

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 22/10/2020 9:10:39 AM AEDT and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged: Concise Statement
File Number: NSD1156/2020
File Title: AUSTRALIAN COMPETITION AND CONSUMER COMMISSION & ANOR v FUJI XEROX AUSTRALIA PTY LIMITED ACN 000 341 819 & ANOR
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads "Sia Lagoes".

Dated: 22/10/2020 9:22:09 AM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Concise Statement

No. NSD

Federal Court of Australia

District Registry: New South Wales

Division: General

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION
and another listed in Schedule 1

Applicants

FUJI XEROX AUSTRALIA PTY LIMITED (ACN 000 341 819)

and another listed in Schedule 1

Respondents

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

1. These proceedings concern unfair contract terms (the **Unfair Terms**) contained in two versions of the nine standard form contracts used by Fuji Xerox Australia Pty Limited (**FXA**) (either as principal or agent for Fuji Xerox Finance Limited (**FXF**)) since at least October 2018 to enter small business contracts with customers (the **FXA Customers**) for the supply of printing goods and services, including related technical assistance.
2. The nine standard form contracts comprise a Software Licence and Support Services Agreement, a Support Services Agreement, a Rental Agreement, a Purchase Agreement, a Fixed Lease Rental Agreement, a Preferred Customer Rental Agreement, a Document Agreement, a Fixed Term Rental Agreement and the Documentation Agreement (the **FXA Contracts**). Particulars of the Unfair Terms are contained in Schedule 2.

Unilateral Variation Terms

3. The FXA Contracts contain two types of Unilateral Variation Terms:
 - (a) the first type allows unilateral variation of the prices paid by FXA Customers; and
 - (b) the second type allows FXA or FXF to unilaterally vary terms without notice which either alters existing, or creates new, rights and obligations between the parties in favour of FXA or FXF.

Filed on behalf of (name & role of party)	The Applicants
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4. The Unilateral Variation Terms are unfair because they:
 - (a) provide unilateral rights of variation without any corresponding or counterbalancing rights to the FXA Customer to reject or negotiate the variation or terminate, without penalty, the contracts if the variation is not acceptable;
 - (b) create significant imbalance in the relationship;
 - (c) go beyond what is necessary to provide FXA and FXF with a mechanism to adjust prices or other terms;
 - (d) may lead to the FXA Customers suffering detriment through increased costs and contractual burdens that had not been anticipated when the contracts were entered, without any means of recourse under the contracts.

Automatic Renewal Terms

5. The FXA Contracts contain Automatic Renewal Terms which provide for automatic renewal unless the FXA Customer gives notice to cancel the contract a certain number of days before the end of the contract term.
6. The Automatic Renewal Terms are unfair because:
 - (a) of the limited window given to terminate, particularly where the contractual term is a number of years, and which may lead to the FXA Customer missing the opportunity and becoming locked in for a further term;
 - (b) FXA and FXF are not required to give any notice that the rollover deadline is approaching, in circumstances where it is better placed than the FXA Customers to keep track of rollover deadlines.
 - (c) this creates a significant imbalance which is exacerbated by other Unfair Terms, including the Unilateral Variation Terms, the Disproportionate Termination Terms and the Termination Payment Terms.

Extraneous Documents Terms

7. The FXA Contracts contain Extraneous Documents Terms which impose obligations from other documents that FXA or FXF are not required to provide to the FXA Customer.
8. The Extraneous Documents Terms are unfair because they impose contractual obligations which the FXA Customer may not be aware of, with no appropriate commercial justification for not providing the terms to the FXA Customer. This creates a significant imbalance which is exacerbated by other Unfair Terms, including the Liability Limitation Terms, the Disproportionate Termination Terms and the Termination Payment Terms.

