

## SUBMISSION TO THE SENATE INQUIRY THE FRANCHISING AND OIL CODES OF CONDUCT

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NOTE: The views expressed in this submission are my own and may not be representative of the Commonwealth Government of Australia or the Department of Jobs and Small Business and the Department of Environment and Energy.



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## 1. THE CODE ADVISER

### 1.1 Franchising Mediation Adviser

The Franchising Code of Conduct Mediation Adviser is appointed under *Part 4—Resolving disputes of Schedule 1—Franchising Code of Conduct of the Competition and Consumer (Industry Codes—Franchising) Regulation 2014*.

Clause 44 of Part 4 provides that the Minister is to appoint a mediation adviser.

The role of the mediation adviser under the Code is principally to appoint a mediator when requested by a party to a franchise agreement (the complainant or the respondent) to a dispute.

A party (the complainant) notifies a dispute, either under the internal complaint handling procedures in the franchise agreement (clause 38) or the Code complaint handling procedures (clause 40) by giving the other party (the respondent) a Notice of Dispute that identifies in writing:

- (a) the nature of the dispute; and
- (b) what outcome the complainant wants; and
- (c) what action the complainant thinks will resolve the dispute.

### 1.2 Oil Code Dispute Resolution Adviser

The Oil Code Dispute Resolution Adviser is appointed under *Part 4—Dispute resolution scheme of Schedule 1—Oil Code of Conduct of the Competition and Consumer (Industry Codes—Oil) Regulations 2017*.

Clause 41 of Part 4 provides that the Minister must, in writing, appoint a person (the **dispute resolution adviser**) to advise the Minister on dispute resolution.

Pursuant to clause 40, the dispute resolution scheme applies to the following disputes:

- (a) a dispute arising if a wholesale supplier fails to supply a declared petroleum product to a customer;
- (b) a dispute arising between the parties to a fuel re-selling agreement;
- (c) a dispute arising in relation to any other provision of Part 2 or 3.

The role of the mediation adviser under the Oil Code is principally to appoint a mediator when requested by a party to a dispute or to make a non-binding determination.



### 1.3 The Appointed Adviser

On 1 December 2016, Derek M. Minus, an Accredited Mediator, Barrister-at-Law and Chartered Arbitrator was appointed as the Mediation Adviser for the Franchising Code by The Hon Michael McCormack MP, then Minister for Small Business, and as the Dispute Resolution Adviser for the Oil Code by The Hon Josh Frydenberg MP, Minister for the Environment and Energy.

Additionally he is also appointed as the Mediation Adviser under the Horticulture Code of Conduct (which is not a subject for consideration by this Inquiry).

A legal practitioner for over 27 years, he is an Accredited Mediator under the NMAS system who has conducted over 4,000 mediations since 1992; a Chartered Arbitrator, court appointed arbitrator and former tribunal member in New South Wales and a lecturer in Law at the University of Sydney conducting a one semester course on *Commercial Dispute Resolution* in relation to the Food and Grocery Code that teaches practical skills of negotiation, mediation and arbitration.

He is responsible for undertaking the Adviser functions under the Codes and managing the administrative functions of the:

Office of the Franchising Mediation Adviser, see [www.franchisingcode.com.au](http://www.franchisingcode.com.au)

Office of the Oil Code Dispute Resolution Adviser, see [www.oilcode.com.au](http://www.oilcode.com.au)

### 1.4 The Adviser's Role

The Adviser manages the administrative Offices which provide the services to franchisees, including; telephone answering, information dissemination, advice about the operation of the Codes and how to access dispute resolution services under them, the separate websites providing an information service about dispute resolution, lists of appointed mediators, and an on-line enquiry and registration of disputes service.

