Unfair contract terms in franchise agreements

Key findings of targeted compliance checks on franchisors

December 2023

Acknowledgment of country

The ACCC acknowledges the traditional owners and custodians of Country throughout Australia and recognises their continuing connection to the land, sea and community. We pay our respects to them and their cultures; and to their Elders past, present and future.

Australian Competition and Consumer Commission
Land of the Ngunnawal people
23 Marcus Clarke Street, Canberra, Australian Capital Territory, 2601

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Executive Summary

This report summarises the key findings of targeted franchising compliance checks conducted by the Australian Competition and Consumer Commission (ACCC).

Ensuring that small businesses (including franchisees) receive the protections under the *Competition and Consumer Act 2010* (Cth) (CCA), the Australian Consumer Law (ACL) (contained in Schedule 2 of the CCA), and mandatory codes of conduct is a current ACCC compliance and enforcement priority.

Through the compliance checks we engaged with 10 franchisors from a variety of industries, including repair and maintenance, education and training, arts and recreation, wholesaling, personal services, and food retailing. We focused on newer franchisors and systems with less than 40 franchisees. We requested franchisors voluntarily provide the ACCC with the latest copies of their key facts sheet, franchise agreement and disclosure document.

We assessed these documents against the requirements of the Franchising Code of Conduct (Franchising Code). In anticipation of the reforms to the ACL's unfair contract terms (UCTs) regime taking effect, we also considered the franchise agreements against the UCT provisions (sections 23 and 24 of the ACL). From 9 November 2023, it is unlawful for businesses to enter into a small business or consumer contract containing UCTs or (subject to transitional arrangements in respect of existing contracts) to rely or purport to rely upon such UCTs. Significant penalties now apply if a court finds that a standard form small business contract or standard form consumer contract contains UCTs.

The use of standard form contracts is common in franchising. Franchisors generally control their business system and brand by entering into substantially the same agreements with their franchisees. The franchise agreement is core to the relationship between a franchisor and its franchisees. Through the agreement, the franchisor sets out the rights and obligations of each party, how the franchisor and franchisee will interact with each other, and the day-to-day rules the franchisee must follow. The franchising relationship is usually characterised by significant limits and controls on the autonomy of franchisees, with significant power residing with the franchisor. We are concerned this power imbalance is exacerbated when franchisors include or rely on UCTs in their franchise agreements.

We are pleased to report that the documents we assessed were largely compliant with the Franchising Code and we did not identify any systemic issues or concerns under the code. All franchisors had prepared a disclosure document and key facts sheet. Nine of the 10 franchisors we assessed have created profiles on the Franchise Disclosure Register.

However, our review of the franchise agreements identified a significant number of clauses that raised UCT concerns for the ACCC. Every agreement contained potentially problematic terms. The prevalent issues we identified related to unilateral variation clauses, withholding and set-off payment clauses, audit power clauses, restraint of trade clauses and termination clauses.

There can be legitimate reasons why franchisors may require certain contractual powers. Many franchise systems seek to balance the rights and obligations between franchisor and franchisee fairly. However, our review identified instances where clauses were broader than what the ACCC considers may be reasonably necessary to protect the franchisor's legitimate business interests.

We have issued this public report to assist the franchising sector to proactively consider their obligations under the ACL's UCT regime. We strongly encourage franchisors to use the report to inform their own reviews and to seek independent legal advice on their rights and obligations under the UCT regime. Each case will need to be considered based on the terms and the particular contract in question.

Parties are encouraged to remove or amend any potential UCTs to avoid financial penalties under the new laws.

Introduction

The primary responsibilities of the ACCC are to enforce compliance with the competition, consumer protection, fair trading and product safety provisions of the CCA, which includes the ACL, as well as prescribed industry codes of conduct including the Franchising Code.

Under the ACL, contract terms in a standard form small business or consumer contract are unfair if they:

- cause a significant imbalance in the rights and obligations of the parties under the contract,
- are not reasonably necessary to protect the legitimate interests of the party advantaged by the term, and
- would cause detriment to the other party if applied or relied upon.

Prior to 9 November 2023, if a court or tribunal found that a standard form small business contract or consumer contract contained a term that was 'unfair', the term would be void — meaning it would not be binding on the parties.

