) is disclosed at or before the time the contract is entered into;* *but does not include <u>any other consideration that is contingent on the occurrence or non-occurrence of a particular event</u>.* The effect of this definition is that it excludes consideration of commission payments and fees for service where payment is contingent upon services being provided. Parties to a standard form contract may have an expectation of very significant fees being payable, notwithstanding that such fees are not 'payable' at

No.	Question	Response
		the time the contract is entered into, and therefore fall outside of the calculation of the 'upfront price'. Nonetheless, the Committee broadly supports the retention of the value threshold. While it may be imperfect, it will still provide an appropriate qualification mechanism in a number of cases, consistent with the policy intent of the UCT regime.
20.	Are there likely to be any negative impacts if the current contract value threshold were to be increased to $5 million? Please provide details.	The Committee notes that the original rationale for the contract value threshold was to 'support time-poor small businesses entering into contracts for day-to-day transactions, while maintaining the onus on small businesses to undertake due diligence when entering into high-value contracts'.[33] Put another way, the purpose of the contract value threshold was in part to ensure that small businesses still undertook due diligence in high-value commercial transactions that were fundamental to their business (as distinct from day-to-day transactions).[34] It is debatable whether the current thresholds are appropriately described as 'low value' in this context. Raising the contract value threshold to $5 million is likely to capture most (if not all) standard form contracts that small businesses might conceivably enter. It would represent a significant departure from the original policy intent of the UCT regime, and would effectively remove any incentive on small businesses to conduct due diligence on standard form contracts that they enter into, even where those contracts are high-value and fundamental to the business. Conversely, such a change would put suppliers at significant risk in relation to high-value supplies.

[33] Explanatory Memorandum, Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Bill 2015 (Cth) 8 [1.7]; 10 [1.18]; 16 [2.7].
[34] Ibid 16 [2.7].

No.	Question	Response
		The Competition and Consumer Committee submits that such a change would not be appropriate. In particular, the Committee is of the view that: (a) businesses entering into high value contracts should be expected to fully consider the terms applicable to such supplies, and to negotiate with suppliers in respect of those terms; and (b) suppliers of high value goods should be able to reduce their risk exposure through the terms and conditions on which they contract (provided that the manner in which those terms are provided do not breach the anticompetitive conduct provisions of the CCA, or amount to unconscionable conduct under the ACL). Accordingly, the Committee considers that option 1 should be pursued (as set out at paragraph 7.3 of the RIS).
21.	Are there likely to be any negative impacts if the contract value threshold were to be removed completely? Please provide details.	As outlined above, the Competition and Consumer Committee is concerned that removing the contract value threshold entirely will encourage small businesses to not conduct due diligence on contracts that they enter into, even where those contracts are high-value and fundamental to the business. Further, by preventing the use of more onerous terms in standard form contracts without specific consideration of each counterparty's circumstances, it will increase the risk and compliance costs to parties proposing standard form contracts.

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Clarity on standard form contracts		
22.	What impact do you consider 'repeat usage' would have on clarity around standard form contracts? Please outline reasons for these views.	The Competition and Consumer Committee notes that under the current law, a court determines whether a contract is a 'standard form contract'. The court can take into account any matter it considers relevant, but must take into account the relevant matters listed in subsection 27(2), including whether one party has all or most of the bargaining power, whether the contract was prepared by one party prior to negotiations and whether the other party was given an effective opportunity to negotiate the terms. If a party to a proceeding alleges that a contract is standard form, there is a rebuttable presumption that it is standard form: parargaph 27(a). In theory, what constitutes standard form is generally well understood, in that the terms of the contract are generally not negotiable (i.e. they are offered on a 'take it or leave it' basis) and the contract is used on a repeated basis. However, the Committee acknowledges that in practice, there can be uncertainty as to what constitutes a standard form contract. In the Committee's experience, the question that most commonly arises is whether a contract is standard form where one or a handful of terms has been negotiated. The Competition and Consumer Committee has reviewed the options canvassed in section 8 of the RIS and makes the following comments: • The Committee considers that there is an opportunity to clarify when a contract is no longer standard form due to the extent of negotiation that has taken place. Accordingly, the Committee does not support maintaining the status quo (Option 1). • The Committee is supportive of the proposed new mandatory factor of 'repeated usage' (Option 2). The Committee considers that whether or not a business has issued the same contract before is highly relevant to whether or
23.	If the law were to be amended to set out the types of actions which do not constitute an 'effective opportunity to negotiate', what impact could this have on your business?	
24.	In addition to the types of actions outlined in option 4, are there any other types of actions that may appear to be 'negotiation' but which you consider do not constitute 'an effective opportunity to negotiate'? What effect have these actions had on your business?	
25.	Do you have any suggestion as to how regulators could better promote and enhance guidance on what constitutes a 'standard form contract'? Please provide details, including any suggestions around improvements to current guidance and areas where further guidance is needed.	

