If you’re planning to sign up to a franchise system, remember that there are some major laws you need to be aware of, and which the ACCC oversees. The mandatory Franchising Code of Conduct is one, but are you also aware of the new unfair contract terms law?

Under the new law, the courts can strike out unfair terms in some franchising agreements, retail leases and other standard form small business contracts entered into, renewed or varied on or after 12 November 2016. The law applies to standard form contracts between businesses where one of the firms employs less than 20 people and the contract is worth up to $300,000 in a single year (or $1 million if the contract runs for more than a year). This means some franchising agreements will be covered.

A term may be unfair under the Australian Consumer Law if it causes significant imbalance, is not necessary to protect the legitimate interests of the party advantaged by the term, and would cause harm to the other party if it were relied on. The unfair term will be void and treated as if it never existed, however the rest of the contract will remain.

In the lead up to the new law coming into play, the ACCC reviewed more than 45 standard form contracts including franchising agreements and retail leases.

Franchising

We found several potentially unfair terms in franchising agreements. This includes terms that allow the franchisor to unilaterally vary the operations manual; clauses that require the franchisee to pay unreasonable liquidated damages; conditions that impose unnecessary restraint of trade clauses on
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Dr Michael Schaper | Deputy Chair
AUSTRALIAN COMPETITION AND CONSUMER COMMISSION

former franchisees; and terms that grant the franchisor an unreasonable power to terminate a franchise agreement.

If you’re about to sign up to a franchise, you should consider whether your contract contains these types of terms. Ask your franchisor and your own lawyer about them. Key questions to ask include: why is the term necessary? Does it protect a legitimate business need? And, are there other clauses in the contract which ‘balance’ the potential unfairness of the term?

Retail leasing

The ACCC also reviewed standard form contracts used in retail leasing and we were pleased to report that the Shopping Centre Council of Australia and its landlord members were very proactive and fully cooperated throughout the review.

In the retail sector, we found a number of potentially problematic terms. This includes clauses providing the landlord with the power to unilaterally vary shopping centre rules. In particular, we were concerned about conditions allowing the landlord to terminate a retail lease for any breach of the rules, regardless of how trivial, without giving the tenant a chance to fix the situation.

We also came across clauses that didn’t place any limits on recoverable costs. We also found contract terms that gave landlords the right to take possession of the tenant’s property at the end of the lease without prior notice. As with other industries, some clauses provided an indemnity (shifting of liability from the landlord to the tenant) that appeared unreasonably broad.

What’s next?

The ACCC is moving from an education phase to an enforcement approach, where we will be targeting unfair contract terms.

We will take action in cases of widespread detriment or where the business involved is acting in blatant disregard of the law.

However, there are a number of ways franchisees and small businesses can resolve concerns about a potentially unfair term.

Ultimately, only a court or tribunal can decide that a term is unfair, but this can sometimes be a long and expensive process, so consider trying other approaches first.

The obvious first step involves talking to your franchisor (or landlord) to see if they are willing to amend or remove the terms. If this process is unsuccessful, you can contact the ACCC, or your local state or territory fair trading agency.

Disputes over the fairness of a particular term may also be resolved through alternative dispute resolution schemes, such as the mediation services offered through the Australian Small Business & Family Enterprise Ombudsman, state small business commissioners (in NSW, Vic, WA and SA), or the Office of the Franchising Mediation Adviser.

For more information visit www.accc.gov.au/uct


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