The Adviser is required to prepare detailed statistical reports on a quarterly and annual basis for the Department, concerning:

- 1) the performance of the dispute resolution service
- 2) the nature of the matters referred for mediation
- 3) who referred the disputes to the OFMA and DRA
- 4) who has made the request for mediation (franchisee or franchisee)
- 5) what type of issues are most frequently raised
- 6) where the enquiries arise, by state



- 7) the nature of enquiries by Industry Type (categorized using the ANZSIC coding system)
- 8) the number of enquiries and disputes mediated
- 9) the mediation success rate and quality of outcome
- 10) the average cost of the mediation
- 11) the party's satisfaction with the mediator's performance
- 12) the party's satisfaction with the OFMA and DRA service

The Department has instructed the Adviser that it not necessary for him to present this information in his report to the Inquiry, as the Department will likely include key statistics from those reports in its own submission to the Inquiry.

### 1.5 Emerging Trends and Systemic Issues

As well providing analysis, the Adviser provides advice to the Department on emerging issues and trends and systemic issues.

For example, over the past 12 months the Adviser has notified the Department that a significant number of "franchising" matters were being conducted under the Oil Code. Many of these matters were concerned with the termination of the franchisee's agreement due to audits of their wages payments, a matter now dealt with under the *Fair Work Amendment – Protecting Vulnerable Workers Act 2017*.

The Oil Code was reviewed and republished by the Federal government on 1 April 2017. It has been noted by the Adviser that the Oil Code, unlike the revised Franchising and Horticulture Codes does not require "good faith" bargaining or provide for civil penalties.

The other noticeable trend, is the number of multi-party disputes that are being notified to the Adviser with upwards of 40 franchisees who are in a system-wide dispute with their franchisor. Although the number of these are small compared to the number of "single franchisee" disputes for which the mediation service is requested, we see the trend as significant and increasing.

The growth in these matters although involving a range of issues, appears to be linked to the ACCC's well publicised actions in pursuing franchisors for breaches in the handing and reporting of franchise marketing funds, as this is a frequently reported cause for complaint.



## 2. THE INQUIRY

### 2.1 Terms of Reference

The following matters were referred to the Parliamentary Joint Committee on Corporations and Financial Services for inquiry and report by 30 September 2018:

(a) the operation and effectiveness of the Franchising Code of Conduct, including the disclosure document and information statement, and the Oil Code of Conduct, in ensuring full disclosure to potential franchisees of all information necessary to make a fully-informed decision when assessing whether to enter a franchise agreement, including information on:

- (i) likely financial performance of a franchise and worse-case scenarios,
- (ii) the contractual rights and obligations of all parties, including termination rights and geographical exclusivity,
- (iii) the leasing arrangements and any limitations of the franchisee's ability to enforce tenants' rights, and
- (iv) the expected running costs, including cost of goods required to be purchased through prescribed suppliers;

(b) the effectiveness of dispute resolution under the Franchising Code of Conduct and the Oil Code of Conduct;

(c) the impact of the Australian consumer law unfair contract provisions on new, renewed and terminated franchise agreements entered into since 12 November 2016, including whether changes to standard franchise agreements have resulted;

(d) whether the provisions of other mandatory industry codes of conduct, such as the Oil Code, contain advantages or disadvantages relevant to franchising relationships in comparison with terms of the Franchising Code of Conduct;

(e) the adequacy and operation of termination provisions in the Franchising Code of Conduct and the Oil Code of Conduct;

(f) the imposition of restraints of trade on former franchisees following the termination of a franchise agreement;

(g) the enforcement of breaches of the Franchising Code of Conduct and the Oil Code of Conduct and other applicable laws, such as the Competition and Consumer Act 2010, and franchisors; and

(h) any related matter.



We understand the terms of reference of the inquiry to focus on the ability for franchisees, operating under the Franchising Code of Conduct or the Oil Code of Conduct, to obtain information, make informed decisions and resolve disputes that occur in franchising operations under both of these Codes.

