Senate Legal and Constitutional Affairs Committee

INQUIRY INTO ACCESS TO JUSTICE

Submission by

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Introduction

The Senate Legal and Constitutional Affairs Committee have been appointed to run an inquiry into the Access to Justice, with particular reference to:
the ability of people to access legal representation;
the adequacy of legal aid;
the cost of delivering justice;
measures to reduce the length and complexity of litigation and improve efficiency;
alternative means of delivering justice;
the adequacy of funding and resource arrangements for community legal centres; and
the ability of Indigenous people to access justice.

As a former franchisee of [DELETED] I welcome the opportunity to provide a submission to this Inquiry. Through this submission I will identify how the current justice system is failing to protect franchisees who find themselves in dispute with their franchisor, and who cannot afford to pay for a legal remedy. This submission also includes suggestions on how this can be rectified.

It is my personal belief that whilst access to justice should be a fundamental right of a fair legal system, many Australians are unable to access that right due to the high costs involved in litigation.

The nature of the franchising industry is one of imbalance and opportunism. This is because franchisors hold the superior position within the relationship. Larger franchisors also have access to managerial, financial and legal resources, often including in-house counsel, which a franchisee simply does not have. The current regulatory conditions provide franchisees little protection from opportunistic franchisors and the high financial cost of litigation ensures they cannot access their right to justice.

This submission will discuss, from a franchisees perspective, the following Terms of Reference:

the ability of franchisees, current and former, to access legal representation;
the adequacy of legal aid;
the cost of delivering justice;
measures to reduce the length and complexity of litigation and improve efficiency; and
alternative means of delivering justice.

Executive Summary

Regardless of means, all Australians should have access to legal services.
Law Council of Australia Submission to the Federal Budget 2009 -2010
Simply having the right to a fair hearing and justice means nothing when barriers are placed in the way of people enforcing their rights.
Unfortunately those who are financially disadvantaged, for whatever reason, find it almost impossible to assert their rights and get access to the justice they are entitled to due to the high cost of litigation.
I believe that steps must be taken to ensure that people in need can access justice and I make the following recommendations:
Recommendation 1
That the courts introduce a specific section that provides assistance to self-represented litigants.

Recommendation 2
That the states introduce a free legal aid service to franchisees and former franchisees where the franchisees can demonstrate financial hardship.

Recommendation 3
The current means testing requirements to access legal aid should be reviewed with a view to raising the eligibility threshold.

Recommendation 4
That courts and tribunals ensure that claims are heard promptly and that they do not allow the franchisor respondents to drag out the proceedings in an attempt to prevent the applicants from receiving a fair hearing.

Recommendation 5
Provide in the Trade Practice Act that the Court can issue class compensation orders once a breach has been established, that would enable affected small businesses and franchisees to be compensated without the requirement for private recovery action.

Recommendation 6
That a Franchising and/or Small Business Ombudsman be established.

Recommendation 7
That a Franchising Tribunal be set up to allow franchisees access to a low cost, or free, final dispute resolution process if mediation fails.

Recommendation 8
That the ACCC Small Business section be replaced with a Franchising and Small Business Enforcement Authority that is set up to specifically monitor business to business and franchisor compliance with the Code and TPA. This Authority would be empowered with sufficient funding to undertake enforcement action for all breaches of the Code and the Trade Practices Act.

Background into the nature of Franchising

Franchising is characterised by an imbalance of power within the relationship between the franchisor and franchisee. This power imbalance, along with the self-regulatory nature of the Code, not only contributes to the ineffectiveness of current regulations to protect the weaker party, it is what characterises the franchising industry.
The use of the word bargaining in the Trade Practices Act suggests that there is some negotiation involved in franchising. In fact, there is very little, if any. Franchising contracts are standard form, one-sided, contracts.
The contracts are "take-it-or-leave-it", and are not open to negotiation. From the minute the franchisee signs the franchise agreement, they will always be in the inferior position. The franchisor is always in control of the franchisee's assets.
The imbalance of power exists throughout every aspect and process of the franchise relationship, starting pre-contract. The franchisor has control whilst the franchisee is left to rely on trust and the reputation of the franchisor. These are things that are not contracted obligations and offer the franchisee little protection against abuse and opportunism.
The result of this power imbalance makes franchisees particularly vulnerable to experiencing unconscionable conduct.
A typical franchisee has no business experience and certainly no experience with the nuances of a franchise contract. In many cases, a franchise purchase will be the first step by a prospective franchisee into the business arena and they will not be aware of how the franchisor-drafted contract will rarely obligate their franchisor to provide any services to the franchisee. Meanwhile all of their obligations will be laid out in great detail. The franchise agreements are constructed in favour of the franchisor and leave the franchisee extremely vulnerable to the whim of that franchisor.
The power imbalance occurs because:
Franchisors control all information about the sector;
Franchisors and their lobby groups dominate discussion regarding regulation of the sector;
Franchisors and their lawyers draft non-negotiable contract terms.