Liability Limitation Terms

9. The FXA Contracts contain Liability Limitation Terms which limit the liability of FXA and FXF to the FXA Customer or which require the FXA Customer to indemnify FXA and FXF even in situations where FXA and FXF, or their agent or contractor, has caused or contributed to the loss or damage, in a manner which goes beyond what is commercially necessary and without corresponding rights or protections for the FXA Customer.
10. The Liability Limitation Terms are unfair because they limit the liability of FXA and FXF and enhance the risk to the FXA Customer without any appropriate commercial justification.

Disproportionate Termination Terms

11. The FXA Contracts contain Disproportionate Termination Terms which allow FXA and FXF to suspend or terminate the contract for minor breaches by the FXA Customer with no corresponding right or a more limited right provided to the FXA Customer.
12. The Disproportionate Termination Terms are unfair because:
 - (a) they allow FXA or FXF to suspend or terminate for minor breaches or breaches of contracts, in circumstances where an equivalent termination right is not given to the FXA Customer;
 - (b) the termination rights that are given to the FXA Customer are not transparently described under the relevant termination clauses;
 - (c) this creates a significant imbalance in the respective rights of the parties, which is exacerbated by other Unfair Terms including the Termination Payment Terms.

Termination Payment Terms

13. The FXA Contracts contain Termination Payment Terms which allow FXA and FXF to impose or retain charges on termination of the contract. These provide that if FXA or FXF exercises their rights to terminate the contract then the FXA Customer must pay FXA or FXF a termination amount, in circumstances where FXA or FXF are able to unilaterally determine certain charges included in the termination amount.
14. The Termination Payment Terms are unfair because they entitle FXA and FXF to significant termination payment amounts that are not based on the loss they have sustained by reason of the termination and therefore there is a risk that they will be disproportionate to the loss sustained in a particular circumstance of termination.

End of Contract Period Terms

15. The Fixed Lease Rental Agreement (**FLRA**) contains End of Contract Period Terms which provide that, following the minimum term, the FXA Customer must either stay in

possession of the equipment and pay FXA or FXF the residual value and any other charges due or pay FXA or FXF the shortfall between the residual value and the market value as determined by FXA or FXF and any other charges due, and further that title in the equipment and parts does not pass to the customer at any time.

16. The End of Contract Period Terms are unfair because, if the FXA Customer elects to pay the residual value, it remains barred by the FLRA from taking title in the equipment, and, if the FXA Customer does not elect to do so, it is exposed to a unilateral determination of market value by FXA or FXF with no rights of review or challenge.

Irrevocable Offer Term

17. The FXA Contracts contain Irrevocable Offer Terms requiring the FXA Customer to make an irrevocable offer to FXA or FXF on signing the contract, but which provide that FXA is not bound by the contract until the earlier of the FXA Customer being advised in writing of the unconditional acceptance of the contract, or the commencement of the provision of support services, by FXA or FXF.
18. The Irrevocable Offer Terms are unfair because the FXA Customer is bound by an irrevocable offer for an indefinite time, in circumstances where FXA and FXF are under no corresponding obligation or any obligation to accept the offer within any particular time and the FXA Customer is subject to the Disproportionate Termination Terms.

Non-reciprocal Obligation Terms

19. The FXA Contracts contain Non-reciprocal Obligation Terms which impose obligations on the FXA Customer or grant rights to FXA and FXF without any corresponding obligation being imposed on FXA or FXF or right granted to the FXA Customer.
20. The Non-reciprocal Obligation Terms are unfair because they are not reciprocal obligations or they otherwise create a significant imbalance in the rights and obligations of the parties, in circumstances where there is no appropriate commercial justification for this imbalance and the risk of detriment to the FXA Customer if enforced is significant.

Unfair Payment Terms

21. The FXA Contracts (other than the Software Licence and Support Services Agreement, the Support Services Agreement) contain payment obligations which arise irrespective of whether FXA or FXF provides the goods or services the subject of the obligation.
22. These terms are unfair because they require FXA Customers to pay for equipment or services that they have nor and may not receive.

