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Consultation RIS re Enhancements to Unfair Contract Term Protections

In general, the fewer exemptions, the better. If the 'victim' will be the weaker/ more vulnerable party in a contractual relationship then regardless of the type of relationship being documented, they need to be protected from potentially exploitative conduct by the party drafting the contract.

3. Key questions

Legality and Penalties

12. I have no data. It is hard to fund the gathering of such data.
13. As for 1
14. Franchise sector uses UNT widely. I will provide examples when I return to my office on 24 March.
15. I am not a small business.
16. Regulatory guidance and education is valuable for people who essentially want to comply with the law. For people who couldn't care less or who know they are the stronger party financially no amount of regulatory guidance or education will change their practices.
17. Yes. It is unrealistic to expect the regulators (ACCC and ASIC) to shoulder the burden of litigating to provide examples of what are UCT. I suggest the onus of proof be shifted to the drafting party to prove the terms in question are not UCT. Financial penalties should be applied to franchisor clients and their law firms that include UCT in template franchise agreements.
18. Personally, no, but why would anyone try as the court process is slow and expensive.
19. Options:
 - a. Option 1 is demonstrably not working. You just need to ask the regulators to satisfy yourself of this.
 - b. Option 2
 - c. Option 3
 - d. Option 4

Flexible remedies

20. No evidence.
21. Of course. Simply to declare a term void is not a sufficient deterrent.
22. Can't they do this already? Of course, they should be able to.

Definition of a small business

23. I am not in business
24. Why have a headcount at all? There is no reason why an arbitrary head count of 20 or any other number should work. If you think of franchises like McDonalds, Hungry Jacks, Quest Apartments, both franchisor and franchisee are likely to have more than 20 employees, yet the franchisee will have been required to sign a standard form franchise agreement, and other contracts, that are significantly weighted in favour of the franchisor. While McDonalds, Hungry Jacks and Quest operation are presumed to be equitably run, not all franchisors are the same. The evidence provided to the 2018 Franchise inquiry by Retail Food Group franchisees and franchisees of other systems accused of predatory behaviour will show this. They, too, may have

had over 20 employees, and would, but for the thresholds, have been able to access the UCT provisions if they could have afforded access to the court process.

25. It is the contract and the power relationship between the parties to it that are more important than the annual turnover of either party. Annual turnover can be gamed. It is a moving number so could not be of value in determining whether a business should be protected by the UCT legislation.
26. Franchisors sometimes include the turnover of all franchisees in their reporting. To impose a \$10m threshold might help make them report with a higher level of integrity – but, I believe there should be no \$ threshold in relation to any relationship where the weaker party is so disempowered as franchisees are. Any \$ threshold is useless as it will be very out of date by the time the legislation is reviewed next time.
27. No comment
28. No headcount should be applied in relation to franchise agreements. Some franchisors run on just 3 or 4 employees in ‘head office’ whereas some run on hundreds. Similarly, franchisees might have only 1 or 2 employees, or hundreds.

Value threshold

29. All franchise agreements and the operations manuals that sit under them. If franchise agreements are included in the UCT provisions without including ‘operations manuals’ in the definition of ‘franchise agreement’ franchisors will simply shift their UCT into their operations manuals.
30. No evidence as I am not in business.
31. Franchisors would have to revise their contracts. They would only do this if the burden of proof was reversed, there were stiff financial penalties for breach, and there was a faster way of franchisees acting collectively to obtain relief.
32. No negative impacts to any party that had nothing to hide.

Clarity on standard form contracts

33. I am not sure what this question is asking.
34. Franchisors would game the definition, as would other strong parties.
35. Options
 - a. Option 4a should be expanded to include powers for ASIC. Regulators would seldom use their infringement notice powers without warning. They are highly motivated to encourage businesses to comply with the law in response to a gentle prompt.
 - b. Option 4b the regulators (ACCC and ASIC) should retain their powers of determination.
36. I suspect the creators of standard form contracts and their clients don’t need to be educated/guided about what is standard form. They use these contracts to save time and their money at all stages of the contracting process. This is legitimate, it is the contents of many contracts that are egregious.

