

10th April 2009

Committee Secretary
Senate Standing Committee on Legal and Constitutional Affairs
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Re: Inquiry into "Access to Justice"

Please accept this as a submission for your inquiry into **"Access to Justice"**.

In short, I was recently a franchisee within one of Australia's largest franchising systems for a period of around eighteen (18) months, and in that short time I unsuccessfully attempted to remedy an agreed breach of the Trade Practices Act by the franchisor. Specifically, there was a breach of the mandatory disclosure requirements of the Franchising Code of Conduct ("the Code") within the Disclosure Document presented to me. Additional to the admission by the franchisor of their breach of law, there was also a corresponding admission that I was entitled to a remedy, but that was when the true problem arose. Other listed parties to the Agreement simply denied all liability on the premise of 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, apart from the franchisors extension of a token and entirely unenforceable settlement offer that was claimed to be in the best interests of both the franchisor and the franchisee, the only true effort to "fairly" resolve the dispute was to issue an aggressive challenge/invitation to litigate and determine liability. In recognition of the fact that the costs of litigation are immense on many fronts, it is not even a consideration, so to mitigate both my financial and personal damage, I terminated the franchise agreement and walked away with nothing.

In the course of this experience, I have been exposed to some of the issues you seek to address, and would like to offer a more detailed submission. I would also like to take this opportunity to express my profound disappointment at the complete lack of support and protection provided to franchisees despite existing laws, as franchisors use both the cost and complexity of the legal system to pillage life savings from victims, right under the nose of authorities. Amongst other things, franchisees are confronted with franchisors that are in breach of the law, and in some cases are even confronted with the total financial collapse of their franchisors (Kleenmaid being the latest franchisor to be added to the list).

Why do so many people at so many levels have such scant regard for the plight of franchisees? The laws were supposedly enacted to protect franchisees, but they are totally inaccessible due to the complexity and cost of the legal system. The laws fail to gain any traction unless you have money!

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

Regards

Scott Cooper

(Scott Cooper)

Scott Cooper - Submission for Inquiry into "Access to Justice"

Submission for Inquiry into "Access to Justice"

Introduction

Franchising is undeniably a major contributor to the Australian economy, with regulation of the industry set around the **"Franchising Code of Conduct"**¹. The **Franchising Code of Conduct** is law and falls under **Section 51AE of the Trade Practices Act 1974** as a 'mandatory code', and as such, fits within the realm of the Australian Competition and Consumer Commission (ACCC).

In recent times, franchising has undergone a deal of scrutiny, including amongst other things, a Federal inquiry by the **Parliamentary Joint Committee on Corporations and Financial Services**. The committee's report **"Opportunity not opportunism: improving conduct in Australian franchising"**² was tabled before parliament on 1st December 2008. This Federal inquiry was initiated following two (2) State inquiries – one in Western Australia, and another in South Australia, with the common theme throughout these inquiries being allegations of various degrees of misconduct and 'abuse' by franchisors towards franchisees, and a complete lack of assistance or access to corresponding legal recourse a grave concern expressed by many.

Referring to the Committee's Report **"Opportunity not opportunism: improving conduct in Australian franchising"**....

"9.24 A recurring theme in submissions to the committee was that the expense of litigation, including time, severely limits the ability of many franchisees to take independent legal action even when they are confident of demonstrating clear breaches of the Code. Some submitters also put forward their belief that franchisors, or their legal representatives, deliberately draw out legal proceedings in order to exhaust any funds the franchisee may have available to finance the action." [page122]

"9.34 The committee agrees that the lack of pecuniary penalties for breaches of the Code means there is insufficient deterrence for conduct that contravenes the Code." [page124]

"9.40 The committee acknowledges the difficulties franchisees face in seeking remedy under the TPA due to the potentially high costs of taking legal action." [page125]"

On the legal front, the Franchising Code of Conduct's legal footing was recently put before the High Court of Australia, where it was determined that a breach of the Franchising Code of Conduct was indeed a breach of the Trade Practices Act, and as such, should be dealt with under the provisions of the Act.

As a brief background, the case was brought before the High Court on appeal, following a decision by the New South Wales Supreme Court- Court of Appeal, where it was ruled that a breach of the disclosure provisions of "the Code" rendered a Franchise Agreement **void ab initio**. (**Ketchell –v- Master of Education Services Pty Ltd [2007] NSWCA 161**³) This decision sent shockwaves through the franchise industry and was promptly appealed to the High Court, courtesy of substantial assistance and funding from the Franchising Council of Australia (FCA). Costs of the appeal were a key consideration, with the High Court ruling they would only hear the appeal on the condition of an undertaking by the franchisor that the franchisor would cover all the costs of the franchisee, irrespective of their final decision. This is where the FCA stepped in and funded the franchisor.

1. [http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/7A99D3F270266211CA257400007E885B/\\$file/TradePracIndCodeFranchRegs1998.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrumentCompilation1.nsf/0/7A99D3F270266211CA257400007E885B/$file/TradePracIndCodeFranchRegs1998.pdf)

2. http://www.aph.gov.au/SENATE/committee/corporations_ctte/franchising/report/report.pdf

3. <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/nsw/NSWCA/2007/161.html?query=Ketchell%20v%20Master%20Education%20Services%20Pty%20Ltd>

All said and done, it is now set in stone that if a franchisor is in breach of the Franchising Code of Conduct, the only realistic avenue available for a franchisee to seek remedy, or to **"access justice"**, is for the franchisee to take court action under the Trade Practices Act, which is an extremely expensive, exhaustive and complicated exercise to say the least. This is also conceded by the ACCC. The problem that undeniably arises here is that in all probability, the franchisee is already under considerable financial pressure, and litigation against a "stronger" franchisor will serve little more than putting them at greater financial risk, and further aggravate damages.