B. RELIEF SOUGHT FROM THE COURT

23. The Applicants seek the relief set out in the Originating Application.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

24. Each of the Unfair Terms is an unfair contract term because it:
- (a) causes a significant imbalance in the rights and obligations of FXA or FXF on the one hand and the small business it contracts with on the other;
 - (b) is not reasonably necessary to protect the legitimate interests of FXA or FXF; and
 - (c) would cause detriment to FXA Customers if relied upon by FXA or FXF.

25. Accordingly each Unfair Term included in any contract with FXA Customers in the form of the FXA Contracts since at least October 2018 is unfair within the meaning of s 24 of the ACL or s 12BG of the ASIC Act and void by reason of s 23 of the ACL or s 12BF of the ASIC Act.

D. ALLEGED HARM SUFFERED

26. The inclusion of the Unfair Terms in the FXA Contracts has meant that the commercial relationship between FXA and the FXA Customers has been governed by the Unfair Terms during the relevant period, since they are not invalid until declared to be unfair by the Court. In addition, FXA Customers are at risk of economic and non-economic harm if FXA or FXF rely upon, act pursuant to or enforce the Unfair Terms. The types of harm that FXA Customers are exposed to include unilateral increases to prices and changes to terms, being locked into contracts for a further term as a result of automatic renewal, being subject to contractual terms of which they are not aware, termination of contracts in reliance on unfair terms and exposure to termination payments when that occurs, not having the benefit of equipment that they have paid for.

Date: 21 October 2020

Johnson Winter & Slattery .

Signed by Tom Jarvis
Lawyer for the Applicants

This statement was prepared by James Arnott of counsel.

Certificate of Lawyer

I Thomas Litchfield Jarvis certify to the Court that, in relation to the Concise Statement filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 21 October 2020



Signed by Tom Jarvis
Lawyer for the Applicants

Schedule 1

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: NEW SOUTH WALES
Division: General

No. NSD of 2020

Applicants

Second Applicant

Rami Greiss
the holder of two delegations from the Australian
Securities and Investments Commission dated 23
October 2019 and 12 October 2020 pursuant to
section 102 of the *Australian Securities and*
Investments Commission Act 2001 (Cth) in relation
to alleged contraventions of that Act

Respondents

Second Respondent

Fuji Xerox Finance Limited (ACN 001 419 807)

Schedule 2 – Unfair Terms in the FXA Contracts

Key	DMA - Documentation Agreement	PA - Purchase Agreement	SLSSA - Software Licence and Support Services Agreement
	DRA - Document Agreement	PCRA - Preferred Customer Rental Agreement	SSA - Support Services Agreement
	FLRA - Fixed Lease Rental Agreement	RA - Rental Agreement	
	FTRA - Fixed Term Rental Agreement		

Paragraph of the Concise Statement	FXA Contracts	Relevant clause	Summary of the clauses
Unilateral Variation Terms			
[3(a)]	SLSSA	Clause 8.6	These clauses provide FXA ¹ with the right to vary all or some of the charges payable immediately by notifying the FXA Customer.
	SSA	Clause 7(e)	
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 9(f)	
[3(a)]	SLSSA	Clause 10.3	This clause provides that, if the licensor or distributor ceases to supply software and support services to FXA, FXA may, but is not required to, vary the charges accordingly.

¹ In this schedule "FXA" refers to either FXA or FXF depending on the contracting party with whom the particular FXA Customer contracted with in a particular case, other than for the SSA, the RA and the PA, where it refers only to FXA.

