Senate Legal and Constitutional Affairs Committee

Inquiry into

Access to Justice

Submission from

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6 May 2009

The terms of reference for the new inquiry into Access to justice require the committee to have particular reference to:

a. the ability of people to access legal representation;

b. the adequacy of legal aid;

c. the cost of delivering justice;

d. measures to reduce the length and complexity of litigation and improve efficiency;

e. alternative means of delivering justice;

f. the adequacy of funding and resource arrangements for community legal centres; and

g. the ability of Indigenous people to access justice.

I thank the Committee for the opportunity to submit to this extremely important Inquiry. This submission refers to points a, c, d, and e. of the Terms of Reference in relation to accessible justice in franchising.

My personal involvement in franchising and franchising disputes across a large number of rogue franchise systems began in 1988. I have and continue to operate for quality franchisors and franchisees with legitimate and substantiated complaints.

Franchising has since 1976 seen numerous Federal and State Inquiries involving various issues relating to unfair, unreasonable and damaging outcomes for franchisees in legitimate dispute. The consequences to generations of franchisees has been substantial or total loss of investment and health and relationship disasters in an industry containing franchise scams and abusive franchisor behaviour that have simply existed because of the imbalance of financial power and the failure to provide access to affordable justice.

The vast majority of these franchisees are described as ‘mom and pop’ operators having become franchisees in mid-life. When they do become victims of rogue franchising they are at a time of their life where they rarely recover their health and their financial future is extremely bleak often requiring government support as the head into their final years.

One constant thread within submissions to all franchising related Inquiries has been the inability of franchisees to access affordable justice when franchisors utilise superior funding and delaying tactics to drain any existing funds from the franchisee to achieve a default ‘win’. Inquiry recommendations have not addressed this most basic injustice.

Submissions, public hearings and questioning by Committee members in the most recent Federal Inquiry into the performance of the Franchise Code of Conduct were repeatedly describing the inaccessibility to justice as a critical failure and yet the recommendations offered no remedy for franchisees although the Committee considered introducing an Ombudsman or a Tribunal. The final report by that Committee however offered nothing to address the issue.

It was noted by the regulator that the ACCC had only pursued Court action in 3 franchise cases in the previous 10 years.

The Senate Standing Committee on Economics Inquiry into Unconscionable Conduct concluded that there was a real need to address 'unconscionable conduct' however; they deferred and concluded that the responsibility should be that of the Courts and the Australian Competition and Consumer Commission rather than define in Law what this conduct amounted to. The historical reality for Australian franchisees is that civil action is not affordable and the ACCC have stated that they are reluctant to pursue such cases.

I will abstain from reporting in this submission on examples of rogue franchising as I have no doubt the Committee will receive other submissions covering specific franchise scams and the inability to achieve remedy.

The phenomenon of rogue franchising is a world-wide phenomenon with the extent of the disasters now becoming much more evident with the onset of the World Wide Web. The existence of scam franchises and the tactics employed cannot be disputed. Academics and industry experts throughout the world increasingly report on and analyse scam business formats and the failures of legislation to curb their growth.

These rogue systems rely on the regulators' inability to curtail their operations and the inherent and designed inability of victims to pursue legal recourse.

The consequences of rogue franchising are extremely and often permanently damaging to vulnerable Australians and while many a commendable recommendation has been on offer there are two points where these past Inquiries achieve nothing.

Without access to affordable justice for franchisees that have been firstly drained financially as a business operator and then as a weaker party in legal dispute with the franchisor most other recommendations become meaningless. As an example; there is much weight behind the current recommendation to introduce 'good faith' to franchising; however, without access to justice it would only be tested and pursued by the few that are left with funds.

While recommendations have been made it has been historical fact that the then Small Business Minister will either water down those recommendations and fail to address the issue or as in the most recent Inquiry; the Minister chooses to ignore the recommendations in total on the basis that unrelated amendments to the Code are only a year old. This and previous government performance has allowed rogue franchising to prosper in confidence.

In a recent paper produced by the Accord Group and published by the University of South Australia the inability of franchisees to access justice through mediation was referred to as follows;

'Impracticability of Litigation or Arbitration

> Because of the costs involved, franchisees often cannot afford litigation despite their strong feelings about the injustice of how they have been treated.
>
> This means that franchisors can assume that franchisees will not take any further action after mediation.
>
> In Australia, government agencies do not provide legal aid for commercial disputants. Government legal action is confined to certain narrow areas usually involving anti-competitive behaviour, a pattern of unconscionable conduct or misleading and deceptive conduct.
>
> Furthermore, it is possible that the amount of the claim means that it is just not worth commencing legal proceedings."
>
> *Taking Commercial Mediation to New Heights: Mediating Franchise Disputes - David Newton and Nathalie Birt - Accord Group.*

This abuse of the more powerful franchisor position to manipulate outcomes is now in the hands of this Committee and I would hope that we might now see effective change to produce fair and reasonable access to justice and equitable outcomes based in either the appointment of an Ombudsman or a Franchising Tribunal to quickly and fairly resolve disputes and operate as a deterrent for rogue franchising.

The Accord Group paper is timely to this Inquiry where references to mediation and access to justice run parallel and where impediments are listed;

1. Power imbalance
2. The financial desperation of franchisees
3. The impracticability of litigation/arbitration
4. Inability to afford advice and/or representation at the mediation
5. Disappointment and loss of trust in the franchisor/franchise
6. Personal nature of the franchise relationship
7. Precedent issues and the effect of 1 dispute on a complete franchise system
8. Unmet expectations
9. Mediations often involve many franchisee parties
10. Selection of franchisees by franchisors

11. Business inexperience of franchisees
12. Unsophisticated negotiation skills of franchisees
13. The structural nature of a franchise.

I am confident that the existence of alternate and affordable justice systems in franchising would see a decline in disputes rather than to over-burden such an authority. This lessening of opportunistic franchisor behaviour would produce a parallel decline in government health and social security costs.

This is truly an immoral situation that has been allowed to continue and to grow for political/economic reasons. Another constant in Federal Inquiries has been the success to downgrade the size and nature of the franchising problem and yet after more than 30years we continue to see unrelenting growth as rogue franchisors become more sophisticated in their abuse of power and more financially influential.

Today we see the only national franchising data relied upon being that which is paid for by those who resist reform to protect extensive self-interests.

All of the trickery put forward to maintain and mask the status quo of abuse should be weighed against the reality of the size of the problem as evidenced by the recent franchising Inquiry and it is time an Inquiry achieved something for the community of Australian citizens who want nothing more than a 'fair go' and not to be bullied and ignored.

I for one of many see government Inquiries as impotent processes to appear to recognise need but adaption of effective change appears not to be a part of the process. Those who ignore injustice and a complex task when they have a responsibility to deliver recourse are as guilty as those who perpetuate any abuse and in the case of franchising the abuse is systematic carnage hidden behind existing unaffordable access to justice.

I ask this Committee to strongly recommend the introduction of an Ombudsman or a Franchising Tribunal to afford franchising a deterrent to abuse and allow all legitimate disputes the opportunity for a fair hearing.

Ray Borradale
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