To quote His Honour Justice Kirby of the High Court of Australia in **Master Education Services Pty Limited –v- Ketchell [2008] HCATrans 89⁴**

"The so-called sophisticated provisions of the Act have an air of unreality, with respect, so far as ordinary consumers and franchisees are concerned because they are not going to rush off and get an injunction in the Federal Court or some other court when the whole point is they have not been given the notice of their entitlements..."

Lobby groups such as the Franchising Council of Australia are already protesting loudly at the mere mention or even prospect of franchisees being enacted with rights as "consumers". More rights for franchisees would threaten the very foundation of dominance that franchisors exert over franchisees, and the last thing franchisors want is to be made more accountable for their actions.

Some questions spring to mind in light of my experiences that will hopefully be addressed by this inquiry.

- The "Franchising Code of Conduct" was enacted for the protection of franchisees, and is slated as law under the Trade Practices Act. It is crystal clear in both its intent and reading, but exactly how accessible are these laws for franchisees?
- Costs of engaging the legal system are incredibly high on many fronts, and a considerable deterrent for the vast majority of franchisees. How can dispute resolution provisions be improved to level the playing field, or alternatively how can the legal system become more accessible to distressed franchisees?
- How many franchisees walk away from franchises after falling victim to a ruthless franchisor, simply due to a lack of money to bring about the enforcement of existing laws?
- It is accepted that the "Franchising Code of Conduct" is **mandatory** under the Trade Practices Act, yet it is only truly enforceable before a court of law. This is somewhat confusing for me, given that across society we see many "codes of conduct". As examples, one only has to look at the football codes and other sporting bodies in Australia. Sports operate under strict "codes of conduct", with severe ramifications for a breach, including amongst other things, fines and/or suspensions, and in some cases even bans from the sport.

Whilst these codes are primarily agreed to and are not 'mandatory' under the law, it appears that they are fully enforceable by their respective governing bodies, with appeals then available through the courts. Breaches of the Franchising Code are only actionable by litigation, with franchisors fully aware that the vast majority of franchisees are financially unable to pursue this action. Even if they commence action, the franchisor via their lawyers on staff will see to it that any available funds are drained very quickly, rendering litigation itself a very blunt tool.

4. High Court of Australia transcript **Master Education Services Pty Limited v Ketchell [2008] HCATrans 89 (8 February 2008)**
<http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/2008/89.html?query=ketchell>

Given all the definitions of the term “justice” that are available, I am yet to find one where it is suggested that in modern society, “justice” is only available to those that can afford it. We know and are forced to accept that this is actually the case, but it is certainly not within any definition of justice

- Why are franchisees given such scant regard by so many - right through to the various levels of Government? Pleas for assistance from franchisees repeatedly fall on deaf ears

There are many questions that could be asked, but with my limited experience in both law and franchising, there is little that I can offer in the way of answers. For now I would like to outline some thoughts under the following headings that may assist in finding solutions;

- The Ineffectiveness of the Franchising Code of Conduct
- Personal Case Study
- Dispute Resolution Provisions under Part 4 of the Code
- Alternative Dispute Resolution Provisions
- Australian Consumer and Competition Commission
- Additional Supporting Evidence
- Conclusion

The Ineffectiveness of the Franchising Code of Conduct

As previously stated, the Franchising Code of Conduct is indeed law and falls under **Section 51AE of the Trade Practices Act 1974** as a **'mandatory code'**, but in practice the Code is little more than a voluntary provision. With no automatic consequence or even penalty for a breach, the Code is largely not able to be enforced on franchisors, unless franchisees have sufficient funds to litigate. The ACCC for whatever reason, appears to demonstrate a clear reluctance to pursue franchisors, leaving franchisors that are so inclined, a degree of freedom to operate "on the edge" without any real fear of reprisal from either the ACCC or the legal system.

As it stands, too many franchisees are left at the complete mercy of their franchisor, with most franchisees unable to obtain any relief or remedy entitled to them under existing laws because they simply cannot afford it, and franchisors know it. The combined complexity and expense of the legal system provides franchisors with an enormous and very effective structural defence.

Referring again to the report **"Opportunity not opportunism: improving conduct in Australian franchising"**

"9.32 The committee understands the deep and widespread frustration amongst franchisees over perceived inaction by, and ineffectiveness of, the ACCC in pursuing complaints against franchisors who are alleged to be in breach of the Code." [page124]

"9.34 The committee agrees that the lack of pecuniary penalties for breaches of the Code means there is insufficient deterrence for conduct that contravenes the Code." [page124]

"9.40 The committee acknowledges the difficulties franchisees face in seeking remedy under the TPA due to the potentially high costs of taking legal action. [page125]"

With significant costs at all levels of enforcement, it is clearly not feasible for the ACCC to act on all complaints alleging breaches of "the Code" and/or Act, but to the detriment of franchisees, it appears the ACCC's initial attention upon receipt of a complaint, lies on the franchisors intent to follow "the Code". This has the unfortunate consequence of allowing franchisors room to move with a very simple but highly effective defence, that their alleged breach is merely a procedural or technical error (that is to say, "sorry about that... but we made a mistake"). So long as the "mistake" is not too widespread or significant, the ACCC will not act with any real force, giving rise to the problem faced by too many franchisees - there is no clear understanding or even explanation of what the ACCC considers extreme or significant? This has over time has seen the perception built that the ACCC has been largely ineffective at enforcing "the Code", and in turn ineffective in assisting franchisees.

