

Scott Cooper

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Inquiry into the Operation and Effectiveness of the Franchising Code of Conduct

Please accept this as a submission for consideration in your inquiry into franchising.

In short, I was a franchisee within one of the largest franchising systems in Australia for a period of around eighteen (18) months.

In that short time, I unsuccessfully attempted to address a breach in the mandatory disclosure requirements within the Disclosure Document presented to me. Other parties listed in the contract agreed by fact that the Disclosure Document presented to me was not in strict accordance with the mandatory requirements of the Franchising Code of Conduct, and there was a corresponding admission I was entitled to a remedy.

The true problem arose though when I accepted the invitation to seek relief from the contract and all other listed parties denied any liability to the contract based on their not being involved in the preparation of the Disclosure Document.

After addressing the issue directly and subsequently through mediation and costly continued legal effort, the only constant was the franchisors combined refusal to negotiate and their insistence that I continue paying fees or the business would be terminated.

Apart from a token settlement offer that was claimed to have been made in the financial interests of the franchisor and the franchisee, the only true effort to resolve the dispute was an aggressive invitation to take the matter to court and determine liability.

Recognition of the fact that the costs of litigation are incredibly high and prohibitive on both a personal and financial front, in practice it was not even a consideration, so to mitigate my financial and personal damage, I terminated the franchise agreement.

With this experience, I have been exposed to many of the issues you are seeking to address in the course of your inquiry, and I would like to offer a more detailed submission, which is attached.

If you require any further details or information please do not hesitate in contacting me. I would welcome any opportunity to assist the inquiry in any manner deemed appropriate.

Regards

(Scott Cooper)

Disclosure

The centre-piece of my dispute was an agreed fact that I was not supplied with a Disclosure Document in full accordance with the mandatory requirements of the Franchising Code of Conduct. Specifically, it was agreed a list of existing franchisees and their contact details was not provided to me. This was claimed at the time to be a breach of existing Privacy Laws.

‘An important point is whether you were given a complete list of all Franchisees in the Region before you started, together with contact details. If not, you would have a good case for a refund.’

‘Please send me a copy of your disclosure document so that I can confirm that details of current Franchisees were not included.’

‘I received your materials I’m not saying this would automatically give you a refund of your Franchise fee, but failure to provide this information would certainly be a breach of the code and should be remedied.’

‘I’ve checked and it appears you were not given a list of current Franchisees in your Disclosure. This is NOT an automatic refund but it certainly strengthens your claim for some kind of settlement.’

When referring to Part 2 of the Franchising Code of Conduct (Disclosure), it is clear on reading that the onus and indeed obligation lies squarely upon the franchisor to ensure that before entering any Agreement and receiving any non-refundable monies from the Franchise Agreement, they must provide a Disclosure Document in strict accordance with the mandatory requirements.

The failure to provide a list of existing franchisees coupled with the franchisors failure to disclose profitability concerns already being addressed by two (2) of the three (3) existing franchisees in the region at the time of my entering the Agreement, it stands to reason that any true ability for me to make an informed decision about the business was greatly reduced.

‘Too many franchisees seem to be making poor income, especially in the early stages.’

‘This is especially serious since a lot of mobile Franchisees appear to be struggling, based on our last survey and from what I hear since then.’

My real anguish remains that the failure to provide mandatory information in my Disclosure Document was never denied — it was admitted. It was the liability for the omissions that was questioned and strongly denied on the premise the document was prepared by a party not included in the Agreement.

All-in-all, the dispute was dismissed as an 'administrative error', fitting into the category of a technical or procedural breach of the Code.

I am left with many unanswered questions despite several attempts to seek clarification, only to be met by deafening silence on many fronts.

- If a Disclosure Document provided before entry is not in accordance with mandatory requirements, what are real implications for a franchisor?
- How can a franchisor deny liability to an Agreement that bears his/her name and signature, and for that matter their logo or trademark?
- How can a franchisor deny liability to an Agreement they have benefitted from financially in the form of both the initial franchise fee and on-going monthly franchise fees?
- It seems somewhat contradictory to on one hand deny all liability, yet on the other hand, maintain authority over the Agreement to enforce the payment of fees or the business will be terminated?
- How many franchisees have lost everything because the franchisor made a technical or procedural breach of the Code, but the franchisee simply does not have the resources to fight?
- As it stands, the franchisor faces very little in the way of reprisal, able to say 'oops — sorry about that', extend a token offer and issue an aggressive invitation to litigate.