It could be argued that most franchise agreements are unconscionable.

Interaction between the Franchising Code of Conduct and the Trade Practices Act
The franchise industry is regulated under the Franchising Code of Conduct and set out in the Trade Practices (Industry Codes – Franchising) Regulations 1998. The Code is a mandatory industry code under the Commonwealth Trade Practices Act 1974 and binds all the participants in the industry.
A breach of the Code is effectively a breach of the TPA.
As well as the regulations imposed under the Code, the conduct of the parties involved in a franchise contract is also subject to the general provisions of the TPA, particularly the provision of Pt IVA and Part V Division 1.
I note that common law also offers some courses of action that can be enacted by the parties to a franchise relationship including fraudulent misrepresentation.

I believe that the successful prosecution of a breach of the criminal code of a franchisor against their franchisee should be considered immediate confirmation of unconscionable conduct.
Whilst the intention of the unconscionable conduct provisions in the TPA was to level the playing field for commercial parties of different sizes and bargaining strengths, the problem of financial equality has meant that only those who can afford legal representation can hope to address any breach of abuse of these provisions.
The laws are ineffective as those who need them can rarely use them.

The operation of the dispute resolution provisions under Part 4 of the Code
Current level of disputation
The idea that 'everything is fine' in franchising has been cultivated by biased self-interested franchisor lobby groups. Franchising suffers from inaccurate reporting due to a real lack of independent research undertaken. What research is undertaken is often deliberately interpreted to present the 'happy franchising' image that the franchisor lobby groups want exposed. The franchisor lobby group, the Franchise Council of Australia (FCA), self-proclaimed as the 'peak' franchising body, pushes the line that there is nothing wrong in franchising, but the increasing numbers of failed franchisees are contradicting this strongly guarded position.
The Griffith University study 'Franchising in Australia 2006' was sponsored by the FCA and stated that "some 35% of franchisors reported that they had been involved in a substantial dispute over the previous 12 month period". These numbers should have been cause for immediate concern, especially when the result is distorted due to the fact that only 212 franchisors out of the 960 suggested to exist in Australia actually took part in this part of the survey; only 22%. But of that 22%, 35% were in dispute with their franchisees. How can the FCA interpret these figures to mean that there is nothing wrong in franchising?
As I have done in submissions to previous inquiries regarding franchising I want to highlight the issue of the level of disputation within the franchising sector. I will do this by presenting just one section from the Griffith University survey. The survey results regarding 'franchised unit changes' are based on the franchisors own Disclosure Documents, so the information again is not independent. The survey used the results for the 2005 survey, this time with only 213 franchisor respondents.

Franchise business ceased to operate – 201
Franchise Agreement Terminated by franchisor – 80
Franchise Agreement not renewed when expired – 48
Franchise Agreement terminated and business bought back by the franchisor – 51
This adds up to 380 franchisees in just 213 franchise systems. Potentially 380 families financially destroyed; 380 franchisee failures from only 213 franchised systems. This does not include any obscure 'transfers' of a franchised business. The overall success rate of these franchise systems should be considered irrelevant if 380 families have lost their homes, their health and their future. The FCA sponsored this Survey and yet all they will freely discuss from the results are the economic benefits to Australia. I believe that they are hoping that by concentrating on the positives, they can gloss over the less desirable results.
Unfortunately it would be a rare occurrence if any of these 380 former franchisees had been able to access the justice system. They cannot enforce their rights when they have financially destroyed. Meanwhile the franchisor can continue to operate unconscionably towards their franchises unchecked.
I do not believe that any franchisor who knows their system does not work, or who has a high turnover of franchisees because of an active churning strategy, would willingly take part in a voluntary survey of any kind.
There does need to be independent research conducted into the true failure rates and level of disputes within franchising. Due to the lack of reporting requirements, a franchisor can knowingly sell unviable businesses repeatedly, terminate or not renew agreements at their own whim without fear of retribution. The current suspected failure rate alone should be reason enough to want a more accurate accounting of former franchisees that have lost financially through their association with franchising.