From my experience, it has been clearly demonstrated that I was naïve and completely mistaken in thinking that the law is the law, and a breach of a mandatory Code would at least have some sort of consequence, but this is obviously not the case in franchising.

To pose a crucial question - when can franchisees rely on the assistance of the ACCC?

With all the bravado of a wolf holding the key to the hen house, the line of reasoning touted by the Franchising Council of Australia (FCA), is that the **"Franchising Code of Conduct"** provides franchisees with extensive protection under the law. It is claimed that if a franchisor is in breach of the Code or indeed the Act, then the franchisee has full recourse under the law by having the matter dealt with via the courts, where a smorgasbord of remedies are available under the Trade Practices Act.

To quote the Franchising Council of Australia from their submission to the South Australian franchising inquiry

*“The Code and the TPA provide comprehensive legal protection from all forms of misrepresentation or illegal behaviour. Any franchisee that has been misled will have a clear legal remedy under existing law, either as a result of a breach of the comprehensive disclosure requirements of the Code or pursuant to the prohibition on misleading or deceptive conduct contained in s52 of the Trade Practices Act. Furthermore the ACCC investigates any complaint alleging breach of the TPA, and actively pursues any franchisor it considers has engaged in unlawful conduct.”*⁵ [Page 11]

In direct contradiction to the views of the FCA, the following is a quote from Jim Penman (the name and face behind one of Australia’s largest franchise systems the **“Jim’s Group”**) in which he offers his opinion on the protection offered to franchisees,

*“Franchisors also have to give you a Disclosure Document with the Contract, which can be useful. Apart from this, protection for Franchisees is pathetically weak.”*⁶

As previously stated, with no automatic consequences, let alone any penalty for a breach of the Code, the huge void created is the undeniable and brutal fact that the legal system is well beyond the reach of the vast majority of franchisees. Franchisees are generally not in any financial position to confront a well financed and well practiced franchisor, in what will inevitably descend into a very deliberately protracted legal battle. The cards are just too heavily stacked in favour of the franchisor from the outset, with franchisees little more than lambs to the slaughter. Franchisees are simply in no position to compete.

All too common, it is not the person with the strongest case that succeeds in litigation, but the person with the deepest pockets. It is wretchedly ironic that the very laws enacted to protect franchisees are actually inaccessible? Any suggestion to the contrary is just plain wrong.

To quote Senator Ludlam,

*“Many people in this country are not able to assert their legal rights...Other Australians are prevented from taking legal action all together because legal aid isn’t available and they can’t afford to access our expensive justice system... Your chances of success before the courts should not be determined by your bank balance.”*⁷

Sadly for too many in franchising, this is exactly the state of play. A quote from Peter Switzer in a column in **“the Australian”** sums it up franchising perfectly....

*“The irony of all of this legal mumbo jumbo is that many franchisors have hidden behind the strict letter of the law to take too many franchisees to the proverbial cleaners after the franchisors have behaved badly. At the end of the day, a sensible person has to hope that the law does not end up looking like an ass.”*⁸

5. <http://www.parliament.sa.gov.au/NR/rdonlyres/DC0595AF-761F-4983-B9A5-62F2FBAA867A/10893/FCASubmission21Jan08.pdf>

6. http://blogs.theage.com.au/enterprise/archives/2007/03/perils_and_plea.html

7. <http://scott-ludlam.greensmps.org.au/content/media-release/greens-win-justice-inquiry>

8. <http://www.theaustralian.news.com.au/story/0,25197,23837915-17164,00.html>

Personal Case Study

The centre piece of my problem in franchising was an agreed fact that the franchisor supplied me with a Disclosure Document that was in breach of the "**Franchising Code of Conduct**", in that it was not in strict and full accordance with the prescribed disclosure requirements.

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 Franchise Agreement and receiving any non-refundable monies from the Agreement, the franchisor must provide a Disclosure Document in strict accordance with the requirements of "the Code".

To quote the Franchising Council of Australia from their submission put before the South Australian Franchise Inquiry⁹ (page 9)

"Australia has the most comprehensive franchise regulatory framework in the world. The cornerstones of that framework are:-

- (1) The Franchising Code of Conduct requirement to provide a detailed disclosure document to prospective franchisees prior to signing a franchise agreement. In addition to typical requirements to disclose the franchisor's business background, relevant financial information, previous litigation and solvency history and other relevant matters the Code uniquely requires the franchisor to:*
 - (a) include a list and contact details of existing franchisees, which facilitates contact with those parties as part of due diligence. As of March 1, 2008 franchisors will also have to disclose details of former franchisees, giving a potential franchisee even greater ability to conduct proper due diligence;*

Additionally on page 10;

"The information to be disclosed includes a list with contact details of existing franchisees, which enables a prospective franchisee to make contact with those actually involved in the business to verify any information provided by the franchisor."