From 9 November 2023, businesses are prohibited from entering into standard form contracts with small businesses or consumers which include UCTs. They are also prohibited from applying or relying on (or purporting to apply or rely upon) UCTs in contracts entered into or renewed, or any UCTs that are varied, on or after 9 November 2023. The ACCC can now seek significant financial penalties from businesses who breach these prohibitions.[1]

Subject to the transitional arrangements for standard form contracts entered into before 9 November 2023, entering into contracts with, or relying or purporting to rely upon, UCTs may now be subject to significant penalties of up to:

Corporations

The greater of:

- $50,000,000
- if the Court can determine the value of the 'reasonably attributable' benefit obtained, 3 times that value, or
- if the Court cannot determine the value of the 'reasonably attributable' benefit, 30% of the corporation's adjusted turnover during the breach turnover period for the contravention.

Individuals

- for individuals, $2.5 million.

More businesses are now covered by the UCT protections: businesses with fewer than 100 employees or turnover of less than $10 million are now covered. This means more franchisees and master franchisees who sign up to standard form small business contracts have the benefit of the UCT protections.

This report provides a breakdown of common terms of concern identified during the ACCC's franchising compliance checks. The report serves as guidance to the franchising sector, and other businesses, on the ACCC's views regarding the types of terms that may raise concerns under the UCT regime. Franchisors are encouraged to seek independent legal advice to ensure their franchise agreements are compliant with the ACL (including the UCT regime) and the Franchising Code.

1 The state and territory fair trading agencies also enforce the Australian Consumer Law and may take enforcement action in relation to unfair contract terms, including imposing penalties.

Franchising compliance checks

Compliance checks are one tool the ACCC uses to monitor compliance with prescribed industry codes. We have powers under the CCA to require parties to provide us with certain documents but can also request that information is provided on a voluntary basis.

In July 2023, the ACCC commenced a series of franchising compliance checks focusing on documents that franchisors must provide to prospective franchisees during the disclosure process. We wrote to franchisors and requested they voluntarily provide copies of their most recent franchise agreement, disclosure document and key facts sheet. As smaller franchise systems make up a significant proportion of the franchising sector in Australia, we focused on newly established franchise systems and/or those with a comparatively smaller number of franchisees. The selected franchise systems ranged from 2 to 32 franchisees.

Unlike our 2019 compliance checks which focussed on disclosure practices in the food services industry, this series of compliance checks involved 10 franchisors from a variety of industries including repair and maintenance, education and training, arts and recreation, wholesaling, personal services, and food retailing. This allowed us to consider practices across a variety of industries involved in franchising.

Unfair contract terms in franchise agreements

The UCT regime only applies to standard form small business and consumer contracts. Under the UCT regime, a contract is presumed to be a standard form contract unless proven otherwise. Section 27 of the ACL sets out a number of factors relevant to considering whether a contract is a standard form contract.

Based on our experience regulating the franchising sector, the ACCC considers many franchise agreements are likely to be standard form small business contracts.

Prospective franchisees generally have limited or no opportunity to meaningfully negotiate the terms within a franchise agreement. A contract may still be standard form despite there being opportunities to negotiate changes to minor or insubstantial terms, or a franchisee being able to select from a range of options. The ACCC considers this may include:

- the location of the site
- whether the franchise agreement relates to a mobile franchise business or a site-based franchise business
- the minimum term of the franchise agreement
- the corporate structure of the franchisee entity (sole trader, a partnership, a company etc).

The UCT protections apply to standard form contracts with businesses that have fewer than 100 employees or make less than $10 million in annual turnover. The ACCC considers that a significant proportion of franchisees and master franchisees operating in Australia are likely to be protected under the UCT regime.

Potential UCTs identified through the compliance checks

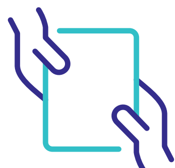
All 10 franchise agreements that we assessed contained terms that the ACCC considers may be UCTs. The prevalent issues we identified relate to:

1. unilateral variation clauses
2. withholding or setting-off payments
3. audit power clauses
4. restraint of trade clauses
5. termination clauses.

This report builds on the ACCC's 2016 review of selected industries for unfair terms, including the franchising sector. The findings of the 2016 review are summarised in the ACCC's Unfair terms in small business contracts report.

Key findings

1. Unilateral variation clauses



Terms that **permit the franchisor to unilaterally vary terms** appeared **in all 10** franchise agreements.