The Dispute Resolution Process
Part 4 of the Franchising Code of Conduct specifies a procedure for dispute resolution that progresses through the processes of notification, negotiation, mediation, and then litigation. Central to the Code is mediation which is claimed to be a quick and relatively low-cost process. There is also a widely held, yet incorrect, belief that the mediation process promotes greater transparency and participation in conflict management and dispute resolution.
Mediation does offer some benefits particularly if both the franchisee and franchisor want to continue the relationship. It can however simply serve to highlight the existing imbalance in the relationship, leaving the process open to abuse due to the confidentiality agreements that are required to be signed. Some franchisors may induce or fabricate a breach, then use the mediation process to apply further pressure to a franchisee to accept a poor deal knowing that they are desperate for a solution.

If informal negotiations fail, the Code directs both parties to attend mediation to try and resolve the dispute. Whilst some cases will be successfully resolved through mediation, mediation will fail for a number of reasons, including, but not limited to, the following:

Successful mediation requires both parties to participate in good faith. For example:
If the franchisor wants to set a precedent to prevent other franchisees from pursuing this

process, then mediation will not be successful; or
The franchisor has previously decided on the outcome – termination, or no settlement;
The franchisor induced or fabricated the breach in the first instance;
The franchisor uses the mediation to intimidate the franchisee;
The franchisor uses the mediation to threaten the franchisee with further reprisal action such as bankruptcy.

There are no penalties or fines for a franchisor that breaches the Code, so there is no incentive for fair play, or even attendance at mediation, by franchisors;

If a franchisor induces or fabricates a breach, a franchisee has no recourse except to rely on the dispute resolution process. If a franchisor has abused the relationship in such a way, negotiation or mediation will be a pointless exercise. If the breach results in terminations, as ours did, then the franchisee has no option but to launch litigation;

Mediation can fail because those in attendance are not authorised to agree to a settlement or course of action;

Failure to prepare for the mediation by both parties can result in the failure to understand the dispute and therefore reach agreement;

Mediation usually occurs when the dispute has escalated towards termination or non-renewal of the franchise agreement. The franchisee is often under financial pressure at this point and may be disadvantaged in mediation by not being able to afford representation;
Franchisors will continue to rely on the contract, even in mediation, which reinforces the franchisees poor bargaining position and allows the franchisor to try and dominate the process;

The confidentiality agreements that both parties are required to sign effectively allows franchisors to conceal the number, reasons and results of previous mediations;
The Code lacks the process of collecting data regarding mediation that could be useful to both prospective franchisees when researching a franchisor, and current franchisees that are in dispute with their franchisor. The franchisor knows the nature and outcome regarding the mediations they have previously been involved in and can conceal this information.

Are the dispute resolution provisions effective?
The Code directs the dispute resolution process as follows:
Notice of Dispute
Negotiation
Mediation
Litigation

The first step in the process is for the franchisee, or franchisor, to issue the other party with a Notice of Dispute, detailing the nature of the dispute, and how the complainant

believes the dispute can be rectified.

There is no requirement to lodge Notice of Disputes anywhere and therefore the opportunity to capture any real statistics regarding the number or nature of these disputes is missed.

There is no independent body capable of ensuring that the Code is adhered to. Our franchisor, ignored our Notice of Disputes, refused to negotiate and terminated our agreements without giving us the option of mediation. There is no authority to report this behaviour too, and no penalty for a franchisor that blatantly ignores their obligations under the Code.

