



Min-it Software

**TREASURY Consultation –  
Strengthening Protections Against Unfair Contract Terms**

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## **Background Information**

This submission is made on behalf of Min- it Software clients.

Min-it Software (“Min-it”) welcomes the further opportunity to make this submission on Treasury’s consultation on strengthening protections for consumers and small businesses against unfair contract terms.

Aside from the software produced in-house, specifically by or for franchised organisations, Min-it is a leading loan management software supplier to non-ADI credit providers, both in Australia, New Zealand and more recently, Papua New Guinea, the United States of America and South Africa. Our clients offer a wide range of consumer and business finance products.

The vast majority of Min-It’s clients are not affiliated with any industry association.

## Introduction

As Treasury notes, consumer unfair contract terms (“UCT”) have been extended over the years to address a perceived prevalence of unfair contract terms in consumer and small business standard form contracts. The last general amendments were enacted in late 2016 with the passing of the Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015 (“SBUCT”) and extended the UCT provisions to standard form small business contracts where the business met the relevant ‘small business’ criteria.

As the Explanatory Memorandum notes, there has also been a further amendment extending the UCT provisions to insurance contracts under the Australian Securities and Investments Commission Act 2001 (“ASIC Act”).

These measures are the result of Government accepting recommendations from the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services (“Hayne Royal Commission”).

We had intended to limit our comments to the proposed amendments to the Australian Securities and Investments Commission Act 2001 (“ASIC Act”). Given the author’s current hospitalisation and Treasury’s advice it cannot grant any extension, though we had intended to make more, this submission therefore covers just two points.

## Contract contravention

Under the Bill, at clause 1BF(2C) of the ASIC Act and 23(2C) of the ACL, “[a] person contravenes this subsection if:

- (a) the person applies or relies on, or purports to apply or rely on, a term of a contract;  
and
- (b) the contract is a consumer contract or small business contract; and
- (c) the contract is a standard form contract; and
- (d) the contract is either a financial product or a contract for the supply, or possible supply, of financial services; and
- (e) the term is unfair.”

Most businesses, whether small or otherwise, rely on the legal advice they receive from their solicitor or lawyer. In fact, unless they sought a second opinion, they would merely accept the professional advice being offered.

In an earlier response to a Treasury Consultation of 2020<sup>1</sup> on UCT Enhancements, in response to question 5, we stated:

*“Having discussed this with our own lawyer, Dr Franci Cantatore, Associate Professor of Law at Bond University and who provides training clinics for students that want to practice law, both of us are in agreement that the issue starts firmly with the lawyers. Based on what we’ve seen, most lawyers create contracts based on precedents. That is a big issue for junior lawyers, particularly for the bigger law firms as these contracts are rarely, if ever, updated to cope with changes in the law or the application of amendments. That allows for terms and condition clauses that are now regarded as UCT’s to persist.”*

and

*“With the high cost of contesting UCTs in the Courts, parties cannot be either risk-averse or risk-tolerant to UCTs; there needs to be a middle ground.*

*In our opinion, there has been no or very little spent in educating businesses to be compliant with UCTs. For example, there has been no media advertising reminding*

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<sup>1</sup> Min-It Software, 2020.

*industry of what a UCT is. In our view, regulators cannot and should not rely on the few big cases they take and then hope the lawyers circulate the details to their clients. Many small businesses simply do not have a lawyer so word is never going to go down far enough.”*

There are still lawyers offering non-compliant UCT contracts to businesses. We are of the opinion that if a person that either enters, applies or seeks to rely on a consumer contract or small business contract that contains one or more UCTs, then the lawyer or solicitor that created it must also be in contravention of this legislation. Any contravention must start with the author of the document on which others rely.

Under s.177(1) of the National Consumer Credit Protection Act 2009 (Cth) (“NCCP Act”), there is provision for the Court, on application by either ASIC or any other person, to be granted an injunction on such terms as the Court considers appropriate if there is, or there is an attempt to, or there is aiding and abetting to, contravene the NCCP Act. Section 178 allows for Compensation Orders to be made by the Court but only if the plaintiff or ASIC (on behalf of the plaintiff) applies for an order under this section. The plaintiff in this case would be the financial services supplier but this would preclude a person that entered into or applied for a consumer contract or small business contract that contains one or more UCTs from taking action. Equally, under s.17 of the NCCP Act, only ASIC can apply to the Court for other orders to compensate loss or damage. Given past experience, we cannot rely on ASIC doing so.

Given the General Conduct obligations of credit licencees under s.47(1) that require it to do all things necessary to ensure that the credit activities authorised by the licence are engaged in efficiently, honestly and fairly, it is arguable that these UCT provisions are also covered. There are no similar provisions under the ASIC Act but there may be provision to prosecute under s.79 of for the Corporations Act 2001.

In our view, there needs to be one standard provision for this legislation that allows for either the relevant regulator (either ASIC or the ACCC) or another person to launch proceedings or be a party to any proceedings against the author of any non-UCT-compliant credit or small business contract. If Government wants to stamp out UCT, then the author must be included

as a party to any proceedings and for that reason, none of the above sections in the NCCP Act go far enough.

It is inequitable in itself if the user of a non-UCT compliant contract is prosecuted but cannot recover any recompense against the author of the document for losses or damages arising out of its use simply because ASIC chooses not to do so.

## **Small Business Definition Threshold**

In our earlier response to Question 13 of the 2020 consultation<sup>2</sup> regarding changing the headcount, we previously stated “we would be against increasing the headcount.” We remain unconvinced that a small business is one that employs fewer than 100 persons and argue that the existing definition of “fewer than 20 persons” should remain. We have no issue with the turnover limit being removed given there are a number of businesses that have little profitability but whose turnover would exceed \$10 million.

Businesses that employ more than 20 people should be able to afford legal advice and not rely on the provisions of this legislation. Doing otherwise is simple laziness or being economic with their actions and encourages a lack of due diligence on the part of the directors.

Furthermore, we are deeply concerned that in aligning the new definition with that used by the Australian Consumer Complaints Authority (“AFCA”), this is a furtive move to enable that body to deem any term in either a consumer credit contract or a small business contract a UCT. AFCA is neither a Court nor a Tribunal and as only a Court can declare a UCT, these provisions should not herald some clandestine attempt at departing from the separation of powers. If AFCA believes a term is UCT, it should refer the matter to ASIC for any possible action.

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<sup>2</sup> Ibid 2, page 11