A list of existing franchisees and their contact details was not provided to me. This coupled with the franchisors combined failure to disclose or even acknowledge existing profitability concerns already being addressed by two (2) of the three (3) existing franchisees in the region at or about the time of my entering the Agreement, I feel it is more than reasonable to suggest that any true ability for me to make an informed decision about the business was greatly reduced.

A formal dispute was raised with the franchisors following their admission that they had indeed breached "the Code", and as such, I was entitled to remedy. This was the point at which the whole landscape changed dramatically, and the heavy artillery was wheeled in.

At the outset of the 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 following the franchisors initial debate over liability, they then simply denied all liability. This was coupled with predictable claims that nobody could afford a settlement, which saw a "forced" settlement offer extended at mediation that was claimed to be for the protection of the financial interests of both the franchisor and franchisee.

9. <http://www.parliament.sa.gov.au/NR/rdonlyres/DC0595AF-761F-4983-B9A5-62F2FBAA867A/10893/FCASubmission21Jan08.pdf>

If as it is claimed by the FCA, "**Australia has the most comprehensive franchise regulatory framework in the world**" and franchisees are in fact offered extensive protection under these laws, how is it that a franchisor can on one hand concede a remedy is warranted as a consequence of their breach of the **mandatory** Code, but then simply deny all liability and force the franchisee to seek remedy through litigation and subsequent determination of liability?

Personally, 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 declarations of "**deep pockets**" etc, so "**see sense and accept the offer**". The ultimate and somewhat disturbing irony is that even if the settlement offer had been accepted, I would never have received any money given the combination of the unenforceable terms and the overall state of disarray within the franchise system. I was even declared "**foolish**" for not accepting the offer. I fail to see how it was "foolish" to reject an offer that at the time, I suspected I was highly unlikely to receive any money from, and now in the clarity of hindsight, know by fact that I would never have received any money from?

When all is said and done, for me to accept the franchisor's "invitation" to litigate and determine liability, it would cost considerably more than any damages that may be claimed and in turn awarded. It was declared in no uncertain terms that I would be forced to pay for people to come in "from all over the country" if I wanted to challenge the franchisor. It was explained by the ACCC, and I to some extent appreciate, but have immense difficulty accepting, that under the circumstances, the franchisor is simply seen as protecting their financial and business interests? This remains a very bitter pill for me to swallow, given the franchisor has profited from amongst other things, both the initial and ongoing franchise fees, despite their agreed breach of a "mandatory" code, by simply hiding behind the costs of accessing the law and adopting tactics that I would describe as nothing more than financial intimidation?

In what I would describe as perhaps the most distressing and crippling blow in the course of my unfortunate experience, was to be told that even though I had asked all the right questions before entry into the Agreement, I was not persistent or aggressive enough to be deserving of the correct answers. It was explained that questioning the answers after entry into the Agreement was too late - they already had my money.

Dispute Resolution Provisions under part 4 of the Franchising Code

If we look at the course of action available to a franchisee in dispute with a franchisor, under Part 4 of "the Code" it suggests referral to mediation. Whichever way one looks at it, dispute resolution under current provisions is grossly inadequate for franchisees, with franchisees too readily becoming little more than "cannon fodder" for a franchisor that is so inclined or well practiced!

Whilst mediation 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. Is it even within reason to expect a franchisor fully aware they are in breach of the Code and/or the Trade Practices Act, to enter any "compulsory" mediation with any real intent to resolve the situation, let alone negotiate? For most franchisees it is the only possible means of being heard when consideration is given to the cost of lawyers and litigation. For many, the thousands of dollars ultimately required to enter mediation in itself, is too much of a burden.

In practice, mediation only provides the franchisor with opportunity to really flex their muscle and further assert dominance, but under the additional protection of a shield of confidentiality. The franchisor is readily able to just point the finger at the franchisee and accuse them of inadequate due diligence, ineffective marketing, being a bad operator, a negative influence etc, whilst they retain full control of the proceedings. The franchisor may throw a token offer on the table, but this will almost certainly be accompanied by the all too familiar confidentiality clause and a disclaimer of any further liability. A franchisor would be loath to be seen as setting any form of precedent that will allow the possible perception of a "money back guarantee" if you find a "problem", so an example must be made to other franchisees to keep them in their box - especially when there is already a surging tide of discontent across the system!

Mediation may well be effective as a means to resolve a difference of opinion in matters like a disagreement over the allocation of marketing and/or advertising funds, or levels of support and communication with the franchisor, but is it appropriate for a matter that centres on a point of law? The more blatant the issue becomes, the more likely it is that the franchisee will be "battered into submission", with the franchisor fully aware that the franchisee in all probability has next to no access to justice.

Franchising becomes far simpler and financially beneficial to those that know the actual rules, but unfortunately, it seems that honesty and disclosure are two words that are poles apart, because in the main, it is quite clear that honesty will not sell franchises?