It is not generally understood that disputes that occur between a franchisor and franchisee, must be dealt with under the Oil Code because of the operation of subclause 3(2)(a) of the Franchising Code which provides that:

*The franchising code does not apply to a franchise agreement to which another mandatory industry code, prescribed under section 51AE of the Competition and Consumer Act 2010 applies.*

Whilst engaged as the Adviser for disputes across these two industries, the OFMA and DRA have a generally narrow view of the level of disputation that exists. That is because we do not see everything, we just see the matters that “come through the door” as it were.

We will therefore make some general remarks about the franchising industry before focussing on the effectiveness of dispute resolution under the Franchising Code of Conduct and the Oil Code of Conduct.

## 2.2 The Franchising Industry

There is not much detailed statistical information available about the level of disputation in the franchising industry. What statistics there are<sup>1</sup> suggest that franchising is a \$144 Billion industry and which in Australia has:

- 1,120 Franchisors
- 79,000 Franchisees
- 470,000 Employees

Anecdotal information and investigative reports in newspapers and the news media frequently refer to extensive problems in franchised businesses with “hundreds” of franchisees suffering financial hardship or going broke. Whilst we do not dispute that these situations may exist, we can only advise that we see few of those matters being brought to the OFMA or DRA.

Whether that is because the OFMA and DRA services are unknown to the franchisees or because franchisees are too scared (an often made comment) to make contact and seek assistance, one can only speculate.

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<sup>1</sup> Franchising Australia 2016 Report published by Griffith University Asia-Pacific Centre for Franchising



In our experience, disputes within the industry are not universally spread. The more established and better organised franchisors have their own (internal) mechanisms for resolving disputes which occur within their network. We simply never see disputes being brought by one of the “household name” franchisors.

It is generally the smaller franchise systems, new franchise businesses, those undergoing rapid expansion and suffering lack of capital or significant changes in ownership or operation, that have problems that are referred to dispute resolution under the Code. Those problems become apparent to the Adviser by the number of disputes occurring in the same franchise network in different locations around Australia, at the same time.

### 2.3 Franchise Statistics

An analysis of the franchised businesses with disputes that we have assisted with mediation, since appointed as the OFMA and DRA 16 months ago, show that:

- over 400 requests for mediation were received for 159 different franchise systems/companies
- 4% of franchise systems generated 10 or more disputes representing 45% of all matters lodged
- 27% of franchise systems were reported as having 2 or more but less than 10 disputes representing 29% of all matters lodged
- 69% of franchise systems had only 1 dispute with a franchisee that was mediated representing 26% of all matters lodged

That is, we have been involved with 10% of all franchisors understood to be operating in Australia, which have had only a single dispute brought to the OFMA.

Also it is significant that one of the ‘4%’ of franchisors with multiple disputes is actually an exemplary company which regularly lodges matters with the OFMA so that it can use the Code’s dispute resolution processes to notify, mediate and resolve identified performance issues within its franchisee network.

There may well be significant unhappiness and financial difficulty being experienced by a large number of franchisees in the industry in certain franchise systems. Our knowledge is based solely on the matters that are brought to us by being requested to provide, information, advice or assistance with the resolution of a dispute. We do not conduct industry surveys, nor are we an association with a large and diverse membership that can receive direct feedback regarding circumstances concerning their members’ operations.



## 3. DISPUTE RESOLUTION UNDER THE CODES

### 3.1 Effectiveness of dispute resolution

The Office of the Franchising Mediation Adviser (**OFMA**) is a government funded body that provides the administrative assistance to the Adviser's role in:

- maintaining a list of accredited mediators,
- receiving requests for mediator appointments, and
- managing the appointment of mediators from a list, to disputes at the request of parties to a franchising agreement.

Originally established on 1 July 1998, as the Office of the Mediation Adviser, it was renamed in 2008 on the recommendations of the then Inquiry to give more prominence to franchising. Although its name was changed the processes available under the Franchising Code were not.