No.	Question	Response
		not the contract in question is standard form. On this basis, it is appropriate that 'repeated usage' is a mandatory factor rather than a discretionary factor. The Competition and Consumer Committee is also supportive of providing further guidance to business on the meaning of 'effective opportunity to negotiate' but considers that this is best done through enhanced regulatory guidance rather than legislative amendment (cf. Option 3). The Committee notes the proposal in the RIS is to identify examples of what is not an effective opportunity to negotiate. The Committee suggests that guidance on both what is and is not an effective opportunity would be helpful to business. Providing this clarification in regulatory guidance rather than in legislation would ensure that the guidance could readily be updated over time.
Minimum standards		
26.	If minimum standards under state and territory laws could be challenged as being unfair, what impact is this likely to have on your business (or those businesses you represent)?	In the Competition and Consumer Committee's view, it is difficult to see how minimum standards under state and territory laws alone could be challenged as being unfair within the rubric of the UCT provisions in the ACL and ASIC Act. The application of such provisions will still need to meet the UCT threshold criteria (for example, standard form contract, small business contract, upfront price, etc) in order for a term to be declared 'unfair'. In any event, subsection 25(1) of the ACL and paragraph 12BF(1)(c) of the ASIC Act state that UCTs do not apply to the extent that the term is required or expressly permitted by a law of the Commonwealth or a state or territory. Minimum standards are generally prescribed by such law(s). Sufficient protections are therefore already in place to protect the application of UCTs to minimum standards. There does not appear to be any evidence to support the identified risk [of UCTs applying to minimum standards] having eventuated or transpired to date.

No.	Question	Response
		The Competition and Consumer Committee notes the issues raised by industry stakeholders in the consultation paper as to the need for the application to minimum standards. If the minimum standard issue was raised in a court of law, the Competition and Consumer Committee considers that a valid defence is open to the would-be respondent to plead that the impugned term was required by Commonwealth, state or territory law(s). The Committee endorses option 1, as set out at paragraph 9.3 of the RIS, to maintain the status quo with no additional exemptions required to the ACL or ASIC Act for minimum standards.
Application of any enhanced protections to consumer and insurance contracts		
27.	What would be the impact of applying any of the options around illegality, penalties and flexible remedies to consumer and insurance contracts?	The Committee considers that the introduction of the options around illegality, penalties and flexible remedies for UCTs would introduce significant uncertainty to consumer and insurance contracts. This is because the Committee considers that the UCT regime lacks clarity in a number of key respects and would be difficult to apply to consumer and insurance contracts. First, it is unclear which insurance contracts would be caught by the current UCT regime. The UCT regime applies in relation to consumer contracts and small business contracts. A *consumer contract* is a contract at least one of the parties to which is an individual whose acquisition of what is supplied under the contract is wholly or