Terms that allow one party to unilaterally vary aspects of the contract are prevalent in standard form contracts, including in franchising. Such terms have been a common feature of the ACCC's UCT enforcement action, including court action against Fuji Xerox Australia Pty Ltd[2] and JJ Richards & Sons Pty Ltd.[3]

Unilateral variation clauses are not automatically unfair but are a common type of term that is likely to raise concerns under the UCT regime. A unilateral variation clause is likely to create an imbalance in the parties' rights and obligations under the contract and may cause detriment to the franchisee, particularly if relied upon to change key aspects of the contract. Terms that allow a franchisor to unilaterally vary important rights and obligations entrenched in an agreement are likely to be problematic where they extend beyond protecting the franchisor's legitimate business interests.

The ACCC considers that unilateral variation terms are particularly concerning when:

- they give the franchisor an unconstrained ability to vary key aspects of the franchise agreement (including the terms under which the franchisee operates), and
- the franchisee does not receive sufficient prior notice of the change and has no ability to exit the agreement without suffering financial detriment.

We identified a range of concerning unilateral variation clauses, including terms that give the franchisor sole or absolute discretion to make changes to the agreement (or related documents) and where the franchisee was only entitled to a very short time period to implement the change. These clauses included terms on the franchisee's key performance indicators, the brand's intellectual property, the layout and fit-out of storefronts as well as increasing the fees payable to the franchisor.

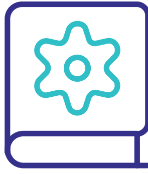
We found that there were 2 widespread types of unilateral variation clauses within the franchise agreements. They were:

- the unilateral right to vary the franchise's operations manual, and
- the unilateral right to vary the approved products list and approved suppliers list.

2 ACCC v Fuji Xerox Australia Pty Ltd [2021] FCA 153

3 ACCC v JJ Richards & Sons Pty Ltd [2017] FCA 1224

Varying the operations manual



Terms that permit the **franchisor to unilaterally vary the operations manual** appeared **in 7 of the 10** franchise agreements.

'Operations manuals' are used by franchisors to detail what a franchisee must do and the policies and procedures the franchisee must comply with. Operations manuals are usually separate documents from the franchise agreement. They are often incorporated into the terms of the franchise agreement and franchisees are required to comply with the manual. Significantly, non-compliance with the operations manual may mean the franchisee breaches the franchise agreement and could lead to the termination of the agreement by the franchisor.

In our 2016 UCT review, the ACCC raised concerns about terms that allow the franchisor to vary the entirety of the operations manual in an unconstrained manner. Our 2023 compliance checks showed that many franchisors continue to include broad, unconstrained powers to unilaterally vary the operations manual in their franchise agreements. We found that the majority of the franchise agreements we reviewed contained broad terms that allowed the franchisor to update, modify or change the content of the operations manual, usually at the franchisor's sole discretion.

There are instances where a franchisor may reasonably require the ability to make changes without seeking the franchisee's consent, for example to respond to changes in the law. However, we consider that terms which place no constraints or limits on when, how or why the franchisor may unilaterally vary the operations manual are likely to go beyond what is reasonably necessary to protect the franchisor's legitimate interests.

Our recent compliance checks found that many of the unilateral variation terms did not require the franchisor to provide the franchisee with reasonable written notice prior to the change coming into effect. While the provision of reasonable notice may not in itself be sufficient to prevent the term being unfair, we consider that the absence of such an obligation is likely to exacerbate the imbalance between the parties and increase the potential for harm to the franchisee.

Four franchise agreements provided that changes to the operations manual would take effect 7 days (or less) after notice was provided. While a clear implementation timeframe provides more certainty to franchisees, 7 days may not be a reasonable amount of time to implement changes to the franchisee's operations or to consider what options are available to them if they consider the changes will have an adverse impact on their business. This is especially the case if the changes are significant/onerous or if the franchisee is required to bear the full costs of implementing the change. Concerningly, we identified one agreement that required the franchisee to implement any changes within 48 hours.

The consequences for a franchisee in the event of non-compliance can be severe. In all instances, failure to comply with or implement the change to the operations manual was stated to be a breach of the franchise agreement and cause for potential termination.

We consider franchise agreements that place no limitations on the franchisor's ability to vary the operations manual are more likely to be unfair. This is especially the case where franchisees do not have a right to exit the agreement (without penalty or financial harm) if they do not agree with, or are unable to implement, the changes to the operations manual.