Another area where franchisees require additional consideration that has again been clearly demonstrated in recently, is the franchisees rights in relation to the financial collapse of franchisors. Most recently we have seen the collapse of Kleenmaid, where quite rightly, considerable press has been devoted to the plight of many consumers and suppliers who at this stage appear to have lost their money, but what about the franchisees? Franchisees have individually lost in all likelihood hundreds of thousands of dollars, and it is alleged that they were only recently told that the company was financially stable, which we sadly now know as being somewhat removed from what was actually the case, very much to the detriment of consumers, suppliers **and franchisees**.

How many franchisors are selling franchises in the full knowledge they are under financial stress?

Is it in the best interests of a franchisor reliant on the sale of franchises to 'grow' their business to disclose they are in financial trouble? Perhaps silence is seen as protecting their business?

How many franchisors will "open their books" to allow franchisees to conduct due diligence?

Alternative Dispute Resolution Provisions

Contrary to reports suggesting that levels of dispute remain low in franchising, one could suggest that the inability to afford the cost of even engaging a lawyer sees franchisees surrendering to the pressure of the franchisor and soldiering on. Alternatively, the franchisee accepts total defeat and walks away as opposed to raising a dispute and fruitlessly throwing good money after bad. This assertion would seem to be supported by a report from the Office of the Victorian Small Business Commissioner.

The Office of the Victorian Small Business Commissioner has established a low cost mediation service, and as revealed in an article on the "**Smart Company**" web site entitled "**Business prefers mediation to lawyers**" by Mike Preston on 2 July 2008¹⁰, the Commissioner Mark Brennan indicated,

"his office has seen a sharp increase in the number of franchise and business-to-business disputes being brought to it for resolution."

The Commissioner went on to add, *"more than 4500 businesses come through its doors over the past five years - and 1200 in the past year - to take advantage of its \$195 dispute mediation service."*...*"The lower costs associated with mediation have also seen a jump in franchisees seeking mediation for disputes"*

Perhaps the most alarming revelation in the report was the discovery of a franchisor that was resisting the low cost mediation in an attempt to exert financial pressure on seventy (70) franchisees!

"According to Brennan, in one case a franchisor sought to resist attempts to have a dispute dealt with through his office because it wanted to exert financial pressure on the 70 franchisees involved by forcing them to use a more expensive dispute resolution process."

"We saw that was happening and successfully asked the Office of the Mediation Adviser (a starting point for dispute resolution under the franchising code) to refer the complaint to us, so we were able to thwart the attempt to put the franchisees under financial pressure," Brennan says."

If one asks around, I am sure the explanation for this attempt to exert financial pressure on franchisees would simply be dismissed as the franchisor protecting their business name. It will also be boldly declared that there is already a clear path for franchisees to follow under the provisions of the Trade Practices Act if they want to remedy the situation, but that is only if they can afford it? That is indeed a very big if!

10. <http://www.smartcompany.com.au/Free-Articles/The-Briefing/20080702-Business-picks-up-for-court-alternative-.html>

Australian Competition and Consumer Commission (ACCC)

To this point, I have not made detailed mention of the ACCC, and would now like to address this issue.

It is accepted that the Trade Practices Act is a substantial and integral part of the law in Australia, and the enforcement of the Act on all fronts is a monumental task. With the Franchising Code of Conduct making up only a small part of the Act, yet the franchising industry as a whole contributing significantly to the economy, the question may be raised as to whether the ACCC is adequately resourced to devote the effort required to monitor and enforce "the Code" in light of the growth that franchising in Australia has experienced in recent years.

Whilst it is known that the ACCC is vigilant in certain areas of franchising, it is accepted that costs involving investigation, legal fees etc, are always a concern and that not every complaint or query from aggrieved franchisees can be actioned. Never the less, it remains that franchisors so inclined, are well aware that the ACCC will not take aggressive action unless their breaches are numerous or significant, but to the detriment of franchisees there is no clear guideline available as to what is considered numerous or significant? Franchisees would greatly benefit from further clarification of how severe a situation has to be in relation to breaches of the Franchising Code or the Trade Practices Act, before the assistance of the ACCC can be relied upon with any degree of certainty.

It is more than clear to all involved in franchising, that a breach of the "mandatory" Code in itself is of no real concern or even consequence to franchisors, with lawyers even going as far as to offer advice suggesting exactly that....

To quote from the website of **"Mason Sier Turnbull"**...

"Although non-compliance constitutes a breach of the Trade Practices Act, in most cases such non-compliance would not be the cause of any loss, and usually, disgruntled franchisees would have other more solid bases upon which to make claims against a franchisor."¹¹

Where did the ACCC come into play in my case?

Following a complaint to the ACCC, the ACCC requested and were subsequently sent amongst other things, correspondence from the franchisor and a copy of my Disclosure Document. To quote from the letter that the ACCC sent to me that addressed my complaint,

"Preliminary assessment of the information you have provided indicates that there may have been conduct by the franchisor that would justify further investigation. However, you should be aware that, on preliminary assessment, it is not likely that the ACCC would take court action in this matter."

After stressing that they are ***"not permitted to give legal advice"***, the ACCC suggested that in relation to my allegations, the ***"allegations did not at this stage appear to have strong legal merit."*** I find that somewhat confusing given the franchisors admissions on several fronts?

A more alarming component from their correspondence that I believe clearly demonstrates their complete lack of understanding of my predicament, and as I now understand it, their lack of understanding of franchising as a whole, was their suggestion that I still had further opportunity to negotiate a favourable settlement? At no stage did the franchisor ever even attempt to negotiate. It was very much a case of "take or leave it", with an attitude of "because I said so" - something I am sure would be quite typical of a franchisor in dispute with a franchisee when they are fully aware and even concede that they are in breach of the law.