No.	Question	Response
		predominantly an acquisition for personal, domestic or household use or consumption (subsection 12BF(2) of the ASIC Act). This is not co-extensive with 'eligible contract' as defined in the *Insurance Contracts Regulations 2017* (Cth), noting currently that there is also a proposal to remove this term as part of the proposed amendments to the insured's duty of disclosure under the *Insurance Contracts Act* 1984 (Cth) (**Insurance Contract Act**). In light of the raft of reforms in the financial services sector, insurers will need to undertake the difficult task of navigating between the different concepts of 'retail client' under the Corporations Act, 'consumer contracts' under the unfair contract terms regime and the new 'consumer insurance contracts' recently proposed by the Australian Government.[35] This will cause confusion and the Committee submits that a consistent approach should be adopted. A *small business contract* is one for which, among other things, 'the upfront price payable under the contract does not exceed $300,000' (subparagraph 12BF(4)(b)(i)). It is unclear how this will apply in the case of an insurance contract. If the premium is payable monthly, is the 'upfront premium' the first monthly premium only? Premiums for a range of consumer insurances include levies imposed by state and territory governments (fire service levies etc). These are taxes, passed through to the relevant government. It is not clear whether they are to be included in the concept of "upfront cost".

[35] Exposure Draft, Financial Sector Reform (Hayne Royal Commission Response—Protecting Consumers (2020 Measures)) Bill 2020: FSRC rec 4.5 (duty of disclosure to insurer).

No.	Question	Response
		Based on the Exposure Draft of the Treasury Laws Amendment (Unfair Terms in Insurance Contracts) Bill 2019 (**Exposure Draft**), the Committee considers that there is uncertainty regarding the application of the UCT regime to some types of insurance contracts. Based on the current wording of the Exposure Draft, the UCT regime would apply to marine insurance contracts that meet the criteria for consumer contracts or small business contracts. Similarly, the UCT regime could apply to health insurance contracts regulated by the *Private Health Insurance Act 2007* (Cth) (that Act not being excluded by regulations under the ASIC Act). On the ordinary principles of statutory interpretation, the UCT regime, being a later Act, would prevail over any inconsistent requirements of the *Private Health Insurance Act 2007* (Cth). It is not clear that the policy objectives of the *Private Health Insurance Act 2007* (Cth) would be thereby advanced. Second, the Competition and Consumer Committee considers that it is not clear in what circumstances a consumer or small business insurance contract would be a standard form contract. The term is not defined in the ASIC Act. However, every contract is presumed to be a standard form contract unless proven otherwise (subsection 12BK(1) of the ASIC Act). The normal or natural meaning of 'standard form' contract in the insurance context implies a template form that is varied only by identifying the subject-matter of the contract, the premium, the period of insurance (if less than 1 year) and the deductible. It would be necessary in each case to determine whether the variations in terms, extensions, covers and other elements of an insurance contract were enough to establish that the contract is not a standard form contract. An insurer therefore cannot be certain whether its individual consumer or small business insurance contracts will be regarded as standard form. Third, the Competition and Consumer Committee considers that it is unclear what terms would be excluded from the UCT laws. Subsection 12BF(1) of the ASIC Act states that the UCT regime does not apply to:

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		a term of a contract … to the extent that, but only to the extent that, the term: *(a) defines the main subject matter of the contract …* Under the Exposure Draft, for insurance contracts, the main subject matter of a contract is only proposed to be excluded from the UCT regime to the extent that it describes what is being insured'. From the Explanatory Memorandum to the Exposure Draft, it seems that the drafters considered that the main subject-matter is a physical thing (such as a house or a car). However, in the case of an insurance contract, the main subject-matter of the contract is not a physical thing. It is a *risk* of loss that the insured might suffer. The insurance shifts the *risk* of that loss from the insured to the insurer. All elements of the definition of the loss that is covered, and the extent of the cover (i.e. how much of the actual loss is covered) is properly 'the main subject matter' of the contract. If the UCT regime is to be applied to insurance contracts, it should be made clear by express drafting consistent with long standing principles of insurance law that risk and its definition is the main subject-matter of an insurance contract. Otherwise consumers – and regulators – may misunderstand the application of the regime to insurance contracts.
28.	What are the other policy options that would be appropriate to apply to consumer and insurance contracts?	The Competition and Consumer Committee considers that significant modifications to the current UCT regime would be required to make it appropriate for consumer and insurance contracts. In the Competition and Consumer Committee's view, the UCT regime should, for example, clarify the following: *Notification obligations*

