Submission to the

Senate Legal and Constitutional Affairs Committee:

Inquiry into **Access to Justice**

11 May 2009

Introduction

The information provided in this submission has been based on my personal experience as an applicant in litigation before the Federal Court. As I stated in my submission for the inquiry into the Franchising Code of Conduct "…that until there is a method put in place that can provide affordable and immediate relief, it is near impossible for the average franchisee to enforce their rights under their agreement or under the code. The average franchisee is a small business operator with limited resources. Justice is simply out of reach." The Parliamentary Joint Committee on Corporations and Financial Services addressed this concern in their report tilted Opportunity not opportunism: improving conduct in Australian franchising in chapter nine Enforcement of the Franchising Code of Conduct. Although the committee acknowledges the difficulties franchisees face due to the potential high costs of legal action their recommendation does not offer any material solution to this issue.

My submission to the franchising inquiry detailed the length, complexity and the expense that occurred because of both of those factors. In this submission I enlarge upon both the discovery process and Alternative Dispute Resolution (ADR).

ADR only works when both parties are prepared to negotiate and reach a compromise. As the franchising inquiry states in chapter seven of the report, there was a stark contrast in views on the effectiveness of mediation. Part of the problem with mediation in the case I had before the court was the other parties' perception that I would not obtain the funds to complete litigation. This had been reinforced with the fact that the respondent had subpoenaed all our personal banking details. I only obtained justice because of money loaned to me from my family and when this resource was drained, the kindness of both my solicitor who is a sole practitioner and my barrister, who agreed to proceed without payment. Both ADR and the franchising Code of conduct would be more effective if the cost of litigation was not beyond the average person.

The cost and complexity of justice has created an inequality that can be exploited by a well funded party. A well resourced party does not have to mediate in good faith if they believe the other party has no other option after mediation. The inequality then also flows through to the size of the legal teams they are able to employ to defend them and the delaying tactics that they are able to put into play. The discovery process was one of the major delaying tactics and urgently needs to be reformed. The expense and complexity of litigation needs to be reduced. If you cannot enforce your rights, they are simply rights on paper and have no real protective powers.

Discovery Process

Davies v. Eli Lilly & Co [1987] 1 All ER 801. Lord Donaldson MR said “In plain language, litigation in this country is conducted 'cards face up on the table'. Some people from other lands regard this as incomprehensible. 'Why', they ask, 'should I be expected to provide my opponent with the means of defeating me?' The answer, of course, is that litigation is not a war or even a game. It is designed to do real justice between opposing parties and, if the court does not have all the relevant information, it cannot achieve this object".

In my proceedings the other side was less than forthcoming. Basically a Notice of Motion was run for every card to be turned over. After spending approximately $80,000.00 we had to accept the fact that we could not afford to force the other side to fully disclose.

The discovery process has become a game that is used to conceal documents and increase the length and costs of proceedings. The concealment is either done by arguing before the court the relevance of each category requested or via discovering a truck load of documents and causing the other party several hours of costly searching, to find the needle in the hay stack. Both tactics are equally costly and time consuming and when used in tandem financially crippling.

The ACCC began proceedings against the franchisor on 25 March 2008 this was 13 days after our trial finished. I obtained a copy of the ACCC statement of claim through the Federal Court registry and I am of the firm belief there are a considerable amount of documents that the other side did not discover. I cannot hold the other party liable for this nondisclosure without reopening our original case. The cost of doing so would not be commercially sound as the amount owed even though considerable to the average person would not

compensate for the legal cost of doing so. It is a concern when the offending party, due to the expense of the legal system is able to retain money that is not rightfully theirs. I do not believe this encourages any party to fully discover.

Mediation

We attempted to mediate our issues with the other party once prior to our proceeding being on foot and the court ordered mediation on three other occasions. The first mediation did not occur as the franchisor claimed there was no dispute. The court ordered mediations were attended by both parties but the issues were not resolved. I can not disclose what was said in mediation but can make the following general comments.

The cost of the combined court ordered mediations were over $10,000.00 to have my barrister and solicitor attend. Mediation is most certainly a cheaper form of justice but it can be used to further increase the legal costs. I could attend mediation which I did on the last occasion without legal counsel to reduced the cost, however when the franchisor is a registered legal practitioner it does put the non legal party at a disadvantage.

I had very little legal knowledge like most franchisees. All I understood in the beginning was what was happening to our company was wrong. I could not explain to anyone why it was legally wrong because I did not understand the laws associated with franchising. To have attended mediation in the beginning without legal representation would have put our company in an even weaker position.

The franchisor had already filed a Notice of Motion for security costs which was followed with a Notice to Produce our personal banking statements from 2003 to the date of the notice along with a valuation of our family home. By producing this information the franchisor was able to determine the chances of our company being able to complete litigation. We had no large amounts of money in our accounts and the equity in our family home was not enough to cover litigation and being a company we could not apply for legal aid. This financial disadvantage put our company in an extremely weak position for the first court ordered mediation.

Fully honest discovery should be done before any court ordered mediation to at least give the weaker financial party some strength in mediation.

Conclusion

What has compelled me to write this submission is the frustration of watching the same long expensive nightmare that I have endured for over 2 years occur yet again. My judgement and the ACCC's involvement should have made it easier for the others and yes they will not have to pay for the court proceedings but they may just end up paying the ultimate price if the franchisor is unable to pay the compensation.

I can't find the words to express just how important it is for the senate inquiry to find a way of providing a cheaper and quicker form of enforcing your rights. If the franchisor could have been made to answer for their conduct when I first started querying commission payments, the amount owed to franchisees would not have been the staggering amount it is now.

The amount of money and time that has been spent by both myself personally and the Australian taxpayer via the ACCC to hopefully hold the one company accountable is in itself an injustice.