

## Parliamentary Joint Committee on Corporations and Financial Services

### Oversight of ASIC, the Takeovers Panel and the Corporations Legislation No.1 of the 46th Parliament

#### Australian Financial Complaints Authority

#### AFCA QoN06:

**Senator O'NEILL:** Maybe you'll need to take this one on notice. Mr Billson, the ombudsman for ASBFEO, indicated in his comments—I noted you were in the room—some concern about unfair contract terms and the delay in understanding, in the broader corporate world and in terms of contract law, what unfair contract terms were and their need to comply with legislation. Could you take on notice what's going on in that space and give us a sense of it, because, clearly, if that's the case, small businesses will be affected and jobs will be lost.

**Mr Locke:** Yes, we're happy to take that on notice.

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#### Answer:

AFCA is aware of the Unfair Contract Terms (UCT) legislation and has already considered it in several determinations in a range of product areas, including investments, derivatives, hedging/forex, insurance, among others. We would be happy to provide examples to the Committee, if considered helpful.

Very few small businesses who complain to AFCA actually rely on breaches of this legislation, when they could do so. This may point to an issue with small business awareness of the legislation or their rights.

In applying the legislation when assessing a complaint, AFCA will consider, among other things, whether:

- the contract is a 'consumer contract' or 'small business contract' as defined by the legislation
- the contract is also a 'standard form contract'
- the contract term does not:

- > define the 'main subject matter', or
- > set the upfront price of the contract
  
- the term is unfair because:
  - > it would cause a significant imbalance in the parties' rights and obligations arising under the contract, and
  - > it is not reasonably necessary to protect the insurer's legitimate interests, and
  - > it would cause detriment to a party if it were to be applied or relied upon.

We would normally consider the UCT legislation when:

- the complainant/small business explicitly raises this issue, or
- it appears to AFCA that a term relied on by the financial firm to the detriment of the complainant, may be unfair in how it has been applied or interpreted.

The legislation has only been in place for several months in Insurance. There is always a lag time between legislation commencing and when complaints may be lodged at AFCA as a general rule. This is because a complainant must suffer loss arising from conduct that has occurred following commencement.

However, we have previously called out situations when a term, or its application to a particular set of circumstances, has been unfair. A common example is Insurance policies that allow an insurer to cash settle a claim based on their cost, which cannot be matched by the insured. In those cases, we have said that is unfair for the Insurer to apply that term when it is the insurer wanting to cash settle the claim.