If a franchise agreement contains clauses permitting the franchisor to unilaterally vary the operations manual, we recommend that:

- The clauses do not go beyond what is reasonably necessary to protect the franchisor's legitimate business interests.
- The franchise agreement stipulates that the franchisor must provide reasonable written notice of the change and a reasonable opportunity for the franchisee to comply. What is reasonable will vary depending on the franchise agreement and the type of change. Franchisors should consider what is reasonable in their circumstances, including whether it is reasonable to require the franchisee to bear the cost of any changes.
- Where appropriate, the franchise agreement should give the franchisee the right to negotiate changes and/or when they must be implemented.

Changing approved products lists and approved suppliers lists

Terms that permit the **franchisor to unilaterally vary the approved products list and/or the approved suppliers list** appeared in **7 of the 10** franchise agreements.

Exclusive supply arrangements are common in franchising. When entering a franchise system, it can be standard practice for franchisors to specify the types of products that franchisees are required to purchase for the business, and/or which suppliers they can purchase from. Specifications about approved products or suppliers are often included in the franchise's operations manual.

There are a number of reasons why franchisors may reasonably seek to control the products or services used by the franchisee. This includes promoting consistency across different franchise units, health and safety reasons (including traceability of inputs), as well as ensuring that the products or services provided (or used) by the franchisee meet certain standards and requirements.

Our compliance checks identified several clauses within 7 franchise agreements that gave the franchisor the unilateral right to add or remove products and/or suppliers at their sole discretion. Such clauses are more likely to be unfair if they:

- do not limit the circumstances in which the franchisor can make changes to the lists
- do not require the franchisor to give prior reasonable notice to franchisees of the change/s
- prevent franchisees in all circumstances from selling products already purchased from the earlier approved products/supplier list.

The ACCC is particularly concerned where there is no onus on the franchisor to minimise the financial impact on franchisees when changes are made to the lists, as such terms may go beyond what is reasonably necessary to protect the legitimate interests of the franchisor.

If a franchise agreement contains clauses permitting the franchisor to vary approved products or suppliers, we recommend that:

- The clauses should specify the circumstances in which the franchisor may review or make changes to the lists.
- Any unilateral variation clauses do not go beyond what is reasonably necessary to protect the franchisor's legitimate business interests.
- The franchise agreement requires the franchisor to provide the franchisee with reasonable notice of a proposed change to the lists. However, franchisors should be aware that notice alone may not prevent the term from being unfair.
- The franchisee has a reasonable time to comply with change/s.
- Where appropriate, the franchise agreement gives the franchisee the right to negotiate changes and/or when they will take effect.
- Where appropriate, the franchise agreement provides the franchisee with a reasonable opportunity to reduce their losses and sell or use goods purchased prior to notification of the change.

2. Withholding or setting-off payments

Terms that permit **franchisors to withhold or set-off payments** without giving the franchisee corresponding rights appeared **in 7 of the 10** franchise agreements.

Terms that enable franchisors to withhold payments or 'set-off' payments against money owed to franchisees were identified in the majority of franchise agreements we reviewed. These terms enable the franchisor to reduce or withhold payments to franchisees where the franchisor is owed money by the franchisee.

These kind of terms can cause cash flow issues for small business. Cash flow is crucial to the prosperity and health of small businesses. Withholding or setting-off payments to franchisees may have a detrimental financial impact on them. For example, it may impact their ability to pay bills, purchase stock, or pay their employees.

We observed that the franchisor's right to withhold or set-off payments could create a significant imbalance in the parties' rights and obligations under the agreement. This was demonstrated by terms that:

- enabled the franchisor to withhold payments or set-off in any circumstances, including where the payment by the franchisee is not due or is disputed
- did not require the franchisor to notify the franchisee about the set-off or withholding of payments
- explicitly prohibited the franchisee from exercising corresponding rights.

We consider one-sided terms that enable the franchisor to withhold payments or set-off amounts in all circumstances may be unfair, especially when the franchisee has no corresponding rights or is explicitly prohibited under the terms of the agreement from reducing payments when the franchisor owes money to the franchisee.

If a franchise agreement contains clauses permitting the franchisor to withhold payment or set-off, we recommend that:

- The franchisor consider whether the clause is reasonably necessary to protect the franchisor's legitimate interests. This should include whether any limitations need to be set out to ensure the clause doesn't go beyond what is reasonably necessary.
- The franchise agreement requires the franchisor to provide the franchisee reasonable notice of its intention to withhold or set-off payments.
- Where possible, the franchise agreement should set out the circumstances where it would be appropriate for the franchisee to withhold payments or set-off. Franchisors should note that a clause may be unfair where one party is able to exercise a right in more circumstances than the other party.
- Where possible, the franchise agreement should specify the method by which the franchisee can dispute or seek a review of a decision to withhold payment or set-off.