Minimum standards

37. I don’t have a small business.

Application of any enhanced protections to consumer and insurance contracts

38. Impact of applying any of the options around illegality, penalties and flexible remedies [Legality and Penalties Option 4 and Flexible remedies Option 5] to consumer and insurance contracts.

- a. The way some travel insurers are allegedly responding to claims that stem from COVID-19 should provide a window into conduct that needs to be addressed in the insurance world.
- b. Option 4.3 - 1 is not working so it is not an option that should be considered.
- c. Option 4.4 – 2 good idea but expensive and of no value unless stiff penalties can be imposed by the regulators without the need to go to court.
- d. Option 4.5 – 3 keeping the court in the loop as 2nd step after a tap on the shoulder by a regulator does not provide a sufficient deterrent. The regulators have not got the resources to chase everyone and the perpetrators are well aware of that.
- e. Option 4.6 – 4a This is a good option. I'd be very surprised if the regulators did not warn first, nor would I be concerned if they did not warn for a second or subsequent offence. They should also be able to target, without warning after the first determination, clients of any firm that drafted standard form contracts for numerous franchisors. ACCC is not the only regulator involved so please make sure all regulators are given the appropriate powers.
- f. Option 4.6 – 4b This should be an option for the regulator. People can appeal bureaucratic decisions on appropriate grounds.

39. No suggestions

40. No comment

Application to franchising agreements

- 41. Because there is no database of franchise agreements it is impossible to answer this question.
- 42. Impossible to answer in the absence of real data.
- 43. No individual franchisee could determine how 'standard' their agreement was. Minor variations should not enable a franchisor to claim an agreement is no longer standard form if, in essence, the agreement is the same for all franchisees operating a particular business at a particular level – eg all franchisees who have a Muffin Break kiosk even though some have different conditions to address the requirements of different landlords. Impossible to answer precisely in the absence of real data. Franchisors lawyers would be able to give you information based on their clients' documentation.
- 44. Franchisors and their lawyers draft franchise agreements. Both would be complicit in the type and range of clauses in the agreement, and whether they are UCT or not. Both franchise directors and their lawyers should be able to be prosecuted if they were involved. To avoid franchisors gaming the law the definition of franchise agreement should extend to Operations manuals as the UCT might be relocated to there.
- 45. Only a small proportion but, as above, impossible to work this out without access to a comprehensive database of franchisors and their standard franchise agreements.

4. Legality and Penalties Option

UCT – use, prevalence and impact

- 1. I will answer this question, with examples, when I return to my office on 24 March.
- 2. Relevant information or data is hard to come across. I suggest you look at evidence to the Banking and Superannuation Royal Commission and the 2018 Franchise Inquiry.
- 3. Franchising sector – it is not an 'industry', it spans many sectors of the retail economy
- 4. Currently no choice but if I had a real way of pushing back then NO, I would not accept it if it was too risky

Education and awareness

5. The current law is toothless so regulators have done all they can and are wasting public money by trying to do more until the law is changed to give them determination and penalty powers.

Legality and penalties

6. Yes.

Increasing regulator powers

7. The ACCC has, and if companies won't heed the ACCC's requests then it is clear the UCT law needs to give sharper teeth to the regulators (mostly ACCC and ASIC in this case)

Other

8. I am not an economist so can't do a cost/benefit analysis. Please remember to factor in mental health and the cost of litigation to costs. Please factor reduced opportunistic conduct by suppliers to the benefits. This leaves the regulators free to use their resources on other issues

5. Flexible remedies

9. NA
10. Yes, as long as the term is also declared void. No point in a remedy that does not include making the term void as the supplier will continue to inflict the UCT on future contracting parties – after all, one reason for using a standard form contract is that it can be used multiple times.
11. Of course. The class of small businesses (eg: franchisees) might be spread across all states and territories. It would be more efficient for a regulator to commence the court proceedings.