11. <http://www.mst.com.au/?id=228>

To quote the ACCC...

"I am aware that there still appears to be an opportunity for the parties to negotiate a settlement of the matter or otherwise work towards establishing your franchise as a more successful business. I am concerned that further action by the ACCC at this time could significantly hinder the achievement of those outcomes."

I find it somewhat intriguing that the ACCC would suggest that their involvement could **"significantly hinder"** my efforts to settle the matter. I can assure you that I did not approach them with my complaint as a result of the franchisor being cooperative and understanding.

Overall, it was explained to me that under the circumstances, the franchisor was doing nothing more than driving a hard bargain to protect their business. It was even explained that a Judge could view on the balance of probability that the problem was primarily my own fault for not performing adequate due diligence, and went on further and strongly suggest that I had simply made a bad commercial decision. I feel it more than reasonable to suggest that a Judge may also find that the franchisor is in clear breach of their disclosure obligations required under the **"mandatory"** Franchising Code of Conduct and in turn the Trade Practices Act, and find in favour of the franchisee?

A lot was said by both the franchisor and the ACCC about the issue of "due diligence" and the apparent lack thereof on my part, but what of the issue of "due care" on the part of the franchisor in the preparation and presentation of their Disclosure Document? It is clearly written within the Code that the franchisor is required to provide a Disclosure Document that is in accordance with the mandatory requirements of "the Code" before they receive any money from the Agreement? I already know the answer to this one. Hi ho, hi ho, it's off to court we go!

Just to emphasise the point again, the franchisors' breach of "the Code" was never denied. It was the liability for the breach that was disputed. My understanding of the law is limited, but it seems somewhat surprising to say the least, to learn that an individual franchisee is expected to fund a complex legal case against one of Australia's largest franchise systems, in order to determine who is actually liable for an agreed breach of the law, whereby the franchisor has failed to provide all the mandatory disclosure information required under "the Code" in their Disclosure Document? Naivety clearly had the better of me.

If the franchisor to a system that bares their name is not liable for the contents of their own Disclosure Document, who is? This question of who is ultimately responsible for the contents of a franchisors disclosure document is a something I would like to see answered, but it is a question that I literally cannot afford to have answered. I feel it is a perfectly valid question to pose though when addressing the issue of "access to justice", because in my case it was perfectly clear that I was never going to receive anything unless I was willing to litigate, despite the franchisors admitted failure to comply with the Franchising Code of Conduct.

Whilst it may be accepted by some that the franchisor was simply protecting their business by driving a hard bargain, and even if the problem as suggested by the ACCC was "entirely my own doing", surely this in no way detracts from the fact that the franchisor has breached the Trade Practices Act, but absolutely nothing has been done about it? I feel it safe to assume that even if the ACCC had even attempted to ask some preliminary questions of the franchisor, there would simply be an apology from the franchisor and an undertaking to not do it again?

12. <http://www.apf.gov.au/hansard/joint/commtee/J11379.pdf>

With that said, I would also like to take this opportunity to raise an additional concern in relation to the ACCCs enforcement of the Franchising Code of Conduct. ACCC Chairman, Mr Graeme Samuel stated the following at the conclusion to his opening address to the **Parliamentary Joint Committee on Corporations and Financial Services** public hearing for the Franchise Inquiry in Melbourne on 5th November 2008:

*"It can also avoid one of the real problems that we often find in making our risk assessment on litigation, which is to say, if we litigate against this particular franchisor, there is potential brand damage that will be done and that brand damage can have its own backwash effect on other franchisees, which in the global context of a particular franchise could do more damage than may have occurred as a result of the particular misconduct that has affected the franchisee concerned."*¹² [page 84]

It is quite apparent from this, that the ACCC views a few sacrificial lambs or some collateral damage in franchising as perfectly acceptable, so long as the overall brand of large franchise systems and the overall image of franchising remains unblemished? In turn, we as franchisees are evidently supposed to just accept that if the ACCC deems a franchise or franchisor 'big' enough and 'important' enough in the grand scheme of franchising, and indeed the economy, then the mandatory "Code of Conduct" and the Trade Practices Act become secondary to their overall priority of protecting the brand and not individual franchisees, even though the franchisee is relying on the so called protection offered under existing laws, and supposedly enforced by the ACCC?

I sincerely hope this is not the case, but based on my experience, it is a conclusion I fear has some seeds of truth. If franchisees are in fact seen as nothing more than insignificant speed bumps on the road to greater good, then please make it clear that this is the case. At least there would then be some level of understanding as to why the ACCC assists the vast minority of franchisees with complaints. I would suggest this probably won't happen though, because it may well impact quite heavily on the ability of franchisors to sell franchises if franchisees were to actually know they have next to no protection?

In the final report of the **Parliamentary Joint Committee on Corporations and Financial Services** - **"Opportunity not opportunism: improving conduct in Australian franchising"** a lot was said about an "expectation gap" that has developed between what franchisees expect of the ACCC relative to their actual role, and where this gap has arisen. Perhaps we could look at just one media release from the website of the ACCC.