[3(a)]	SSA RA, PA, FLRA, and PCRA	Clause 7(c)	These clauses provide that FXA may impose a “base support charge” for the remaining term if, in any quarter, actual impressions are less than the aggregate average monthly print volume specified in the FXA “customer expectation documents” which FXA can amend without notice.
[3(b)]	SLSSA	Clause 2	This clause makes the FXA Customer’s use of the software subject to the relevant end user licence agreement which can be amended without notice to the FXA Customer.
[3(b)]	SSA, RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 4(a)(vi)	These clauses require a FXA Customer to comply with FXA’s “customer expectation documents” which can be amended without notice, and any reasonable directions issued by FXA from time to time.
[3(b)]	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 7	These clauses provides that the contract is subject to terms which are not stated in it and which can be amended without notice to the FXA Customer.
Automatic Renewal Terms			
[4]	SLSSA	Clauses 5 and 7.2	This clause provides for automatic renewals at FXA’s then standard rates (that is, at unilaterally imposed “rack” rates) unless the FXA Customer gives notice of cancellation no less than 30 days before the renewal date.
[4]	SSA, RA, PA, PCRA, DRA and FTRA DMA	Clause 2(b) Clause 2(c)	These clauses provide that if the FXA Customer does not give written notice no later than 90 days before the end of the minimum term, the contract holds over and may then only be ended on 90 days’ written notice.
[4]	FLRA	Clause 2(c)	This clause provides that if the FXA Customer elects to stay in possession of the goods following the minimum term then the agreement in respect of support services will continue in hold over and may then only be ended on 90 days’ written notice.

Extraneous Documents Terms			
[7]	SLSSA	Clause 2	This clause imposes obligations from the relevant “end user licence agreement”, which FXA is not required to provide to the FXA Customer.
[7]	SSA, RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 4(a)(vi)	These clauses impose obligations from the “customer expectation documents”, or “(where none is available) any end user documentation, manual or specification published by the manufacturer”, and any reasonable direction issued by FXA, which FXA is not required to provide to the FXA Customer.
Liability Limitation Terms			
[9]	SLSSA SSA	Clause 4 Clause 3(a)	These clauses provide that FXA is only obliged to use reasonable endeavours to deliver the software and is not liable to the FXA Customer, to the extent permitted by law, for any delay, but with no right for the FXA Customer to be excused from the charges payable.
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 3(b)	
[9]	SLSSA SSA	Clause 8.1 Clause 7(a)	These clauses provide that the FXA Customer must pay all charges in full when due with no set off or deduction.
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 9(a)	
[9]	SLSSA SSA	Clause 8.5 Clause 7(h)	These clauses provide that the FXA Customer must pay FXA all costs and expenses incurred in exercising its contractual rights on a full indemnity basis, without any corresponding right and exacerbated by other Unfair Terms, including the Disproportionate Termination Terms.
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 9(i)	

[9]	SLSSA SSA RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 9.2(iii) Clause 9(b) Clause 11(b)(v)	These clauses contain a representation and warranty by the FXA Customer that it has read each document forming part of the contracts (including any document incorporated by reference) and has based its acquisition decision solely on their contents, thereby seeking to exclude any liability for any statements made by FXA or FXF during the sales process, including as to fitness for purpose of the goods or services the subject of the contracts.
[9]	SLSSA SSA RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 9.3 Clause 9(c) Clause 11(c)	These clauses provide FXA with significant caps, reductions or limitations on its total liability where the FXA Customer is required to pay termination payments without any such reduction, cap or limitation.
[9]	SLSSA SSA RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 12.9 Clause 10(h) Clause 13(h)	These clauses provide that the FXA Customer agrees that it has not relied upon any representation by FXA not set out in the contract.
[9]	FLRA, PCRA, DRA, FTRA and DMA	Clause 4(a)(ii)	These clauses require the FXA Customer to indemnify FXA for loss or damage to the products (including all associated costs) with the only exclusions being normal wear and tear and to the extent attributable to FXA's negligence or default, thereby exposing the FXA Customer to an indemnity for loss or damage to the products caused by FXA, or by its employees, agents or contractors, which is accidental and does not amount to negligence.