6. Definition of a small business contract

Current headcount threshold (less than 20 employees)

12. Not in a position to answer this

Increased headcount threshold

13. Any number chosen would be arbitrary, so employee headcount is not a suitable threshold.

Annual turnover threshold

14. No comment
15. \$10m annual turnover is another arbitrary threshold. All weaker parties in standard form contracts – which are largely 'take it or leave it' need the protection of UCT legislation. This applies particularly to franchisees. I expect the turnover of an hotel, a McDonalds and other franchise operations could exceed \$10m.
16. Not qualified to comment.

6.6.2 Option 2 - aggregation

17. I am opposed to aggregation because it would enable contracting drafters to 'game' the system. They could make it appear as if they were operating in a highly competitive environment by lumping employees/tenants/suppliers/ franchisees together when in fact they are all separate.

Value threshold

Current contract value threshold (\$300,000 or \$1million for contracts greater than 12 months)

18. The current value threshold would exclude many franchise agreements. The fact that they do so is a perfect reason why thresholds are an inappropriate test where standard form contracts are concerned. They are quickly out of date.
19. Unable to comment as not in business.

\$5million contract value threshold

20. It would be quickly out of date and would not cover some franchise agreements.

No contract value threshold

21. Cannot think of any negative impacts. This is the only feasible option.

8. Clarity on standard form contracts

Repeat usage

22. I suggest a better term would be 'intended for repeat usage' as this would also protect the early users of the contract.

Effective opportunity to negotiate

23. This would be too easy to 'game'.
24. Absence of opportunity to negotiate is canvasses in Option 3. Other examples could be:
 - a. Contracts that emerge following a mediation (eg farm debt or franchise dispute) when the lender/franchisor has a set of outcomes they habitually agree to and the borrower (farmer or franchisee for example) would never be able to know that they were being railroaded into what was essentially a standard form contract.
 - b. The problem is that the consumer doesn't always know they are entering a standard form contract so they won't be on their guard and can waste time and money seeking amendments that they will never get.

Education and awareness

25. Continue the current trend to publish information in several languages.

9. Minimum standards

26. No further comment.

10. Application of any enhanced protections to consumer and insurance contracts

27. The 'virus' exclusions that travel insurance contracts are currently relying on are a perfect example of UCT in insurance contracts. While no one wants another insurance company to fail they should not be able to exempt liability for a situation that is well beyond the policy holder's control.
28. I have no suggestions
29. Probably more expensive contracts

11. Application to franchising agreements

Contract law alone cannot place any effective fetter on the conduct of an unscrupulous franchisor and its advisers. Franchisees are both the least informed consumers and the most disempowered investors in the 21st century business world. They need protection through UCT and recognition as stakeholders in the franchisor under the Corporations Act.

Nevertheless, franchise agreements will always be part of the franchisor/franchisee relationship. Thus, it is essential, as a first step, that all franchise agreements be given the benefit of the UCT protection. No thresholds should be applied. Thresholds are arbitrary. Even if they could be set at appropriate levels on day 1, they quickly become out of step with reality.

30. We don't have Australian accurate data to answer this question. Maybe the retail lenders or the ATO could provide ballpark figures.
31. Yes but it is difficult to identify the number.
32. Most franchise agreements are standard form contracts. This makes business sense as it is easier for a franchisor to administer one or 2 common forms of an agreement than a bespoke negotiated contract for every franchisee. To ensure that franchisors do not game any amended UCT provisions I suggest it is essential for the definition of franchise agreement in this part of the legislation to be expanded to include franchise operating manuals. If the definition is not expanded unscrupulous franchisors will insert the UCT into the manual.
33. Yes they would be appropriate. The current toothless provisions do not help the regulators get the attention of organisations that persist in including UCT in their contracts.
34. No precise idea. Not having \$ thresholds would help the regulators get the attention of franchisors with evergreen contracts.

Thankyou for the opportunity to make these comments.

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