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		Notification obligations are critical to an insurer protecting its legitimate interests in pursuing its rights of subrogation and recovery against third parties. If the UCT regime is applied to insurance, it should be clear that the regime does not apply to the notification obligations unless the obligation is clearly excessive. *Utmost good faith* The insurer's duty of the utmost good faith is implied into each contract of insurance to which the Insurance Contracts Act applies and cannot be excluded (subsection 13(1)). Failure by the insurer to comply with that duty will expose the insurer to damages for contractual breach, to a civil penalty of up to 5,000 penalty units (subsection 13(2A)) and to potential loss of its Australian financial services licence (section 14A and Corporations Act Part 7.6, Division 4 Subdivision C). The application of the utmost good faith duty is not the same in relation to marine insurance. Under section 23 of the *Marine Insurance Act 1909* (Cth), the consequence of either party failing to observe the duty of the utmost good faith is that the other party may avoid the contract. *Termination, avoidance and cancellation issues* For contracts to which the Insurance Contracts Act applies, the provisions of Part VII of that Act apply. If the UCT regime is applied to insurance, it should be made clear that termination, avoidance or cancellation consistently with the provisions of that Act does not give rise to rights or liabilities under the UCT regime. The relationship between the civil penalty for a breach of good faith and any penalty imposed under the UCT provisions needs to be clarified – the regulator should not be able to 'double dip'.

No.	Question	Response
29.	What would be the impact on consumer and insurance contracts of applying those requirements?	The Competition and Consumer Committee considers that the UCT regime is likely to result in less protection for insureds generally. Given the vague and indeterminate nature of the tests for UCT, if any of proposed options were applied to consumer or small business contracts (without the modifications noted above in response to Questions 27 and 28), it is likely that: (a) these contracts will be more difficult to read and understand – as they will go into greater detail about the risk covered and the obligations of the parties; (b) pricing will increase, through: (i) premium cost increases; and (ii) deductibles increasing; (c) notification obligations on insureds will increase, allowing insurers to monitor risk; and (d) renewals being restricted. The overall effect is likely to be a further restriction in the availability of insurance.
Application to franchising agreements		
30.	How would the options for defining small business (in Section 6) apply to franchisees and franchisor businesses, and what proportion of franchisees would be a small business under each of the options?	Franchised businesses are extremely diverse, and cannot be easily classified. The Franchise Council of Australia reports that the Australian franchise business segment includes 1,344 networks, with more than 98,000 individual franchised outlets, employing more than 598,000 people.[36]

[36] Franchise Council of Australia, 'About the FCA' (Web Page) <https://www.franchise.org.au/about/>.

No.	Question	Response
		Based on the experience of its members, the Competition and Consumer Committee considers that most, but not all, franchisees are likely to be small businesses. Franchisors are often very small businesses, with few staff and limited revenue. Even in the case of very large franchise systems involving hundreds of franchisees, the franchisor may itself have 20 or fewer employees. Equally, however, many (if not most) franchisors are also small businesses based on the current headcount threshold (and this number will increase substantially if the proposed increase from 20 employees to 100 employees proceeds). These differences highlight that the franchise sector is not one which sits neatly within the scope of the UCT regime. As discussed below, the Competition and Consumer Committee's view is that the franchise sector requires specific regulation which can be targeted to the unique features of the sector, as already occurs through the Franchising Code of Conduct.
31.	Will changes to the value thresholds for contracts (section 7) apply to franchise agreements, and what proportion of franchising agreements would be captured under each option?	Changes to the value thresholds for contracts are likely to have limited impact on most franchise agreements. Most franchise agreements are multi-year contracts, and there are few systems where the 'upfront price' will exceed $1 million. Even in franchise systems that do have significant upfront costs, these costs will often be associated with lease obligations and fit-out costs. These costs are typically incurred in separate contracts, such that the upfront price under the franchise agreement itself will be reduced.
32.	How would the options for clarifying a standard form contract (Section 8) apply to franchise agreements and what proportion of franchisee agreements would be a standard form contract?	There is significant uncertainty around whether franchise agreements can properly be considered to be 'standard form contracts'. There are usually variables in franchise agreements which are separately negotiated with each franchisee. However, the core terms of franchise agreements are typically not negotiated separately with each franchisee. In part, this is perhaps because the