The success of a dispute resolution service is mainly measured by the settlement rate achieved. The settlement rate for mediations conducted by OFMA in 2017 was 80% and in the first quarter of 2018 reported as 85%.

One can regard these high rates of settlement as an indication that the Code dispute resolution processes employed by skilful mediators who have been assessed and appointed by the Adviser, are effective in resolving disputes brought to the OFMA.

However, even where a dispute is "settled" with the parties entering into an agreement, not all the issues raised by either side may be resolved.

In obtaining information about the success of the mediation (measured by whether an agreement was reached and recorded) we also enquire about the extent of the resolution that is obtained. Whether it is considered by the mediator to "Completely" resolve all of the issues in dispute or only "Mostly" resolve them.

When we factor in this additional information, and look at the results for 2017, 15% of the matters reported as resolved, were only partially resolved, or the resolution was regraded as less than satisfactory or required. Factored back, this means that only around 68% of matters are "totally resolved" to the satisfaction of the parties.

This then leaves around a third of all participants who attend a mediation session who do not resolve their dispute or resolve it only in part but because they do not achieve a "complete" resolution can remain unhappy or disgruntled.



### 3.2 Relevant Findings from the 2008 Inquiry

The 2008 Federal Parliamentary Joint Committee investigation into the Franchising Industry reported significant dissatisfaction with mediation as a process in resolving franchising disputes despite high apparent mediation settlement rates.

The review of the Franchising Code of Conduct by the Parliamentary Joint Committee on Corporations and Financial Services identified in its report<sup>2</sup> problems with the mediation only model employed by the OFMA.

The Committee noted that:

“7.29 Views put to the committee on the utility of the current mediation arrangements under the Code were polarised. For instance, the Franchise Council of Australia (FCA) stated:

*The mediation based dispute resolution process is highly effective and considered world's best practice. It is quick, low cost and effective in over 81% of cases, which is a phenomenal result.*

7.30 In stark contrast to this statement, many submissions to the committee revealed substantial dissatisfaction amongst franchisees, and also some franchisors, regarding the current operation of the mediation provisions.”

The Committee also noted at 7.48 that:

“In light of these comments, the relatively high settlement rate cited for the OMA mediations is potentially misleading. The blunt settlement figure provides no indication either about the relative satisfaction of the parties with the mediation outcome, or whether the mediation outcome subsequently occurs.”

The committee recorded at 7.57, that:

“Having regard to both the limitations of mediation as it currently exists and the high, often prohibitive, costs of litigation, many submitters and witnesses asked the committee to consider the introduction of alternative dispute resolution mechanisms in franchising. Suggestions put forward included an increased focus on pre-mediation strategies; the creation of a tribunal to make determinations; or the introduction of a franchising ombudsman.”

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<sup>2</sup> “Opportunity not opportunism: improving conduct in Australian franchising” (December 2008)



This dissatisfaction is given voice in the comments of participants whose mediations did not completely resolve their concerns, recorded in recent reports to the OFMA:

### **RESPONSE 1**

*"Overall the service was well run and the requirements well communicated. The aspect of the parties seeking to resolve the matter was quite poor. The other party presented their view with no attempt to mediate and were in complete denial that any of the issues presented actually happened. As far as they were concerned nothing was their fault nor had they any involvement. I believe [the mediator] tried his best but [the franchisor] were just playing games and acting the bully."*

### **RESPONSE 2**

*"Although the mediation process would work in some cases, as a small business owner this process has been very expensive and gained no result. If a small business like mine does not have the funds to fight this matter in court, and the other party knows this, there is little chance to obtain a result. [The franchisor] know the chances of them being investigated by the ACCC is next to none, so made little effort to comply or resolve the matter. If large, multi national companies are able to make clear breaches that cause devastating results like what has happened to my business knowing there is a 99% chance they will not be investigated, what the point in having a Franchising Code in place? I would be interested in providing more information, or donate my time to help adjust this system to help small business. I have written letters to parliament about this issue, who are now aware of what has taken place with my business, and the little support that is available."*

