

Rents under pressure

When it comes to negotiating a commercial lease on a property, franchise operators are, like all small- and medium-sized businesses, protected from bullying and other unfair practices under the Trade Practices Act.

Unfortunately, some players in the market seek to gain an unfair advantage over smaller operators by using their larger size to pressure other businesses.

The use of harsh or oppressive behaviour can amount to what is known as unconscionable conduct. There are no hard and fast definitions used to define unconscionable conduct, although court rulings on the issue have provided some direction.

One area where unconscionable conduct can become somewhat of an issue for franchisees is in leasing retail space.

The issue of leasing by a franchise system is generally complicated by the fact that there are three parties involved—the landlord, the franchisor and the franchisee.

Successful franchisors always bargain hard for the interests of their franchisees to achieve the best possible rental outcome.

This is not always easy as the franchisor is generally dealing with a landlord who has an advantage in bargaining power.

Franchisor representatives have complained about difficulties in securing reasonable terms when negotiating lease renewals with major landlords.

Franchisees for their part often feel disempowered and poorly informed about processes leading to revised rental terms. Sometimes the franchisees claim they are being squeezed out by new rental rates.

There are also situations where the franchisor tries to unfairly use the lease as leverage against a franchisee during a dispute, which concerns the ACCC.

Landlords must act fairly towards their tenants, or risk running foul of the Act. There are a number of ways that some landlords, including franchisors sub-letting to franchisees, have in the past attempted to use leases to pressure their tenants.

The following case highlights how larger parties can be tempted to use their control over leases or other business arrangements to deal unconscionably with a smaller franchisee.

The cases taken to date by the ACCC show there are a number of ways that franchisors can find themselves potentially in breach of the law by using their power over sites they lease. This also applies to landlords who may act unconscionably in their dealings with franchisors and their franchisees.

Like all franchising disputes, the best and most effective way to settle complaints is through good communication and identifying problems early.

The vast majority of franchisors genuinely recognise that their own success rests on helping their franchisees to succeed, but there are always a few black sheep who seek to tip the balance of power their own way by putting undue pressure on franchisees. Using their position in respect of tenancy arrangements can be one of the ways to do this. Equally, landlords need to act fairly in their dealings with franchise tenants.

The ACCC's attitude is that both sides have rights during disputes, and when one party attempts to use its weight to resolve issues, that may be considered unconscionable conduct.

Apart from bargaining strength, issues that may cause concern include:

- > whether the stronger party imposed conditions that were not necessary to protect their legitimate business interest
- > the use of undue influence or pressure tactics
- > whether the stronger party made adequate disclosure to the weaker party
- > the willingness of the stronger party to negotiate
- > the extent to which each party acted in good faith
- > the requirements of any relevant industry code.

LANDLORD SQUEEZES TENANT

In 2001 the ACCC took court action against a South Australian master franchisee who sought to punish a franchisee they were in dispute with by attempting to change the condition of a lease.

The franchisee had been renting the site to run a cake shop, while at the same time sub-letting another section of the site to another business.

The landlord, who had originally agreed to the sub-let arrangement, refused to allow the franchisee to continue sub-letting the site, allegedly as punishment for a dispute between the two parties.

The Federal Court found that the franchisee had relied on rent from the sub-let to maintain a viable business. The master franchisee, knowing this, had allegedly sought to punish the franchisee by removing the ability for the franchisee to carry on the sub-let and therefore maintain their business.

The ACCC took the case to court and the landlord was ordered to pay compensation of \$10 000 to the franchisee.