Disproportionate Termination Terms			
[11]	SLSSA SSA	Clause 10 Clause 8	These clauses provide FXA with significant rights of termination with no corresponding rights for the FXA Customer.
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 10	
[11]	SLSSA	Clause 10.2	This clause provides that, if the FXA Customer is in breach of the SLSSA, or another agreement with FXA, then FXA may suspend the provision of support services but the obligations of the FXA Customer to pay for the support services continues.
[11]	SLSSA	Clause 10.4	This clause provides that FXA may terminate, on notice and for cause, the SLSSA immediately in whole or in part if the FXA Customer breaches any term.
[11]	SSA RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 8(b) Clause 10(b)	These clauses permit FXA to suspend the provision of the services if the FXA Customer breaches the contract or any other contract which FXA reasonably considers is related but requires the FXA Customer to continue paying all charges during the suspensions.
[11]	SSA RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 8(c)	These clauses permit FXA to immediately terminate the contract for cause and by notice if the FXA Customer breaches any term of the contract which is not remedied within seven days of notice of the breach whereas cl 10(l)(iii) of the SSA and cl 13(m)(iii) of the RA, PA, FLRA, DRA, PCRA, FTRA and DMA only permit the FXA Customer to terminate for a material breach by FXA that is not remedied within 30 days of notice (by registered post or, in some case, by fax).

Termination Payment Terms			
[13]	SLSSA	Clauses 10.5 and 10.6	These clauses provide that if FXA exercises its rights to terminate the contract then the FXA Customer must pay FXA an amount which includes, the unpaid balance of the licence fee for the remainder of the initial licence term and any other resource costs, including break costs, that FXA incurs.
[13]	SSA	Clauses 8(d) and 8(e)	These clauses provide that if FXA exercises its rights to terminate the contract then the FXA Customer must pay FXA an amount which includes any other resource costs, including break costs, that FXA incurs.
[13]	RA, PA, PCRA, DRA, FTRA and DMA	Clauses 10(d) and 10(e)	These clauses provide that if FXA exercises its rights to terminate the contract then the FXA Customer must pay FXA an amount which includes, an amount equal to the then unpaid balance of the rental charges for the remainder of the contract and any other resource costs, including break costs, that FXA incurs.
[13]	FLRA	Clauses 10(d) and 10(e)	These clauses provide that if FXA exercises its rights to terminate the contract then the FXA Customer must pay FXA an amount which includes, an amount equal to the then unpaid balance of the rental charges for the remainder of the minimum term discounted by applying a discount rate, any other resource costs, including break costs, that FXA incurs, and the residual value.
End of Contract Period Terms			
[15]	FLRA	Clause 2(b)	This clause provides that following the minimum term, the FXA Customer must either stay in possession of the equipment and pay FXA the residual value and any other charges due or pay FXA the shortfall between the residual value and the market value as determined by FXA and any other charges due.
[15]	FLRA	Clause 3(e)	This clause provides that title in the equipment and parts does not pass to the FXA Customer at any time.

Irrevocable Offer Terms			
[17]	SLSSA SSA, RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 1.1 Clause 1(a)	These clauses provide that, by signing and returning the contract to FXA, the FXA Customer irrevocably offers to acquire the goods and services the subject of the contract but that FXA is not bound by the contract until the FXA Customer has been advised in writing of FXA's unconditional acceptance of the contract or FXA has commenced providing the support services whichever occurs first.
Non-reciprocal Obligation Terms			
[19]	SLSSA SSA	Clause 12.5 Clause 10(d)	These clauses provide that FXA is not liable to the FXA Customer for any delay or non-performance of its obligations arising from a defined force majeure event (the definition of which includes actions by third party suppliers), but there is no reciprocal obligation.
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 13(d)	
[19]	SLSSA SSA	Clause 12.6 Clause 10(e)	These clauses provide that the FXA Customer must not assign or transfer the contract or any benefit or right under it without FXA's prior written consent but FXA can assign the contract without notice.
	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 13(e)	
Unfair Payment Terms			
[21]	RA, PA, FLRA, PCRA, DRA, FTRA and DMA	Clause 9(d)	These clauses provide that FXA will invoice the FXA Customer irrespective of delivery by FXA of the goods or services the subject of the invoice.
[21]	PA	Clause 9(b)	This clause provides that FXA may invoice the FXA Customer the purchase price on formation of the contract, which may be before FXA have delivered any of the goods or services the subject of the purchase price.