### **RESPONSE 3**

*"From my understanding of this process: 1. If a franchisee cannot afford a lawyer, the franchisor's law team will enforce it's opinion of the mediator in legal terms. Albeit which might as well be true, but it is contrary to the belief that that this might be a cheaper official way to get an agreement. It must be stated outright that a lawyer from each side is a must. 2. My Dispute was a single point that [the Franchisor] lied and gave me a number*



that can only work if I underpay staff, and all the franchisor had to do was to produce one single paper of any of its stores where everyone was paid legally within that number. Franchisor failed and refused to produce it for any one of its stores. 3. From that point on, I truly believed that I have a strong win-able case only to be told that since this would require an investigation into franchisor books and a forensic report is needed and I would need to go to a full court and spend way more money and than I can win. So if I cannot afford all that, I should take 100% loss as my unavoidable fate of doing business in Australia legally. 4. Mediators do not have the power to halt the status quo and request further investigation when such an obvious franchisor lie is caught. Therefore they can only inadvertently support franchisors as their legal teams have figured out these limiting powers and they continue to rob people like myself."

#### **RESPONSE 4**

"If the Franchisor is not prepared to capitulate at all, there is little point to Mediation. There is no accountability for a disingenuous party, whose agenda simply was to appear and go through the motions and seek to give the impression progress may be made after the day of mediation."

#### **RESPONSE 5**

"My experience with franchising has shown me that there are inadequate controls in place to protect franchisees from rogue franchisors. The franchise industry would appear to have a very serious problem in terms of normal hard working families who invest significantly in terms of financial, emotional and physical outlay, only to be left with nothing when things go awry. The system would appear to protect illegitimate franchisors because it is left to the victim (franchisee) to pursue legal action at significant cost once they have in some cases lost everything. Legal advice then tells you that a successful prosecution can often lead to no recovery of your investment through compensation if the franchisor has his assets protected, liquidated or goes bankrupt themselves. In my case (and 2 other franchisee victims) the franchisor completely changed his business model by abandoning the franchise system he created and appointed distributors under completely different agreements and trading terms. He then had inadequate controls to manage his distributors who then became my direct competition. It was a



predatory and deliberate strategy to send me out of business whereby my only chance of compensation was to engage lawyers which I now cant afford. The franchisor completely misrepresented himself to me and included information in the disclosure document that was completely incorrect. The ACCC offered absolutely no help at all and the Franchise Code of Conduct seems nothing more than a piece of paper. I have completely exhausted every avenue to create accountability but it seems the only option I have is to risk another \$30,000 in lawyers which thanks to the franchisor I do not have any more. It seems the system is going to allow this predator to potentially scam more money out of more innocent people without any possible threat from statutory authority or risk to him. It will make for a very interesting media story if that is to occur."

### **RESPONSE 6**

"I realize the process is necessary but as this is the only time I've been through this it didn't achieve anything which was expected due to the attitudes and behaviours of the Franchisor Directors."

### **RESPONSE 7**

"I felt over powered by the franchisor and their aggressive angry solicitor and yet the mediator allowed them to play hard ball and I felt I had no possible solution after a very long day."

### **RESPONSE 8**

"The legislation and the Code are very good both in letter and in spirit. We, as franchisees, see and experience the abuse of franchisors and their lawyers on a daily basis. The franchisees are powerless because the legal framework (the legislation & the Code) are abused by franchisors and lawyers. We see how many franchisees suffer emotionally, financially and health wise because the system is not giving franchisees the necessary protection. Please find a way to stop the abuse by the franchisors and the lawyers. The dispute resolution process is not working. The only alternative is legal action which cost 100's of thousands of dollars which is beyond the means of most franchisees. Please implement the dispute resolution process in letter and in spirit."