3. Auditing the franchisee's business

Terms that permit the f**ranchisor to audit the franchisee's business** appeared **in all 10** franchise agreements

It is common for franchisors to include in their contract a term that permits them to audit a franchisee's business financials. The ACCC acknowledges the importance of financial transparency in the franchisor-franchisee relationship.

We have observed that audit power clauses are generally drafted as follows:

- The franchisor has a broad discretion in deciding when to audit a franchisee, and in many cases is not required to give reasonable prior notice to the franchisee.
- If a discrepancy is identified, the franchisee will be required to pay to the franchisor the amount of the underpayment.
- In certain circumstances, the franchisee will be required to reimburse the franchisor for expenses associated with the audit.

In principle, the ACCC does not consider that such an approach is inherently unfair. However, we consider such terms are more likely to be unfair where the franchisee is required to:

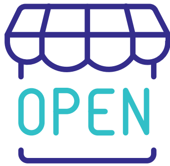
- pay interest on an underpayment at a higher default interest rate than what would apply in the normal course of business
- cover all fees and expenses related to the audit without limitation (this may include living and travelling expenses) and where there is no obligation on the franchisor to keep the costs reasonable.

During our review, we identified only 3 agreements that limited the franchisee's liability to the reasonable costs of the audit.

If a franchise agreement contains clauses permitting the franchisor to audit the franchisee's business, we recommend that:

- The clauses do not go beyond what is reasonably necessary to protect the franchisor's legitimate interests.
- If the franchise agreement requires the franchisee to pay for the costs of the audit, those costs are proportionate and reasonable.

4. Restraint of trade



Terms that seek to **limit when and/or where one party can supply goods or services** for a period of time once the franchise agreement ends, appeared **in all 10** franchise agreements.

Restraint of trade clauses are not inherently unfair, however they can often be framed in ways that raise concerns under the UCT laws. The usual purpose of restraint of trade clauses is to restrict franchisees from operating a similar business after the franchise agreement has come to an end. This may include preventing them from:

- trading in a certain area for a certain time
- doing business with current or former customers of the franchise
- soliciting employees of the franchise to leave the brand.

The ACCC highlighted concerns about the use of restraint of trade clauses in our 2016 UCT report. At the time, we encouraged franchisors to review their restraint of trade clauses to ensure they were only as broad as reasonably necessary to protect their legitimate interests. We advised that when forming a view on whether a restraint of trade clause is likely to be unfair, the ACCC will have regard to the length of the restraint, the restraint area, and the breadth of conduct the franchisee cannot engage in.

Our current series of compliance checks found that restraint of trade clauses continue to be prevalent in franchising. We identified that:

- Many terms extended the definition of 'restricted conduct' to include behaviours such as 'participating in', 'interested in', or 'indirectly involved with'.
- Nine of the 10 franchise agreements included 'cascading' 'restraint periods' from as long as 5 years to as short as 3 months. The number of different restraint periods varied between agreements with one agreement having as many as 6 possible restraint periods. The ordinary intention of this type of drafting is to ensure that, if the longest period/s were found unreasonable by a Court (and therefore void), one of the lesser restraint periods would still apply.
- Eight of the 10 franchise agreements included 'cascading' areas in kilometres under the definition of 'restraint area'; the intention being that if for any reason the largest area/s were found by a Court to be unreasonable, a lesser restraint area would apply. The number of different restraint areas varied in the agreements from 3 tiers to as many as 8, with the restraint area ranging from the entirety of Australia to 2 kilometres from the franchisee's previous site.

The ACCC considers these sorts of cascading restrictions may reduce the transparency of such restraints, including because they can increase uncertainty about the extent to which franchisees are restrained.

Historically, restraint of trade clauses, including in the franchising sector, were often drafted with cascading restraint areas and periods, some of which may have exceeded what was reasonable. A typical consequence of such excessive cascading restraints being judged as unreasonable at common law was that those restraints would be severed but the enforcing party could still rely upon the reasonable restraints.

However, the ACCC considers that such restraints which go beyond what is reasonably necessary to protect the franchisor's legitimate interests are likely to be unfair.