The second step in the process is negotiation where both parties should try to agree about how to resolve the dispute. In rogue franchisor systems, this step will just not happen. There may be a meeting, but there will be no negotiation. Instead the franchisee will be left with no mistake regarding the vulnerable position they are in.
The third step is mediation. Franchisees are at a disadvantage in this process as they have no access to free advice or representation. Whilst franchisors will often have been through the process before, can call on the FCA or their lawyers for advice and representation, the franchisee will be facing this stressful situation for the first time and quite often they do not know who to talk to about it.
Mediation is costly, the average seeming to cost around $5,000.00, and cannot deliver court enforceable decisions. I have heard from former franchisees of two different systems that they spent around $30,000.00 on legal costs just trying to get their franchisor into mediation, and still failed. When a dispute reaches the stage of mediation the franchisor has usually breached the franchisee and repossessed the business and are in a much stronger bargaining position; the franchisees are often broken from months, or even years, of financial and emotional duress. The franchisors often have access to confidential financial information from suppliers and lenders on the franchisees, enabling the franchisor to enter into any mediation in a very strong bargaining position. The franchisee usually has access only to information provided to him by the franchisor. Again there are no statistics available that can show that mediation is an effective way to solve a franchise dispute. The confidentiality clauses in the mediation agreement effectively keep quiet the true nature of any mediation results. Any statistics that are currently quoted cannot be substantiated and do not take into account those that walk away from mediation, broke and disillusioned, with nowhere else to go. Independent research needs to be conducted into this process to ascertain the true level of disputation in the franchising industry.

When mediation fails
The Code leaves the option of litigation open. I presume this to be because a failed mediation does not always lead to litigation. If mediation does not result in a resolution to the dispute, the only avenue remaining to the franchisee, both former and current, is litigation. However, this is usually not an option due to the high cost.

Litigation - The last resort

When a franchisor ignores the Code, or mediation fails, the only option left to a franchisee or former franchisee is the long and expensive process of litigation.

You will not hear of many litigation cases, and whilst the FCA and other lobbyists would have you believe this is because the level of disputation is so low and the Code is working, in reality, it is the cost, both financially and personally, that prevents most franchisees from pursuing this course of action. It just not a viable option when you are already financially destroyed.
In the few instances where franchisees have been able to mount litigation, they are often overwhelmed by the franchisor's financial might. Even when a franchisee does commence legal action, it is unlikely that they will have the financial resources to continue through to trial. Franchisor lawyers are experts in delaying the legal proceedings and appealing any point they can in an attempt to drain the franchisee's resources.
The Ability to Access Representation

Everyone should have the right to get legal advice and representation. For franchisees, disputes with their franchisors usually result in catastrophic financial losses and, as such, their need for advice regarding their options is great. Due to their financial situation, it is unlikely that they will be able to afford legal representation.

It is essential when determining that a legal system is fair to ensure that people have the ability to access legal assistance and representation in order to obtain a fair hearing. Access to justice can only occur when people can gain access to legal assistance. If there is no way for people to access this representation then legal actions cannot be pursued, and those who are perpetrating the injustice are effectively allowed to operate as they like without fear of penalty.

Unrepresented litigants
The high cost of access to legal representation often leads to people deciding to represent themselves. This is not a desirable situation and self-represented franchisees, or litigants, are disadvantaged from the beginning for a number of reasons. Firstly they will be emotive and find it hard to be objective about their own case. They may be intimidated by the whole court process and they lack the legal knowledge and the ability to express themselves and their case to their best advantage. Their lack of understanding will also undoubtedly increase the length of time that the case will take to be heard in court.

The rights of individuals to procedural fairness and a fair hearing means that courts or tribunals will need to provide more assistance unrepresented litigants. This presents issues for the judge or tribunal who must already assist the self-represented litigant to understand not only the procedures of the court, but also issues of law and the framework governing the court or tribunal. This issue can present difficulties to the judge or tribunal who must be careful not to assist the self-represented litigant to the detriment of the other party.

For this reason I believe that the courts need to introduce a section that provides specific assistance to self-represented litigants. This section would provide the self-represented

franchisee with guidance regarding how the court process operates, focus the individual on their issues, and assist them with their preparation.

Recommendation 1

That the courts introduce a specific section that provides assistance to self-represented litigants.

