



The Real Estate Institute of Australia  
16 Thesiger Court | PO Box 234,  
DEAKIN WEST ACT 2600  
Phone 02 6282 4277 | Fax 02 6285 2444  
www.reia.com.au | reia@reia.com.au

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Unfair Contract Terms Consultation Paper  
Small Business, Competition and Consumer Policy Division  
The Treasury  
Langton Crescent  
PARKES ACT 2600

### **Extending Unfair Contract Term Protections to Small Businesses Consultation Paper**

The Real Estate Institute of Australia (**REIA**) welcomes the opportunity to contribute to the consultation into the possible extension of unfair contract term protections to small business on behalf of its Affiliates' Council.

REIA represents around 80% of real estate agencies and is an important element of the broader property and construction sector, which makes a significant contribution to Australia's social climate and economic development. The real estate profession employs approximately 77,000 people and contributes \$300 billion annually in economic activity.

Importantly, REIA represents an integral element of the small business sector. Some 99 per cent of real estate agencies are small businesses and 11 per cent of all small businesses in Australia are involved in real estate. Only 0.6 per cent of businesses employ 50 or more persons.

The REIA's members are the State and Territory Real Estate Institutes, through which around 80% of real estate agencies are collectively represented.

REIA also represents the major franchisors through its Affiliates' Council.

We have had the opportunity to examine the contribution of the Franchise Council of Australia to this consultation and agree with its comments, particularly those headed *Franchise agreements differ from consumer contract*. REIA also wishes to make the following brief additional comments.

The Treasury would be aware the Government has published an exposure draft of the Competition and Consumer (Industry Codes – Franchising) Regulation 2014 which proposes enacting a mandatory Franchising Code of Conduct (the Code).

The Code sets out, over 11 pages, matters that need to be disclosed to a prospective franchisee.

Moreover, subclause 11(2) of the Code provides:

- (2) Before a franchise agreement is entered into, the franchisor must have received from the prospective franchisee:
  - (a) signed statements, that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by:
    - (i) an independent legal adviser; or
    - (ii) an independent business adviser; or
    - (iii) an independent accountant; or
  - (b) for each kind of statement not received under paragraph (a), a signed statement by the prospective franchisee that the prospective franchisee:
    - (i) has been given that kind of advice about the proposed Franchise agreement or franchised business; or
    - (ii) has been told that that kind of advice should be sought but Has decided not to seek it.

It would be reasonable for a franchisor to believe that a prospective franchisee who seeks professional advice would, amongst other things, seek advice as to whether the terms are 'fair' or not.

Therefore, it would be disappointing for a franchisor if, after taking advice from these independent advisors (or after expressly declining to take advice), a franchisee still attempted to avoid a franchise agreement because it would cause 'detriment' if the provision was to be relied or relied on – a definition of 'unfairness' created by paragraph 24(1)(c) of the *Australian Consumer Law*.

Finally, paragraph 24(1)(b) of the *Australian Consumer Law* says that a term of a consumer contract is unfair if it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term.

Conversely, section 7 of the proposed Franchising Code of Conduct requires parties to act in good faith when negotiating an agreement, with subsection 7(6) providing that to avoid doubt, the obligation to act in good faith does not prevent a party to a franchise agreement (or a person proposing to become such a party) from acting in his, her or its legitimate commercial interests.

It must therefore follow that someone who is not acting in their legitimate commercial interest is not acting 'in good faith' and so action can be taken under the Code.

This could include penalties for failing to comply with the terms of the Code that may be imposed once the Competition and Consumer Amendment (Industry Code Penalties) Bill 2014, currently in the House of Representatives, passes.

Given these provisions, it is clear that following the consideration of the Wein Report that reviewed the current Code, the Government has decided that franchisees should be protected through:

- the disclosure of information;

- the requirement to either take, or expressly decline to take, professional advice when considering whether to enter into a franchise agreement; and
- imposing an obligation on parties to act in good faith when negotiating.

The concepts contained in the *Australian Consumer Law* relating to unfair contracts could have been imported into the Code when it was being framed. Largely, they were not.

The 65 pages of the Code should be taken as the exhaustive statement of the law governing the relationship between franchisees and franchisors.

To do otherwise would cause confusion and impose cost on small businesses (something highly undesirable) and defeat the policy intention of setting out how the franchisee/franchisor relationship is to be regulated in one law.

REIA and its Affiliates' Council therefore recommend that any extension of the unfair contract provisions of the *Australian Consumer Law* to small business should exclude franchise agreements regulated by the Code.

Yours sincerely,



Amanda Lynch  
**Chief Executive Officer**  
Real Estate Institute of Australia

[amanda.lynch@reia.com.au](mailto:amanda.lynch@reia.com.au)  
Ph: 02 6282 4277