### 3.3 Improving Effectiveness

At the time that the OFMA was established, dispute resolution procedures, apart from arbitration, were little used in Australia. The Supreme Court of New South Wales, due to the influence of its former Chief Justice, Sir Laurence Street, who became a mediator on his retirement from the court, adopted a mediation scheme, probably Australia's first, in 1995.

Coming forward to today, dispute resolution processes, especially but not limited to mediation, abound in every court and tribunal in Australia:

- The Family Court has a family dispute resolution process with Family Dispute Resolution Practitioners (FDRP) accredited by the Federal Attorney-General's Department, as well as arbitration of Family law property only, disputes.
- The Federal Administrative Appeals Tribunal (AAT) has incorporated processes of conferencing, conciliation, mediation, case appraisal and neutral evaluation.
- The NSW Local Court system which can deal with commercial disputes up to \$100,000 can appoint mediators or arbitrators to resolve disputes under the *Civil Procedure Act 2005*.
- The NSW Workers Compensation Commission has an integrated conciliation/arbitration system where the same person provides both processes.
- The NCAT (NSW Civil and Administrative Tribunal) has a wide and flexible power to resolve disputes other than by adjudication. Section 37 of the *Civil and Administrative Tribunal Act 2013* provides that:  
*The Tribunal may, where it considers it appropriate, use (or require parties to proceedings to use) any one or more resolution processes.*
- The QCAT (Queensland Civil and Administrative Tribunal) even has an arbitration-mediation (arb-med) process, termed a hybrid hearing, whereby the member first arbitrates the dispute (and privately records the decision) before attempting to resolve the dispute by mediation. If the matter is settled then the arbitration outcome is destroyed. See QCAT Practice Direction No 1 of 2012.

Likewise, each of the Codes of Conduct that were subsequently established under section 154AE of the *Competition and Consumer Act 2010*, incorporated additional (determinative) processes in addition to mediation to assist the parties achieve the resolution of their disputes.



### 3.4 Oil Code

As well as appointing a mediator, the Oil Code provides for the Adviser to make a non-binding determination.

Clause 45(6) of the Oil Code provides that:

*(6) The dispute resolution adviser may make a non-binding determination about the dispute.*

This is akin to a process of expert determination by the Adviser who can call for information to be provided, before making the determination.

Clause 45(7) provides:

*(7) Before making a non-binding determination under subclause (6), the dispute resolution adviser may allow each party to give, within the period specified by the dispute resolution adviser, information about the following matters:*

- (a) the contractual arrangements between the parties;*
- (b) how the party has complied with the code;*
- (c) what action the party has taken towards resolving the dispute;*
- (d) how the dispute could be resolved;*
- (e) if a non-binding determination was made, how much time the party would require to give effect to the determination;*
- (f) any other matters the party considers relevant.*

This process is purely facilitative, as clause 46 holds that evidence of information given, or of any act done, by a person for the purposes of the determination by the Adviser, is not admissible in any court; federal or state tribunal or private arbitration or like determinative proceedings before a person authorised by the consent of the parties to hear evidence.

### 3.5 Horticulture Code

As well as appointing a mediator, the Horticulture Code provides for the appointment of a Horticulture Produce Assessor.

Clause 49 of the Horticulture Code provides for a horticulture produce assessor to be appointed by the parties, the Adviser, or the mediator appointed by the Adviser.



The role of the horticulture produce assessor is to provide an expert, non-binding determination by investigating a matter that is referred to him or her under the appointment and providing a report on:

- (a) if a trader has rejected horticulture produce under the agreement - whether the rejection of the produce was in accordance with the requirements of the Code and the horticulture produce agreement;
- (b) whether amounts paid by a trader to a grower under the agreement were calculated in accordance with the requirements of this Code and the agreement.