<http://www.accc.gov.au/content/index.phtml/itemId/632826/fromItemId/2332>

In the release it states the following....

"ACCC Chairman, Mr Graeme Samuel, said it is of paramount importance that franchisors comply with the Act and Franchising Code of Conduct and provide full, clear and unambiguous information to potential franchisees so they can make an informed decision on whether to enter a particular franchise system."

"The ACCC will continue to take action to promote strong compliance on the part of franchisors, particularly given the growth of this sector over the past few years", Mr Samuel said.

"The ACCC will act promptly against franchisors that do not meet these fundamental standards".

Based on this, were my expectations of the ACCC assisting me against a franchisor that admitted they had breached the Trade Practices Act and the Franchising Code of Conduct unfounded? It certainly seems so

In conclusion, I would again like to refer to the testimony of ACCC Chairman Mr Graeme Samuel before the Parliamentary Joint Committee on Corporations and Financial Services' public hearing on November 5th 2008 in Melbourne, where Mr Samuel issued a public challenge to demonstrate a case where the ACCC had not acted where appropriate evidence had been provided, and he would issue a public apology

“Mr Samuel—I will just explain that. You have indicated that there are parties out there that say, ‘We don’t bring our complaints to the ACCC because they will not do anything about it.’ I would like to point out a public challenge now: show us a complaint that the complainant is prepared to back up with the appropriate evidence that it is a breach of the Franchising Code of Conduct or a breach of the misleading and deceptive conduct provisions. I will make it easy; I will not go as far as the unconscionable conduct provisions. Show us circumstances where the ACCC has said, ‘We’re not going to pursue that matter because we just are not interested’, and I will come out and publicly apologise. There is the challenge. I just do not believe it is happening. I hope that is safe.

CHAIR—Too late now if it is not.” [page 96]

After presenting the ACCC with what I naively believed to be sufficient evidence, including amongst other things, admissions from the franchisor, no action was taken and I was simply wished well in my future endeavours - sentiments that were also echoed by the franchisor, as I was exiled to the franchising abyss.

Additional Supporting Evidence

As previously stated, the ACCC strongly suggested that a large part of my problem was a bad commercial decision, and despite admissions from the franchisor, that my *"allegations did not at this stage appear to have strong legal merit."*

It has to be clearly stated that I totally agree on all fronts that my decision to enter the franchise was a bad commercial decision, but the business I purchased did not in any way resemble the verbal and written representations provided to me. That was why I began questioning the franchisors so early in the piece. For me, the real question that needs to be answered is how the bad decision came about?

My decision to enter the Agreement was based upon the information provided to me. The Disclosure Document (although incomplete) was one of many considerations, along with literature and other representations which have subsequently been shown to be "inaccurate", and in some cases even admitted to being "inaccurate". To this day, there are statements on their website that are just not true, and the franchisor even admits it. The ACCC explained that this is referred to as "puffery"? A materially relevant issue was the joint failure of the franchisors to acknowledge existing profitability concerns that were being expressed by other franchisees, and their failure to provide me with a list of existing franchisees citing privacy laws. As previously mentioned, failure to provide a list of existing franchisees is a breach of the mandatory disclosure requirements of "the Code".

The profitability concerns being expressed by existing franchisees, and even franchisors, remain unaddressed, and amongst other things, have ultimately led to the "removal" of some franchisors from the system after being "voted out" by their franchisees. The system remains in a state of total disarray with other franchisors also in the process of being "removed", and other franchisees walking out. Does this not further strengthen claims that the franchise system as a whole was certainly not what was portrayed nor described to me. Concerns surrounding profitability and support indeed did exist across the board, and this was all totally denied in the course of mediation.

Following is just a few examples of the franchisors conduct and attitude from various forms of communication. It should be pointed out that all correspondence is from the same person

In relation to the franchise system as a whole

"There are obviously problems in the Division, and in your Region, and in [REDACTED]"

"Too many [REDACTED] franchisees seem to be making poor income, especially in the early stages"

"This is especially serious since a lot of [REDACTED] Franchisees appear to be struggling, based on our last survey and from what I hear since then."

"...franchisees independently contacted me with complaints about excessive fees in return for limited support"

"I am concerned about support given by your Franchisor"

"[REDACTED] in [REDACTED] and [REDACTED] in [REDACTED] have two of the top ratings in the country based on last year's Franchisee survey. [REDACTED] scored 100% on Franchisee satisfaction....reporting good income and none poor. There's no doubt this is a business slower to build than most...."

(NB: Within two (2) months both of the people mentioned in this e-mail were on probation under threat of termination, after being voted out by their franchisees for lack of support and profitability concerns?

In relation to my dispute....

*"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 materialsI'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."

Debate surrounding liability then ensued between the franchisors, followed by their complete denial of any liability and a subsequent failure to engage in any meaningful form of negotiation to determine a settlement. Denial of liability was on the premise that they were not involved in the preparation of the Disclosure Document. Getting nowhere fast, I turned to a lawyer (against the wishes of the franchisor), and this is where the "rules" and attitudes really changed

Despite earlier admissions ("*I received your materials*"..."*and it appears you were not given a list of current Franchisees in your Disclosure*"), the following was received in response to a letter from the lawyer questioning the disclosure omissions....