Cost of Litigation and the case for increased funding for legal aid

The most important aspect of having a fair system with equal access to justice is for the applicant to have the ability to pay the costs of mounting legal action. For franchisees that have just lost their businesses and other assets there is very little chance of them having the financial resources to undertake any type of legal action. This has a discriminatory effect on those franchisees. The awarding of costs also weighs heavily into the decision of whether franchisees commence proceedings.
For others who commence legal action the high costs of fees to continue the proceedings often mean that those proceedings cannot be carried on. In many cases, the cost to continue is out of the means of the franchisees, but to discontinue the proceedings would mean that they must pay the franchisors incurred costs. With no access to legal aid or free representation, this means bankruptcy.
It is obvious that the lack of funding creates an insurmountable barrier for franchisees that prevents them being able to access justice effectively.
Whilst there is no obligation for the state or commonwealth governments to provide free legal advice for commercial or civil matters, the states are required to make the court system accessible to everyone. This is where legal aid can assist. I believe that the states should provide free legal aid to franchisees where the franchisees cannot afford it. Due to the inaccessibility of legal aid, franchisees are being deprived of their opportunity to take these matters to court and recover the losses they have occurred through the opportunistic behaviour of their franchisors.

Recommendation 2

The states introduce a free legal aid service to franchisees and former franchisees where the franchisees can demonstrate financial hardship.

Means testing for legal aid
Very few people who require legal aid can access it due to the means testing criterion. Only those people on extremely low incomes can access a legal aid grant, and even then they are often required to make a financial contribution.

The current system effectively prevents people from accessing legal aid if they are employed. Just because someone is employed part or fulltime does not mean that they can afford to launch litigation. Often these people are working just to pay debts and prevent bankruptcy. The current system ensures they will never be in the position to access the

legal system.

It is my belief that the difficulty in gaining legal aid has meant that those who continue to seek a legal remedy must represent themselves. The complexity of law in many cases, particularly franchising, and the risks involved in running these cases often means that it is impossible for a self-represented litigant to run an efficient and effective case. Most people have no understanding of the legal system, and are in fact, intimidated by the process.

It seems obvious that the threshold to accessing legal aid needs to be raised so that those who need it can access it, regardless of their employment status.

Recommendation 3

The current means testing requirements to access legal aid should be reviewed with a view to raising the eligibility threshold.

Improving the efficiency of litigation

To improve the efficiency of the litigation process, measures need to be introduced to reduce the length and complexity of litigation. This is a specific Terms of Reference in this Inquiry.
A fair hearing involves not just access to justice, but also requires that the trial will be conducted in a reasonable timeframe. Unfortunately delaying and dragging out proceedings is a well known tactic used by franchisors who know only too well that the franchisee has limited resources and will eventually run out of funds to continue the case. Yet again franchisees are discriminated against due to their lack of financial resources. Whilst there will be cases where the complexity of the issues will require a lengthier trial, this rarely occurs with franchise cases. Usually the delays that are experienced are a direct result of the lack of financial resources of the franchisee. Certainly in our particular case, delays have been caused due to our lack the funds to take the fight directly to the other side and ensure their timely responses to court procedures. In order to ensure we can continue to the end, and to preserve our limited resources, we must follow the timetable set by the franchisor who continues to drag out the proceedings and appeal every technical point they can in the hope that we will eventually run out of money. Due to the delaying tactics used by [DELETED] we have incurred legal costs of over $250,000.00 and we still have no date set for trial.
Some delaying tactics are also designed to result in the discontinuance of cases due to the statutes of limitations.
Often as franchisees have limited resources, their cases are not given the attention they deserve by their legal representatives and this can result in poor representation and missed timelines.
Court procedures need to guarantee that cases are heard within a reasonable timeframe. This is the only way to ensure that a lack of resources by a franchisee litigant is not used against them by a cashed-up franchisor.

Recommendation 4
That courts and tribunals ensure that claims are heard promptly and that they do not allow the franchisor respondents to drag out the proceedings in an attempt to prevent the applicants from receiving a fair hearing.