Case study: Back In Motion Physiotherapy Pty Ltd

In 2020, the ACCC accepted a court enforceable undertaking from Back In Motion Physiotherapy Pty Ltd in relation to UCT concerns. Back In Motion's franchise agreement contained a restraint of trade term that had the effect of restricting franchisees, on exiting the franchise system, from offering physiotherapy services within a 10km radius of any Back In Motion franchise site throughout Australia for 12 months. Given the number and location of franchise practices, this term could have effectively prevented former franchisees from offering physiotherapy services in most metropolitan areas in Australia.

The ACCC considered the term was also drafted in a manner that caused uncertainty as to the extent franchisees were restricted from offering physiotherapy services, given the use of cascading definitions of 'Restraint Area' and 'Restraint Period'.

The franchise agreements also included a clause under which franchisees could elect to pay Back In Motion a 'buy out fee' equal to four times their annual royalty fees, in order to be released from the unfair restraint of trade.

Back In Motion provided the ACCC with an undertaking that included, among other things:

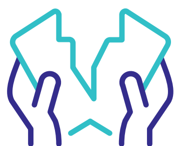
- An admission that the restraint of trade and buy-out fee terms may be unfair within the meaning of the ACL.
- Back In Motion will not enforce or purport to rely upon the alleged unfair terms in current agreements with franchisees.
- Back In Motion will not include the alleged unfair terms in future franchise agreements.

More information about the undertaking is available on the ACCC website.

If a franchise agreement contains clauses permitting the franchisor to limit the business activities of the franchisee after the contract ends, we recommend that:

- The franchisor consider how it will define the restricted conduct, restraint period and/or restraint area to only capture what is reasonably necessary to protect the franchisor's interests.
- Any restraints in the franchise agreement do not go beyond what is reasonably necessary to protect the franchisor's legitimate interests.
- The clauses are consistent with any requirements of the Franchising Code.

5. Termination clauses



Terms that **give one party**, usually the franchisor, (but not the other) **extensive rights to terminate the agreement** appeared **in all 10** franchise agreements.

Franchise agreements can end in a variety of ways. This includes through the exercise of a termination power under the contract. During the compliance checks, we identified that:

- Nine of the 10 franchise agreements reviewed by the ACCC included a clause that enabled the franchisor to terminate for breach of any term of the agreement (irrespective of whether the breach was material or minor).
- Only 2 franchise agreements granted franchisees corresponding rights (in addition to those provided in the Franchising Code) to terminate the agreement if the franchisor is in breach of the agreement and fails to remedy the breach. One agreement specified the breach must be material.
- One franchise agreement included a clause that enabled the franchisor to terminate the agreement without cause (i.e., where the franchisee had not breached the agreement).

There are circumstances in which termination clauses can be reasonably necessary for both franchisors and franchisees. For example, they can protect franchisors and their franchisee networks from harm caused by significant misconduct by a franchisee. Termination clauses can also assist both parties to the agreement to reduce their losses in the event a franchise unit is performing poorly. That said, franchising requires a significant investment by the franchisee and the risk of harm to the franchisee from the agreement being terminated is high.

In the ACCC's view, clauses that permit the franchisor to terminate where the franchisee has failed to remedy a material breach of the agreement are unlikely to raise UCT concerns, provided the franchisee is afforded a reasonable opportunity to remedy the breach. The ACCC considers termination clauses are more likely to raise UCT concerns where the franchisor is allowed to terminate the contract in a significantly wider range of circumstances compared to the franchisee.

Although not common amongst the agreements reviewed, we were particularly concerned to find one contract which granted the franchisor the power to terminate a franchise agreement before it expired and without the consent of the franchisee, even if the franchisee had not breached the agreement. In our view, such a clause is likely to be unfair because it goes beyond what it reasonably necessary to protect the franchisor's legitimate interests and will cause significant detriment to the franchisee if relied on. While the clause in question included an obligation on the franchisor to provide the franchisee with reasonable written notice of the proposed termination and the reasons for it, we consider that these conditions are likely to be insufficient to prevent the clause being unfair.

Case Study: ACCC v Fujifilm Business Innovation Australia Pty Ltd

In 2022, the ACCC commenced proceedings against Fujifilm alleging that multiple of its standard form agreements contained UCTs. The court declared 38 terms across 11 standard form agreements were UCTs.

Fujifilm supplies a range of products to businesses on a lease basis, including photocopiers, scanners, and printers.

