

Undertaking to the Australian Competition and Consumer Commission

Given under section 87B of the *Competition and Consumer Act 2010* (Cth)

by Back In Motion Physiotherapy Pty Ltd ACN 109 945 388.

1. Person giving the Undertaking

- 1.1. This Undertaking is given to the Australian Competition and Consumer Commission (**ACCC**) by Back In Motion Physiotherapy Pty Ltd ACN 109 945 388 (**Back In Motion**), for the purposes of section 87B of the *Competition and Consumer Act 2010* (**CCA**).

2. Background

- 2.1. Back In Motion is a franchisor with a network of franchisees who provide physiotherapy and related services in Australia and New Zealand.
- 2.2. Since at least 2004 Back In Motion has entered into standard form small business contracts for the supply of franchised physiotherapy practices (**Franchise Agreement**).
- 2.3. Most of the Franchise Agreements have included a restraint of trade (**ROT**) term which prevents franchisees and guarantors on exiting the Franchise Agreement from being involved in a physiotherapy or other practice that competes with Back In Motion or any Back In Motion franchisee, within a defined 'Restraint Area' and during a defined 'Restraint Period'.
- 2.4. The effect of the ROT term is to restrict franchisees, on exiting the franchise system, from offering physiotherapy services within a radius of up to 10km of any Back In Motion franchise site throughout Australia for up to 12 months. Given the number and location of franchise sites, this term could effectively prevent former franchisees from offering physiotherapy services in most metropolitan areas.
- 2.5. Most the Franchise Agreements also contained a special condition buy-out fee (**BOF**) term under which, franchisees could elect to pay Back In Motion a fee equivalent to four times the franchisee's annual royalty fees in order to be released from the ROT term.

3. The ACCC's concerns

- 3.1. The ACCC considers that each of the ROT and BOF terms are unfair within the meaning of section 24 of the Australian Consumer Law (**ACL**), being Schedule 2 to the CCA. Having regard to matters including transparency and the contract as a whole, the ACCC considers each of the terms:
 - a. causes a significant imbalance in the parties' rights and obligations arising under the contract;
 - b. is not reasonably necessary in order to protect the legitimate interests of Back In Motion; and
 - c. would cause detriment to franchisees if applied or relied on,for the reasons that the ROT term:
 - d. restrains franchisees from working across most metropolitan areas in Australia on exiting the Franchise Agreement, including geographical regions where former clients of the franchisee would not reside, with the effect of unfairly restricting a franchisee's ability to practice in their field of qualification and experience, and
 - e. creates significant uncertainty as to the extent franchisees are restricted from offering physiotherapy services, given there are 21 possible permutations of the ROT term, which is made up of a series of cascading definitions of 'Restraint Area' and 'Restraint Period' which are dependent on a court finding one or more of the definitions unenforceable. The cascading

restraints range from 10km from any Back In Motion site in Australia for 12 months to 3km from the former franchisee's site for a period of 3 months; and

for the reason that the BOF term requires franchisees to pay a fee to be released from an unfair restraint.

4. Admissions and Resolution

4.1. In order to resolve the ACCC's concerns, Back In Motion:

- a. admits that the ROT and BOF terms may be unfair within the meaning of sections 23 and 24 of the ACL; and
- b. offers this Undertaking to the ACCC.

5. Commencement of this Undertaking

5.1. This Undertaking comes into effect when:

- a. this Undertaking is executed by Back In Motion; and
- b. this Undertaking so executed is accepted by the ACCC (the **Commencement Date**).

5.2. This Undertaking has effect for three (3) years after the Commencement Date (**the Term**).

5.3. Upon the Commencement Date, Back In Motion assumes the obligations set out in section 6 below for the purposes of section 87B of the CCA.

6. Undertakings

Cease conduct and desist future conduct

- 6.1. In relation to franchisees who have entered a Franchise Agreement prior to the Commencement Date that includes a ROT or BOF or terms having the same or similar effect, Back In Motion will not enforce or purport to rely upon such terms except to the extent permitted by paragraph 6.2 below.
- 6.2. Paragraph 6.1 of this Undertaking does not prevent Back In Motion from enforcing or purporting to rely on any term to the extent that it restricts, for up to nine months, a former franchisee from actively soliciting a client knowing they have been a client (at any time in the previous 12 months) of a Back In Motion franchise located within 10km of the former franchisee's Back in Motion practice.
- 6.3. Back In Motion will not include the ROT or BOF, or any terms having the same or similar effect, in any Franchise Agreements entered into after the Commencement Date.