Litigation – Our Experience

In their verbal submission to the SA Economics Committee Inquiry into Franchising, [DELETED] franchisor and partner of [DELETED] law firm and representing the FCA said:
"Prior to ...1988, I saw a lot of disputes where a franchisor would just run the whole process out for a long time, but you really do not see that now. My firm would represent over 300 franchisors ... and I can tell you that, basically, most of our clients will be into mediation within a month if there is a real dispute happening. ...most of the disputes are sorted out within a month. In that context it is really quite amazing..."
This has certainly not been our experience at the hands of [DELETED] law firm [DELETED] who are representing [DELETED] against us. In our own litigation, we filed our Summons in November 2005 against [DELETED]. We were never offered mediation by [DELETED]; in fact our request was refused. When we were breached by [DELETED] we issued Notice of Disputes as per the Franchising Code provisions which were ignored and our Franchise Agreements subsequently terminated. In this situation, a franchisee can only walk away financially destroyed, or attempt to litigate to get a legal remedy to their dispute.

In practice, drawn-out litigation can be very lucrative for the law firm involved. Our lawyers have told us to be prepared for the long haul in prosecuting our claims. In a letter received from our lawyers in October last year, we were told that [DELETED] "strategy continues to be to litigate this matter to a halt by attrition." We have been going through this process for nearly 3½ years. How long and at what cost is it going to take to get our claims heard?

Our litigation has been repeatedly delayed by [DELETED] and their law firm [DELETED] in an attempt to get us to the point where we financially, or emotionally, cannot continue to proceed against them. We are heading to the Supreme Court next week to hear an appeal brought on by [DELETED] on a minor technical decision from 2007, as well as their challenge to the jurisdiction of the Industrial Relations Commissions to hear our case. They have said that if they lose in the Supreme Court, they will take it to the High Court. This wastes our time and is costing us a small fortune. We have now spent longer fighting [DELETED] to get back what is ours, than we were actually franchisees.

We have been tied up in litigation now for nearly three years and are no closer to getting our case heard. We have been refused access to legal aid and it is a continual struggle financially to keep our case going. This is why you do not hear of many franchisees suing franchisors to recover their losses. Justice is just not affordable.

To me it is a simple truth; franchise disputes are usually won by the party with the deepest pockets, not the party with the greatest merit. This needs to be addressed.

Alternative option to litigation

The current dispute resolution process for franchise disputes is flawed. Franchisee's interests are not being protected in this self regulated industry, where requests for mediation can be ignored by a franchisor without fear of penalty. There must be another avenue available for resolution if mediation fails, other than having to commence of legal action.

For this reason I would suggest the establishment of a franchise tribunal system as the next step if mediation is unsuccessful. A franchising specific tribunal would have the advantage of industry experts making the judgements; experts who can look at the issues of the relationship as a whole. Repetitive behaviour will also become obvious.

I also suggest that the introduction of a franchise ombudsman service be considered. This ombudsman service could be a resource for information, providing parties access to independent expert advice, and dispute resolution services. An ombudsman service could also collect important industry data including the number of disputes; mediations conducted and provide the true results of the process on public register.

The real tragedy of franchisor opportunism is the extent of a franchisees loss. Franchisees put everything they have into buying a franchise; this usually means the family home, other property assets, and their life savings. The resulting loss means they have to start all over again, with a huge debt, often bankrupt and with a damaged credit rating. This is just the financial cost.

Associate Professor Zumbo made this recommendation in his submission to Joint Parliamentary Committee on Corporations and Finance, Inquiry into Franchising. I can certainly relate to his statement that small business face a real challenge funding litigation to recover their losses under the Trade Practices Act. We were advised to avoid the Federal Court for our litigation unless we had over $500,000.00 to fund the case and also due to the uncertainty of the Unconscionable Conduct provisions. For these reasons we commenced our action in the Industrial Relations Commission (NSW).

When the ACCC was investigating [DELETED] a very real concern for some of the complainants was that even if the ACCC moved to prosecute [DELETED], it would still be difficult to recover their losses in a cost effective way. The only option would have been to potentially attempt to fund a class action, which would of course result in high legal costs and might in the end still see some of these former franchisees walk away with nothing.

With this in mind, I fully support Associate Professor Zumbo's recommendation that a new approach be considered that would allow for an efficient and effective recovery of franchisee and small business losses from breaches of the TPA. The recommendation that the Court be given the power to make a class compensation order following a successful finding of a breach of the TPA, and simply order that the business compensate all affected franchisees or small business owners, would allow franchisees to access compensation without the need to fund their own action.