One of the clauses that the Court declared void was a termination clause that allowed Fujifilm to immediately terminate the contract if any breach of the contract was not remedied within 7 days. Under the contract, the customer was only given the right to terminate the contract if Fujifilm materially breached the contract and the breach was not remedied within 30 days. The Federal Court concluded that the Fujifilm termination clause was unfair.

Key takeaways for franchisors:

- The balance of rights between the parties is important when considering whether a termination clause is unfair.
- The opportunity to remedy a breach may not be sufficient on its own to prevent a termination clause being unfair.

More information is available in our media release.

If a franchise agreement contains termination clauses, we recommend that:

- The franchisor does not include termination clauses that go beyond what is reasonably necessary to protect the franchisor's legitimate interests. In particular, the franchisor should give consideration to whether termination is an appropriate remedy for particular breaches of the agreement.
- The clauses are written in plain language, presented clearly and not hidden in the contract. Franchisors should consider how they can increase the transparency of termination clauses in a franchise agreement.
- The franchise agreement has appropriate counter-balancing terms. Franchisors should consider the balance of termination rights between the franchisor and franchisee.
- Franchisees are provided a reasonable opportunity to remedy any potential breaches that may give cause for termination under the agreement.

Conclusion

UCTs are a priority for the ACCC

We have issued this public report to provide guidance to the franchising sector on the ACCC's views about the application of the UCT regime to their contracts.

The findings in this report are particularly concerning given the ACCC has previously raised concerns about similar terms following our 2016 UCT review of selected industries. Accordingly, these clauses may be indicative of common practices that have become entrenched within the franchising sector. Franchisors that fail to proactively take steps to address the concerns we have outlined in this report, as well as other potentially unfair terms in their contracts, risk enforcement action by the ACCC.

We consider that the franchising sector is on notice regarding the ACCC's views about UCTs in franchise agreements. In line with our Compliance and Enforcement policy, where we see a risk of widespread small business detriment as a result of potential UCTs, we have a range of enforcement tools available to us to achieve compliance, including taking court action.

What franchisors can do when reviewing their standard form contracts

The following general tips may help franchisors when reviewing their standard form contracts:

- **Consider both points of view:** Even if you think a term is reasonably necessary to protect your business's legitimate interests, consider the term, and any detriment it could cause, from the franchisee's point of view.
- **Include counter-balancing terms:** Check whether your contract has appropriate counter-balancing terms.
- **Avoid broad terms:** Check for reasonableness and ensure terms are only as broad as reasonably necessary to protect your business's legitimate interests.
- **Meet your obligations under the ACL:** Don't include terms that seek to avoid your business's obligations under the ACL or the Franchising Code – for example, terms that seek to limit your customers' consumer guarantees rights, or terms that seek to disclaim any representations your business may have made outside of the contract.
- **Be clear:** Use clear and simple language in your contracts.
- **Be transparent:** Look for ways to ensure key terms are clearly drawn to the attention of your franchisees during the sign-up process, and any renewal process.

What we expect from the franchising sector

Franchisors should proactively review their franchise agreements and any other standard form consumer contracts or standard form small business contracts that they use in their business. If a franchise agreement contains any potentially unfair terms, franchisors should take immediate action to address them. Franchisors should not enter into small business contracts which contain UCTs or rely (or purport to rely upon) such terms. We remind franchisors that it is not sufficient to simply add a clause in your contract to state that all the terms are reasonable and necessary.

A successful franchise system relies on the success of its franchisees. Inadequate or misleading disclosure to prospective franchisees and reliance on potentially unfair terms sets them up for failure. It is in franchisors' interests to be fair and transparent in their dealings with people looking to buy a franchise in order to promote the long-term success of the franchise system.

We encourage the franchising sector to use this general report and existing guidance from the ACCC to review their franchise agreements for potential UCTs. State and territory fair trading agencies may also have useful guidance on their websites. Franchisors are encouraged to seek independent legal advice to ensure their franchise agreements are compliant with the ACL and the Franchising Code.

Additionally, we encourage prospective and current franchisees to use this report to identify potential unfair terms in agreements they either have or are planning to sign. To find more information about the UCT regime, please visit the ACCC's Contracts webpage.

If a current, former or prospective franchisee is concerned about the practices of a franchisor, they can make a report online to the ACCC. Each report is individually assessed. While we can't take action in relation to every report, each report allows us to better direct our resources towards addressing systemic issues that have the potential to cause the greatest harm.

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