*"To say that 'all parties agree that this was not provided' is untrue. **I did not prepare and have never even seen the Disclosure document** so I could hardly make any sort of comment except to say that we rely on the statement given by your client."*

As required under "the Code", mediation was formally requested, but to summarise, mediation is best described as a joke – and not a very funny one! As previously stated, given the turmoil in the franchise system, the settlement offer extended was unenforceable and never likely to eventuate, and in the clarity of hindsight, by fact would never have occurred. The settlement offer was clearly nothing more than a cleverly orchestrated attempt to protect the franchisor, by ensuring that I would never receive any money, and that an example or clear statement was made to other franchisees.

Attempts at further negotiation following mediation were met with extreme resistance in the form of continued aggression and declarations of 'deep pockets', with constant refusal to answer questions of liability unless it was in a court room?

"If you go to court you'll both spend tens of thousands in legal fees. You may well get more, but....." I strongly advise you to see sense and accept the offer."

"....you were very foolish not to accept it."

I put it to you that it is more than reasonable to suggest that had I been provided with a Disclosure Document in full accordance with the mandatory disclosure requirements of the Franchising Code of Conduct, I would have had the opportunity to discover some of the existing problems within the franchise before entering the Agreement, including amongst other things, the profitability concerns of existing franchisees and franchisors alike that still exist today. Accordingly, it is more than reasonable to suggest that I would be in a far better financial position now.

Conclusion

Although mandatory under the Trade Practices Act, the Franchising Code of Conduct in reality is little more than a voluntary provision, with franchisees unable to seek any real protection or remedy due to their inability to afford any "access to justice". Franchisees are invariably in no financial position to even attempt to compete against a well financed and well practiced franchisor and their legal team, in what will inevitably be a deliberately protracted legal fight. It is a futile and wasteful exercise for franchisees to even try. Franchisors know it and use it to their full advantage.

"The so-called sophisticated provisions of the Act have an air of unreality, with respect, so far as ordinary consumers and franchisees are concerned because they are not going to rush off and get an injunction in the Federal Court or some other court when the whole point is they have not been given the notice of their entitlements..."

"9.40 The committee acknowledges the difficulties franchisees face in seeking remedy under the TPA due to the potentially high costs of taking legal action. [page125]"

"The Code" exists to protect franchisees, but this is purely in theory only. The portrayed protection afforded to franchisees that is touted under "the Code" is little more than propaganda. In fact, from my experience I would go as far as to say it is plain wrong. "The Code" is not worth the paper it is written on unless you have access to vast sums of money to litigate, but unfortunately this is in total contradiction to the 'safe' image of franchising that is widely portrayed.

Allow me to quote just one example from the Franchising Council of Australia's website....

"With high unemployment figures and the need to cement job security, franchising continues to grow as a real and meaningful alternative to regular paid work. "The beauty of franchising is that it allows you to be in business for yourself, not by yourself" says Steve Wright, Executive Director of the Franchise Council of Australia."

With the current sharp rise in unemployment being experienced across the economy, the lay of the land is treacherous for franchisees, but alas for the franchisor, it is a perfect storm.

"With high unemployment figures and the need to cement job security, franchising continues to grow as a real and meaningful alternative to regular paid work."

"As Australian unemployment figures skyrocket and tales of job loss and economic despair are the order of the day, stories of hope and inspiration are to be found in the franchising sector."

Franchising can have devastating consequences and prospective franchisees need to have this clearly explained. With this submission, I sincerely hope that I have been able to demonstrate just how blatantly ineffective the protection actually provided to franchisees under "the Code" is, and how easy it is for a franchisee to be left wandering in the wilderness with their only tool for navigation being the moral compass of their franchisor. My experience in franchising has seen me walk away with nothing, despite amongst other things, an agreed breach of the mandatory disclosure requirements of the Franchising Code of Conduct, but I have been rendered completely powerless by a lack of money, and an exhaustive trail of dead ends.

Aside from a bleak employment outlook that sees me struggling to find employment, I sank to new depths recently when I received yet another proverbial "kick in the guts", by learning that I am not even entitled to anything from the government stimulus package because I failed to earn sufficient income for the 2007/08 financial year to qualify. I certainly provided a significant financial "stimulus" to someone over my short time in franchising, but it certainly wasn't of any benefit to me!

There have been many declarations of “decisive” action by the Government recently in relation to the economy. Given the contribution of franchising to the economy, I would love to see some “decisive” action to protect and enhance the rights of franchisees under existing laws. For existing laws to be effective, they have to be accessible, but as it stands there is precious little “access to justice” for franchisees. On past performance I won’t be holding my breath, but at least some form of action on the recommendations from the Parliamentary Joint Committee on Corporations and Financial Services report **“Opportunity not opportunism: improving conduct in Australian franchising”** would be of tremendous assistance to franchisees. Even a token effort to demonstrate that someone is listening would be much appreciated, but from where we sit, the silence is deafening?

As a final plea, if franchisees are in fact deemed to not be worthy of consideration, and simply viewed as collateral damage as part of the big picture protection of “big” franchisors and their role in the economy, and in turn are indeed going to be ignored and left to fend for themselves, then a statement from the Minister for Small Business, Independent Contractors and the Service Economy saying exactly that would ease a great deal of angst. Please, just stop offering hope for franchisees when given the current structure of franchising, there is clearly none.

Your time and efforts are much appreciated

THANK YOU