No.	Question	Response
		Franchising Code of Conduct[37] regulates the terms of franchise agreements, including terms which are frequently the focus of ACCC action in connection with the UCT regime (such as exclusions of liability, termination rights and post-termination restraints of trade). Even where not negotiated, franchisees will typically have a reasonable opportunity to negotiate as a result of the protections that they are afforded under the Franchising Code of Conduct. For instance, the Code imposes obligations on franchisors to provide disclosure of various information to prospective franchisees, and the obtaining of independent legal, accounting and business advice. There are also obligations on franchisors and franchisees (including prospective franchisees) to deal with one another in good faith. These elements are all consistent with franchisees having a 'reasonable opportunity to negotiate'. In these circumstances, the Competition and Consumer Committee considers that the UCT regime may not be appropriate for regulation of Franchise Agreements. As noted, the Committee's view is that the franchise sector requires specific regulation which can be targeted to the unique features of the sector, as already occurs through the Franchising Code of Conduct.
33.	How will the different penalties, infringement notices and enforcement options (Section 4) apply in the franchising sector? Would they be appropriate for franchise agreements?	The imposition of penalties, infringement notices and associated enforcement options would not be appropriate for franchise agreements. The Franchising Code of Conduct already includes civil penalty provisions for breaches of the Code including: • Failure to act towards another party to a franchise agreement (or potential franchise agreement) in good faith (subsection 6(1)).

[37] *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth) sch 1 ('*Franchising Code of Conduct*)'.

No.	Question	Response
		• Failure to provide mandated disclosures, or to receive a non-refundable deposit, at least 14 days prior to the entry into a franchise agreement (subsection 9(1)). • Failure to provide at least 6 months' notice if the franchisor does not intend to a renew a franchise agreement when it expires (subsection 18(2)). • Failure to provide a party with reasonable opportunity to cure any notified breach of the franchise agreement before terminating the agreement for breach (subsection 27(2)). There are other provisions of Franchise Agreements which are regulated by the Franchising Code of Conduct, but for which civil penalties do not apply where it is breached. For instance, section 23 of the Franchising Code of Conduct stipulates that a restraint of trade contained in a franchise agreement will have no effect if a franchise agreement is terminated or not renewed by a franchisor where compensation for loss of goodwill is not paid to the franchisee. The Franchising Code of Conduct has been carefully structured to provide a balance between ensuring that specific contractual provisions and behaviours are regulated, while mandating the *conduct* (as opposed to contractual terms) is engaged in in good faith. In the circumstances, the Competition and Consumer Committee's view is that franchise agreements should be expressly excluded from application of the UCT regime. Instead, any particular contractual terms which are seen as contrary to policy, should be specifically regulated through amendments to the Franchising Code of Conduct.

No.	Question	Response
34.	What proportion of franchise agreements are perpetual or evergreen, and how could UCTs in these agreements be addressed?	The Competition and Consumer Committee understands that relatively few franchise agreements are perpetual or evergreen. The highly regulated nature of the franchise sector means that even long-term franchise agreements typically provide for variation if necessary to reflect changes to the law. As to the question of how evergreen or perpetual standard form contracts should be dealt with more broadly, the Competition and Consumer Committee is of the view that it would be inappropriate to apply the UCT regime to contracts retrospectively. The UCT regime assesses the 'fairness' or clauses at the time the contract was entered into, and that must take into account the state of the law as it existed at that date.