Additionally, although clause 40 sets out the process for dispute resolution involving the appointment of a mediator or a horticulture produce assessor, clause 38(1) provides total flexibility in choice of dispute resolution process, in that:

- (1) *Growers and traders may use any dispute resolution procedures they choose to resolve horticulture disputes that arise between them.*

### **3.6 Food and Grocery Code**

Introduced in 2015, the Food and Grocery Code (although still a voluntary code) provides a “best of breed” dispute resolution process and a model example of a modern dispute resolution process. The Code includes the range of dispute resolution services, normally mandated in any commercial contract, such as those regularly entered into by the Commonwealth Government or any major trading corporation.

This Code makes available to a supplier, a choice of both collaborative and determinative processes:

- (a) negotiation with a buyer,
- (b) mediation (facilitated negotiation), and
- (c) binding arbitration

The latter two processes are utilised by sourcing an independent resolver from an appointed private membership body.

This use of a range of increasingly guided resolution processes rather than just relying on a single process of mediation, allows for both flexibility as well as finality in achieving resolution and ensures that all matters brought into the system are resolved at some point, within it.



### 3.7 Improving the Franchising Code

The best way for government to increase both the settlement rate and satisfaction with the Franchising Code dispute resolution service is to update the Code to introduce other complementary dispute resolution processes.

The best model for doing this is the existing schema employed in the Food and Grocery Code. Here the three dispute resolution processes available ensure that all disputes that are brought into the scheme are resolved.

Negotiation provides the cheapest and most flexible process. Mediation is next and allows the parties to engage in negotiation with a trained and experienced facilitator. Arbitration is available where mediation does not completely resolve all of the issues and a party wants an investigation of the facts and a determination on the evidence. It is the most expensive because of the time and expertise required but delivers finality to parties who “want their day in court”.

Most importantly, franchisees are not left with the only mechanism to achieve resolution being the expense and uncertainty of litigation in the Federal Court.

### 3.8 Tribunals and Franchising Ombudsman

It is sometimes suggested (as it was in 2008) that the solution is the establishment of a specialist Federal Tribunal. But the establishment of a body that would make and enforce its decisions in the federal sphere would offend against the separation of powers doctrine found by the High Court to apply in the *Boilermakers’ case*<sup>3</sup>.

Although state based tribunals like NCAT, VCAT and QCAT do have the ability to make binding and enforceable decisions, their jurisdictional limit is often too low to accommodate the size of awards that can be made in a franchise case which can be up to \$1,000,000.

Even if this limit were to be raised, it is doubtful that nationally based franchisors would want to be involved with purely state based decision making, with the fear that decisions and awards may vary wildly between different states.

Australia already has a highly active and effective, Australian Small Business and Family Enterprise Ombudsman (ASBFEO), but it has not been given the power to even recommend that matters be referred to arbitration.

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<sup>3</sup> R v Kirby; Ex parte Boilermakers’ Society of Australia (1956) 94 CLR 254



### 3.9 Arbitration universally employed

It should be realised that arbitration is used as the mechanism of choice in the resolution of franchising disputes in most of the rest of the common law world as well as in civil law countries.

Arbitration is also universally used in international commercial dispute resolution (more frequently coupled with mediation).

Since the time of the last Parliamentary Joint Committee report, the state based Commercial Arbitration Act, has been completely revised and updated (in line with an amended International Arbitration Act) based on the UNCITRAL Model Law and has been adopted nationally as a "uniform act" in all States.

A strategy that used binding arbitration and existing arbitrators would provide an alternative, lower cost methodology for obtaining resolution of disputes that do not completely resolve at mediation.

It would also avoid the need for small businesses to entertain litigation in Court where the expense can be prohibitive and where the decision maker may have no expertise in the commercial nature of the transaction.

There are hundreds of trained and experienced private arbitrators (most of them with legal qualifications as it is the state law societies and bar associations that have kept the process alive) in Australia and professional associations that train and maintain their standards.

