



SHOP TALK

ISSUES AND NEWS AFFECTING THE AUSTRALIAN SHOPPING CENTRE INDUSTRY

SHOPPING CENTRE
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FCA CODE OF CONDUCT ON RETAIL TENANCIES IS JUST A MEDIA STUNT

Details of the long-threatened Franchise Council of Australia's proposed code of conduct on retail tenancies are expected to be revealed at a 'retail leasing issues forum' in Sydney on Wednesday. Coyly the FCA has issued invitations proposing that one of the topics on the agenda is "a national approach to constructive landlord/tenant lease negotiations". Most sensible people would support replacing the existing state and territory regulation of retail tenancies with a single national approach but this is not what the FCA has in mind. Instead the FCA is apparently proposing an additional national code of practice which would sit on top of the existing state and territory legislation.

Hang on a minute! Hasn't the FCA strenuously opposed the introduction of state regulation of franchising in South Australia and West Australia on the grounds that it would mean "double regulation" of franchising? Didn't the SA President of the FCA, in response to moves to introduce a code on franchising in that state, threaten not to open any more stores, saying: "Why do we need extra laws [on franchising]?" The answer is 'yes' to both questions but the FCA has never been bothered by accusations of inconsistency and hypocrisy.

Contrast the regulatory oversight of the retail leasing industry with that of the franchising industry. Retail leasing is regulated by seven pieces of legislation (and one mandatory code of practice) around Australia. This state and territory legislation governs every aspect of the retail tenancy relationship, beginning even before the lease is entered into. The legislation contains financial and other penalties for non-compliance. The NSW *Retail Leases Act*, to take one example, contains 157 sections and is 98 pages. The Victorian *Retail Leases Act*, to take another example, contains 121 sections and is 128 pages. Each review of retail tenancy legislation – and these have occurred on a regular basis – adds even more regulation. In Victoria there has been a near quintupling of regulation in just twenty five years ([Shop Talk 15/9/11](#)).

Now compare the regulatory oversight of the franchising industry. There is only a single code of conduct: the *Franchising Code of Conduct*. This is a code of practice, not an Act of Parliament. The Franchising Code does not contain any financial penalties for non-compliance. The Code contains only 35 sections and is only 26 pages – around one-fifth of the amount of regulation of retail leasing in NSW. Not surprisingly, the Chairman of the ACCC recently described franchising in Australia as "an environment with few rules". Let's not forget that the FCA (which, despite its claims, represents franchisors, not franchisees) has consistently opposed every change to the Code or has had to be dragged screaming and kicking to acceptance of proposed amendments. Despite this the FCA wants even more rules to apply to retail leasing which, by contrast, already has far too many rules.

The SCCA has formally advised the FCA that it will not be entering into negotiations on this proposed code of practice, which has been dubbed the 'Norton Rose code'. (The Chairman of the FCA is not a franchisor but is a partner of Norton Rose, solicitors.) We have recently set out in detail the reasons why we won't be negotiating on this proposed FCA code in [this letter](#) to the Chairman of the ACCC, Mr Rod Sims.

Mr Sims, in an address to the FCA National Convention last October, referred to the more than 600 franchise-related disputes handled by the ACCC last year and noted that this supported the proposition that "there are problems in the [franchising] sector". Mr Sims said it was difficult for him to ignore these statistics and pointed out that the sector has suffered from a poor image. Recent parliamentary inquiries in WA and SA have also highlighted problems in franchising and have led to calls in both states for additional regulation. Instead of reflecting on Mr Sims' comments, and taking action to address concerns, the FCA has sought to deflect attention from its own industry problems and its own "environment with few rules". The proposed code is simply a media stunt.