All too common with the law, it is not the party with the strongest case that succeeds in litigation, but the party with the most money.

Mediation under Part 4 of the Code

It is accepted that the Franchising Code of Conduct is indeed law and falls under Section 51AE the Trade Practices Act as a 'mandatory code', in reality the Franchising Code of Conduct is not able to be enforced to any large extent on franchisors, unless franchisees have sufficient funds to litigate.

The overall theme is that if a franchisor is alleged to be in breach of the Code or indeed the Act, regardless of the 'mischief', the franchisee has a means of having the matter dealt with in the courts via the smorgasbord of remedies available under the Trade Practices Act.

Whilst mediation is specified under the Code and is often reported as being a more cost effective and arguably a successful means of alternative dispute resolution, it can only be as effective as the respective parties allow it to be.

Based on my experience, mediation provides the franchisor with another opportunity to flex their muscles and further assert dominance. At their belligerent best, the franchisor is able to point the finger at the franchisee for inadequate due diligence, ineffective marketing, being a

bad operator, a negative influence, etc., all whilst retaining full control of the proceedings. This is generally accepted as the franchisor protecting their business name and financial interests.

In my case, a formal dispute was raised following a general admission the franchisor had breached the Franchising Code of Conduct, and I was entitled to remedy. It was at this point the whole landscape changed dramatically and the heavy artillery was wheeled in.

At the outset of my dispute it was stated that I "had a good case for a refund" and that there was a "breach of the code and should be remedied", but other parties to the Agreement debated liability and all then simply denied any liability. This coupled with a predictable claim that nobody could afford a settlement, saw a "forced" settlement offer extended that was claimed to be for the protection the financial interests of both the franchisor and franchisee.

The token settlement offer was extended with an aggressive invitation to 'take it to court if I wanted more', with a bang of a fist on the table to reinforce the costs associated with legal action and 'we'll see you in court' as they stormed out of mediation and constant refusal to negotiate.

Particularly in low-cost-entry franchises, the costs of engaging in litigation far exceed any damages that may be claimed.

This clearly demonstrates the gigantic void that exists in the current system. The only avenue open for the franchisee to obtain true remedy is litigation, which is aggressively invited by the franchisor, perfectly safe in the knowledge that in all probability litigation will never eventuate.

I was reminded none too subtly both verbally and via e-mail of 'the tens of thousands of dollars in legal fees to get more' and accompanying boastful declarations of having 'deep pockets', etc., so 'see sense and accept the offer'.

In the clarity of hindsight, even if the settlement offer had been accepted, I would never have received any money given the terms of the settlement and the state of the franchise system as a whole – not to mention the termination/'forcing out' of some franchisors and the offer of settlement being withdrawn within days after mediation. I was even declared 'foolish' for not accepting the offer. Somehow it was 'foolish' to reject an offer that I would never have received any money from.

This all remains a very bitter pill to swallow, given the franchisor profited from an agreed breach of what is termed a 'mandatory' code. I left with nothing, but the franchisor continued operations unscathed, able to sell my franchise and others.

Conclusion

- **Although 'mandatory' under the Trade Practices Act, the Franchising Code of Conduct is in reality, little more than a voluntary provision.**
- **What are the true consequences for a franchisor knowingly in breach of the Franchising Code of Conduct?**
- **Current provisions for dispute resolution and overall protection are grossly inadequate on many fronts, and rest far too heavily in favour of the franchisor.**
- **Franchisors are too readily able to use the costs of dispute resolution provisions as a defence to 'protect their commercial and financial interests'. They are also seemingly jointly able to deny all liability, forcing the franchisee to determine liability before the courts?**

My experience in franchising has seen me walk away with nothing, despite amongst other things, an agreed breach of the mandatory disclosure requirements required under the Franchising Code of Conduct, powerless to do anything after an exhaustive trail of dead ends, due to a lack of money.

It is clear that remedies available to franchisees impacted by a franchisor in breach of the Franchising Code of Conduct and/or the Trade Practices Act need to be significantly enhanced. Breaches of the Franchising Code of Conduct and/or the Trade Practices Act should have far greater consequence or penalty.

I for one, strongly disagree with any attempt to suggest that existing laws and provisions are adequate, and I am sure many others have grave doubts over the adequacy of any protection offered under the current provisions and financially inaccessible laws.

I am hopeful that if nothing else, this submission is able to clearly demonstrate the absolute imbalance that exists between a franchisor and franchisee in dispute.

Your time and efforts are much appreciated

THANK YOU