



Franchising Alert November 2009

Proposed new “Australian Consumer Law”

On 26 October 2009 legislation was introduced into Parliament to amend the *Trade Practices Amendment (Australian Consumer Law) Bill 2009 (ACL Bill)* that was first introduced into the House of Representatives on 24 June 2009.

The October 2009 amendments introduced by the Government will be welcomed by the franchise industry.

The amendments include:

- > deferral of the commencement date of the unfair contract terms provisions relating to standard form contracts from 1 January 2010 to 1 July 2010 (at the earliest);
- > removal of the Minister's right to prohibit terms by regulation; and,
- > amendment of the test of “unfairness” so that a consumer must now show “detriment” before a contract term will be determined as unfair.

Background

The Council of Australian Governments accepted a recommendation from the Productivity Commission that there be uniform consumer protection laws across Australia.

The Government then introduced the ACL Bill which included a wide range of provisions including:

- > new ACCC powers to require substantiation of claims;
- > new ACCC powers to issue infringement notices (akin to a speeding ticket);
- > civil penalties (as opposed to criminal penalties) making it easier for the ACCC to obtain penalties in court for offences that were previously subject to the criminal standard of proof;
- > civil penalties for unconscionable conduct and for breaches of other provisions relating to false representations; and,
- > the power for a Court to declare unfair contract terms in standard form contracts void and unenforceable.

This Alert focuses on the impact of the *unfair contracts* provisions in *standard form contracts* with *consumers* in the franchise sector.

Unfair Contract Provisions

These provisions apply to *business to consumer contracts* (and more about that later).

What is an “unfair contract term” in a consumer contract?

The term is unfair if:

- > it would cause a significant imbalance in a parties' rights and obligations;
- > it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
- > the consumer is able to establish detriment.

Factors that Courts will consider in determining whether a term is unfair:

- > the extent to which the contract is transparent;
- > the parties' conduct as a whole;
- > whether one party but not the other has the right to terminate the contract, to vary the contract and to renew or not renew the contract;
- > whether the contract is a standard form contract with terms imposed on the other party;



- > whether the contract is a consumer contract - that is, one of the parties is an individual whose acquisition is predominantly for personal, domestic or household use; and
- > whether the consumer suffered detriment. Detriment may include financial detriment or other forms of detriment such as inconvenience.

Provisions which are held to be unfair are void and so unenforceable. The whole contract will not be avoided, however other rights under the contract may be affected where certain provisions are held to be unfair and void.

What are the implications for the Franchise industry?

Many franchises supply goods and services to consumers using standard form contracts - for example, for courier services, mobile phone supply, printing services, car and truck rental services, real estate agencies.

Such contracts should be reviewed to see that they meet the tests for transparency and fairness and that any adverse terms are properly justifiable on the basis of protecting the legitimate interests of the franchisee.

In the early days, one at least initially, may expect the ACCC to focus on particular industries - for example, airlines, travel, telcos and bank contracts.

Potential issues

Originally, the Government proposed that the unfair contract provisions would apply to both *business to consumer transactions* and *business to business transactions* where the sum involved was less than \$2 million.

However, when the ACL Bill was introduced by the Government, the ACL Bill did not include business to business transactions.

The decision to exclude such transactions has been the subject of much criticism by small business and may yet be reversed. If that occurs it will considerably widen the scope of the review of standard form contracts that franchise systems will need to undertake.

Even the current definition of consumer may apply to, for example, a sole trader.

It is still possible that the Government may again adopt that approach. For example the Independent Senator for South Australia, Nick Xenophon, tabled amendments earlier this month seeking just such a change, which the South Australian Government is also considering supporting.

Some conclusions

The October 2009 changes proposed by the Government are positive for the franchising sector. However, it is clear that there will be continuing pressure on the Government to include *business to business* transactions within the scope of the unfair contracts provisions. Such inclusions are likely to affect franchise agreements and in our view will create uncertainty for the franchise sector.

While the Unfair Contract Terms amendments are not yet law - and may not now become law until next year - franchisors and franchisees might sensibly take advantage of the delay and begin a review now of the standard form contracts in use between franchisees and consumers to ensure that they are not "unfair".

Note that independent of these proposed changes, the general provisions of the Trade Practices Act (including those relating to misleading and deceptive conduct, false representations and unconscionable conduct) continue to apply.

Recommendations

In anticipation of both the eventual passage of the Unfair Contract Terms amendments to the Trade Practices Act next year, and of the report on amendments to the Franchising Code of Conduct that is to be provided by the end of January 2010 by the Expert Committee appointed by the Government, we recommend franchisors should:

1. make submissions directly to the Minister, Dr Craig Emerson (see details below) and the proposed Expert Panel in respect of the Franchising Code of Conduct, requesting that in light of the Minister's release, the Government clarify its position as to the relationship between the Code and the proposed unfair contract legislation;
2. in light of Senator Xenophon's proposed amendment, consider making submissions to the Minister supporting the position taken by the Government and seeking assurance that the Government will continue to reject the application of the Unfair Contracts Terms provisions to business to business contracts; and
3. review the existing suite of standard form contracts used by franchisees to enter into transactions with consumers.

The ACL Bill contains many other changes which will affect all businesses including:

- > new powers in the ACCC to issue substantiation notices and to issue infringement notices;
- > new civil penalties including penalties of up to \$1.1 million for corporations and \$220,000 for individuals for engaging in breaches of the consumer protection; and
- > unconscionable conduct provisions.



Against the background of the risk of a failure to comply and the penalties that might follow, it is prudent that all who deal with consumers through standard form contracts carefully review them in advance of the passage of this legislation.

Should you require assistance in reviewing your business to consumer contracts or with making a submission to Government, we would be pleased to assist.

** Should you wish to write to Minister Emerson, his contact details are:*

The Hon Dr Craig Emerson MP
Minister for Competition Policy and
Consumer Affairs
PO Box 6022
House of Representatives
Parliament House
CANBERRA ACT 2600

There is also an online contact form:

[http://minister.innovation.gov.au/emerson/
Pages/Contact.aspx](http://minister.innovation.gov.au/emerson/Pages/Contact.aspx)

Details of the Expert Panel have not yet been announced.

Authors

David Lieberman - Consultant

+61 2 8248 5828

david.lieberman@thomsonplayfordcutlers.com.au

Stephanie Barnes - Lawyer

+61 2 9020 5795

stephanie.barnes@thomsonplayfordcutlers.com.au

For more information on this topic please contact:



David Gaszner

Partner

+61 8 8236 1354

david.gaszner@thomsonplayfordcutlers.com.au



Sean O'Donnell

Partner

+61 2 9020 5770

sean.odonnell@thomsonplayfordcutlers.com.au



Philip Smith

Partner

+61 2 9020 5755

philip.smith@thomsonplayfordcutlers.com.au



Michael Warren

Partner

+61 3 8080 3562

michael.warren@thomsonplayfordcutlers.com.au