Corrective Notice to Affected Persons

- 6.4. Within 7 days of the Commencement Date, Back In Motion will provide notice of the terms of this Undertaking, in the form in **Attachment A**, to all current franchisees, and former franchisees who have exited a Franchise Agreement within 12 months preceding the Commencement Date, whose Franchise Agreements included the ROT or BOF or terms having the same or similar effect. Notice of the terms of the Undertaking does not need to be provided to any former franchisees in respect of which, prior to the Commencement Date, Back in Motion has agreed in writing not to enforce the ROT and in respect of which there has been a written agreement with Back in Motion not to pay a buy-out fee in an amount calculated in accordance with the BOF term in their respective Franchise Agreement.

ACCC inquiries

6.5. For the purpose of monitoring compliance with this Undertaking, the ACCC may make reasonable inquiries of Back In Motion with respect to compliance with this Undertaking and Back In Motion will respond to such inquiries within 14 days or as otherwise agreed with the ACCC.

7. Acknowledgments

7.1. Back In Motion acknowledges that:

- a. the ACCC will make this Undertaking publicly available, including by publishing it on the ACCC's public register of section 87B undertakings on its website;
- b. the ACCC will, from time to time, make public reference to this Undertaking, including in news media statements and in ACCC publications; and
- c. this Undertaking in no way derogates from the rights and remedies available to any person arising out of matters related to the ACCC's concerns addressed by this Undertaking.

Executed as an undertaking

Executed by Back In Motion Physiotherapy Pty Ltd ACN 109 945 388 pursuant to section 127(1) of the *Corporations Act 2001* by:


Signature of sole director / company secretary
Jason T. Smith
Name of director (print)
Date: 16 th September 2020

Accepted by the Australian Competition and Consumer Commission pursuant to section 87B of the *Competition and Consumer Act 2010* (Cth) on:

18 September 2020

Date

and signed on behalf of the Commission:



Chair

18 September 2020

Date

ATTACHMENT A CORRECTIVE NOTICE TO AFFECTED PERSONS

Back In Motion Physiotherapy Pty Ltd
Waterman Business Centre,
Suite 307, 44 Lakeview Drive,
Scoresby VIC 3179

Dear (insert name)

Court-Enforceable Undertaking to the ACCC in relation to restraint of trade and buy-out fee terms

1. In response to Australian Competition & Consumer Commission (**ACCC**) concerns that terms in your Franchise Agreement providing for restraints of trade on termination and buy out fees were unfair contract terms under section 23 and 24 of the Australian Consumer Law (**ACL**), Back In Motion Physiotherapy Pty Ltd (**Back In Motion**) has agreed not to enforce those terms in your Franchise Agreement.
2. Back In Motion has provided a court-enforceable undertaking to the ACCC under section 87B of the *Competition and Consumer Act 2010* (Cth) (the **Undertaking**). The Undertaking is publically accessible via the ACCC's website on the s.87B undertakings register (see the following link: <https://www.accc.gov.au/public-registers/undertakings-registers/s87b-undertakings-register>)
3. The effect of the Undertaking is that, except as described in paragraph 4 below, Back In Motion will not enforce the following terms of your Franchise Agreement and will not include terms with the same or similar effect in any future agreements with its franchisees:.

- **24.2 Carrying on Business in Competition:**

The Franchisee and the Guarantor (if any) must not, except as expressly provided in this Agreement, at any time:

...

(b) at any time within the Restraint Area during the Restraint Period beginning on the date of any assignment or the expiration or earlier termination of the Franchisee's rights under this Agreement,

engage in or be concerned or interested directly or indirectly (whether as a member, shareholder, beneficiary, director, employee or consultant or otherwise) in any firm, corporation, trust or business involved with a practice which could be reasonably regarded as a market competitor to the Franchised Business and/or a business carried on under the Franchise System.

- **27.2 Franchisee's right to be released from the restrictive provision**

If the Term ends for any reason (other than by termination under clause 27.3, 27.4 or 27.5) and the Franchisee:

(a) pays to Back In Motion before the end of the Term:

(i) if the Term did not terminate by way of expiry, the Term Fee plus GST (if part of the Term has not expired); and

(ii) the Buy-Out Fee plus GST; and

(b) has observed, and observes all of the obligations to be observed by the Franchisee under this Agreement, including the payment of all monies due to Back In Motion;

then clause 24 in its entirety shall not apply to the Franchisee.

4. The undertaking does not prevent Back In Motion from enforcing or relying on any term in existing, franchise agreements as amended to the extent that:
- the term restricts a former franchisee for a period of no more than 9 months from actively soliciting a client of a Back In Motion franchise located within 10km of the former franchisee's Back In Motion practice;
 - where the former franchisee does so knowing they have been a client of the Back In Motion franchisee at any time in the previous 12 months

Kind regards,

Jason T Smith,

(*Signature*)