Arbitrators are empowered under many legislative schemes to act as experts and conduct the resolution of the dispute first by attempting conciliation and then if that fails, determining the matter as an "expert". That is, the arbitrator is empowered to conduct an "inquisitorial process" to use their business and technical expertise and call for evidence in order to determine a matter.

A quick decision by an experienced industry "expert", using a flexible dispute resolution process can deliver a binding decision at much less cost than attempting to conduct litigation in a Federal Court.



## 4. OTHER IMPROVEMENTS

### 4.1 Greater publicity

Generally when we speak to franchisees, their frequent complaint is that they “knew nothing” about the existence of the OFMA or DRA support services that can be provided for free. They usually add that they “wished they had found out about it 12 months ago” as they have been trying to negotiate with their franchisor without success for that length of time.

Hearing those comments is particularly disappointing as the government has invested significantly in establishing legislation and funding the OFMA and DRA services but through inadequate promotion and marketing, people who could be assisted early in their dispute arrive too late when the financial burden has limited their options to successfully extricate themselves from financial calamity.

It should be noted that the ACCC is funded to provide a level of awareness about the Code but is (naturally) focussed more on regulatory matters whilst the OFMA is focussed on reconciliation of the disputing parties. A recent ACCC publication for the franchising industry, “Franchising: What you need to know” provided a careful analysis of the statutory requirements but under the heading “Dispute Resolution” failed to mention the OFMA service even existed or provide contact links.

Both the ACCC and the Franchise Council of Australia, at our request, feature links on their websites that go directly to the OFMA website.

One simple, inexpensive and effective method to provide franchisees with information about the OFMA would be to require franchisors to print on page 2 of every Franchise Agreement, the contact details for the OFMA and a brief explanation of the services it can provide to assist franchisees who find themselves in a dispute with their franchisor. Banks and financial institutions were required to do the same and publish in their loan documents the name and contact details of the internal and external dispute resolution services.

### 4.2 Civil Penalties

The introduction of “civil penalties” was heralded at the time that the Franchising Code was amended in 2015.

There are 24 clauses in the Franchising Code that attract “civil penalties” which can lead to the imposition of civil penalties of “up to 300 penalty units” currently \$62,000 from 1 July 2017.



Two clauses that contain civil penalties relate to Part 4-Dispute Resolution services:

cl 6 - failure to comply with the Obligation to Act in Good Faith

cl 39(3) – Failure to attend the mediation

Both of these areas are matters about which franchisees frequently complain.

Having civil penalties for a failure to abide by the Code is of little value unless the ACCC is funded and sufficiently resourced to be seen as an “active cop”.

### 4.3 Hotline to the ACCC

Sometimes complainants (franchisees mainly) have gone through the existing Franchising Code dispute resolution process and not been able to resolve their dispute because of actions by a franchisor which they complain are in breach of the Code.

Where this occurs, those franchisees who have invested their time in trying to use the mandated process could be assisted by being given a “hotline” or fast entry into the ACCC’s investigative area.

### 4.4 Collective Bargaining Exemption

Collective bargaining occurs when two or more competitors get together to negotiate terms, conditions and prices with a supplier or customer. These arrangements can sometimes be prohibited by the provisions of the *Competition and Consumer Act 2010*.

The ACCC can give approval to allow businesses to take part in collective bargaining without the risk of legal action for breaching the *Competition and Consumer Act*, if it is satisfied the arrangement provides an overall public benefit.

As noted earlier, increasingly, groups of disgruntled franchisees from the same system are banding together to seek support and share the costs of dispute resolution by participating in a single mediation. If those franchisees are deemed to be competitors, and during the mediation they are engaging in conduct that could be an anti-competitive arrangement (such as collective boycott or cartel conduct) then they would need to seek an approval from the ACCC to avoid the risk of legal action before using the mediation process.

As an alternative and to ensure support for franchisees attempting to resolve problems across their franchise, a general exemption could be allowed for franchisees engaging in a group mediation with their franchisor.

