

General Information – Background

The Franchise Advisory Centre provides consulting and specialised education and professional development services to both franchisors and franchisees. Consulting services are provided to intending and established franchisees, as well as existing independent small business owners considering franchising, up to large well-established systems. In 2007 alone, more than 60 education/professional development events will be held throughout Australia, as well as several in New Zealand. The Franchise Advisory Centre publishes a national electronic newsletter on franchising, released fortnightly to some 3,000 franchisor executives and managers throughout Australia. Additionally, centre director Jason Gehrke has studied the sector at postgraduate level, and is a member of the Australian Competition and Consumer Commission's (ACCC's) Franchise Consultative Panel, which advises the ACCC on implementation of the Franchising Code of Conduct.

Recommendations:

#1 – Uniform national legislation for retail leasing

The Centre would wholly support moves to bring about standard national retail leasing legislation, rather than the piecemeal state-by-state legislation which currently exists, and which adds unnecessary compliance costs to franchisors as they grow their systems nationally.

#2 – Establishment of a Leasing Bond Authority

Where lessees must pay substantial bonds/guarantees to landlords prior to taking occupancy, lessees are disadvantaged by having these bonds refunded entirely at the landlord's discretion on completion of the lease. This can and unfortunately does lead to abuse by unscrupulous landlords who unreasonably withhold part or all of a tenant's bond.

The creation of a Leasing Bond Authority, such as the Residential Tenancies Authority which provides a similar function for rental housing tenants and landlords in Queensland, would be a positive step that would provide transparency to the process of bond lodgement, deduction and refund. In short, the Residential Tenancies Authority does not seek to control the commerciality of the lease, but rather, to ensure that bonds are managed and refunded in a fair and equitable manner. Moreover, the process prevents one party (the landlord) from arbitrarily taking advantage of the lessee.

#3 - Leasing Disclosure for Tenants

Since 1 July 1998, disclosure to franchisees by franchisors of materially relevant facts to assist them in their decision-making process has been required under the Franchising Code of Conduct. Similar disclosure by retail lessors to lessees should be required for anything other than casual leasing agreements. Examples of information to be disclosed should include:

- Previous tenancies granted for the site, including occupancy periods, and summary of leasing rates and outgoing costs;
- Details of how these tenancies ended (eg. Not renewed by tenant, terminated by lessor, etc)
- Capital works conducted by the landlord during these tenancies, and planned future capital or major maintenance works for the duration of the tenancy, including new or modified fitout requirements;
- Foot-traffic counts summaries for the last 5 years;
- Details of any civil or criminal proceedings against the lessor for the last 10 years;
- Summary of outgoing inclusions;
- Summary of key terms of the agreement;
- Recourse to mediation in the event of a dispute (such as the Office of the Mediation under the Franchising Code of Conduct);
- These are just a sample of suggested disclosure items. Please view the Franchising Code of Conduct at www.accc.gov.au to review the pro-forma disclosure document for ideas of other disclosure items.

The disclosure should also be provided a minimum 14 days prior to the execution of a leasing agreement, in line with standard practice under the Franchising Code of Conduct.

4 – No mid-term rent reviews

The practice of mid-term rent reviews should not be permitted, and is similar in some ways to the concept of inertia selling (which is illegal). Tenants should not be held to ransom by lessors acting unconscionably and changing a key financial term of the agreement part way through. An annual increase formula only should be established up-front and agreed to by both parties for the duration of the full term of the lease.

5 – Solicitor's or business advisor's certificate required before signing a lease

This is a key platform of the Franchising Code of Conduct designed to reduce the instances of people rushing in to buy businesses without taking stock of the obligations they will be undertaking, and to ensure they have competent advice. This should also be a requirement for all retail lease agreements other than casual lease agreements.

6 – Mandatory auditing of marketing funds expended by landlords on behalf of retail tenants

Again, a similar provision exists under the Franchising Code of Conduct, unless more than 75% of franchisees (or retail tenants in this case) agree to forego such an audit.

7 – Turnover not to be a determinant of rent

Unlike franchise systems, where franchisors and franchisees are very much partners in their mutual success, and franchisor inputs can produce greater outcomes for franchisees, landlords have no such relationship and should not seek to benefit improperly from turnover-based rent. Instead, landlord rental benefits should flow not from turnover, but from inputs over which the landlord is expected to influence, such as:

- Foot-traffic counts;
- Building climate and environment;
- Parking, etc.

Such variables would need more specific measures applied, but would at least demonstrate to a tenant that there is a positive value-proposition in paying a higher rent.

8 – Relocation costs to be paid by the instigator of the relocation

Where landlords require tenants to relocate, the costs of relocation should be borne by the landlord, not by the tenant.

9 – Recognition of the rights of franchisees as occupants

A common business practice in franchising is for franchisors to take a head lease on a retail site, and then sublet (usually on the same terms) to the franchisee. This enables the franchisor to maintain control of the outlets, and also to help negotiate a better deal with large retail centre managers that would not otherwise be available to a single tenant. However, in the very rare instance of franchisor insolvency, franchisees need the ability to deal with the landlord direct, through the automatic assignment of the lease, in order to maintain business continuity. Otherwise, franchisees risk losing their businesses through opportunistic termination by landlords as a result of the failure of a third party (the franchisor).

10 – Mandatory cooling-off period

As with the Franchising Code of Conduct, retail tenants should have a mandatory 7-day cooling-off period after the signing of a retail lease. The tenant should be free to withdraw from the contract without penalty during this time, save for any reasonable costs expended by the landlord on the tenant's behalf (eg. Design drawings, etc).

While some of these recommendations may exist individually in various state retail leasing legislation, only a uniform national approach will deliver real benefits to Australian small business

(End of submission)