Recommendation 5

Provide in the Trade Practice Act that the Court can issue class compensation orders once a breach has been established, that would enable affected small businesses and franchisees to be compensated without the requirement for private recovery action.

The small business sector is important to the Australian economy. It is therefore, vitally important that prospective franchisees feel that their investments will be protected. Currently that is not the case.

I believe that a Franchising or Small Business Ombudsman should be established as a resource for information, providing parties access to independent expert advice, and dispute resolution services. An ombudsman service could also collect important industry data. This office could manage the registration of franchise systems, post their franchise contracts on a public register, keep independent records including the number of disputes; mediations conducted and provide the true results of the process on public register.

Recommendation 6

That a Franchising and/or Small Business Ombudsman be established.

Recommendation 7

That a Franchising Tribunal be set up to allow franchisees access to a low cost, or free, final dispute resolution process if mediation fails.

When a franchisor ignores their obligations under Franchising Code of Conduct, or mediation fails, the only option left to a franchisee or former franchisee is the long and expensive process of litigation.

You will not hear of many litigation cases, and whilst the FCA and other lobbyists would have you believe this is because the level of disputation is so low and that both the Code and the TPA are working effectively, in reality, it is the cost, both financially and personally, that prevents most franchisees from pursuing this course of action. It just not a viable option when you are already financially destroyed.

In the few instances where franchisees have been able to mount litigation, they are often overwhelmed by the franchisor's financial might. Even when a franchisee does commence legal action, it is unlikely that they will have the financial resources to continue through to trial. Franchisor lawyers are experts in delaying the legal proceedings and appealing any point they can in an attempt to drain the franchisee's resources.

For this reason I would recommend that the Government establish a Franchising Tribunal, not unlike the Real Estate and Industrial Relations Tribunals. Franchising involves contracts between two parties, one with more power than the other. It stands to

reason that the weaker party should have access to a low cost resolution process if mediation fails to resolve the dispute. At present the franchisee has nowhere else to go.

Recommendation 8

That the ACCC Small Business section be replaced with a Franchising and Small Business Enforcement Authority that is set up to specifically monitor business to business and franchisor compliance with the Code and TPA. This Authority would be empowered with sufficient funding to undertake enforcement action for all breaches of the Code and the Trade Practices Act.

This Enforcement Authority could effectively be housed by a Franchising and/or Small Business Ombudsman. This Authority would have the funding to investigate fully all complaints regarding both the Franchising Code of Conduct and the Trade Practices Act, and then enforce penalties or prosecution.

The ACCC is not effective in its role as enforcer of the TPA, nor is it seen to be effective. I do not know if this is due to a lack of funding and resources, conflict of interest regarding their dual role of educator and regulator, a lack of confidence to litigate under the current unconscionable conduct provisions, or just lack of will.

Quite simply, the ACCC does not investigate or take action in all complaints, particularly the smaller complaints of breaches of the Code. The actions they do take are irregular, often relying on individual franchisees to establish the case through their own litigation before taking action. Because of their sporadic action, franchisors can breach the Code every day knowing that the likelihood of the ACCC investigating is minute. Meanwhile, a franchisee can be breached indiscriminately by their franchisor with no recourse knowing that if they do not rectify the breach, or pay the fine, they can lose their business and their entire investment.

I do not believe that the ACCC can maintain its dual roles and be effective at either of them.
The ACCC has failed in its current role of regulator and needs to be replaced.
Conclusion

Due to the high financial costs involved in litigation, the current justice system is failing to protect franchisees who find themselves in dispute with their franchisor. A legal remedy is not accessible and needs to be rectified.
Access to justice is a fundamental right of a fair legal system, but many Australian franchisees are unable to access that right due to the high costs involved in litigation. Due to the nature of the franchising sector, franchisees are always at a disadvantage and need access to financial assistance to access a fair outcome in their disputes with their franchisor. The provision of legal aid and legal assistance to franchisees will not only ensure a fair outcome, it will assist to clean up the rogue franchisors within the franchising sector.

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