Summary

My submission addresses solely the issue of the dispute resolution provisions under part 4 of the Franchising Code of Conduct and the cost and the time involved when this provision did not work. I believe based on my experience with the Office of Mediation Advisors, the ACCC and the legal system, that until there is a method put in place that can provide affordable and immediate relief, it is near impossible for the average franchisee to enforce their rights under their agreement or under the code. The average franchise agreement is usually 5 years. The average franchisee is a small business operator with limited resources. Justice is simply out of reach.

Hoy Mobile Pty Ltd is a franchisee of ███ Pty Ltd and I am a co director of Hoy Mobile. Under the franchise agreement we operate a mobile phone retail store at Eastgardens in Sydney. We commenced our five year agreement with ███ on the 21 August 2003. All monies are deposited to the franchisor's account and three times a month Hoy Mobile was to receive their percentage of the gross profits. All stock is supplied by the franchisor.

In March 2006 we requested mediation which the franchisor refused. Mid July 2006 I lodged a formal complaint with the ACCC. On the 1 September 2006 after being issued with a termination notice we began Federal Court proceedings, as this was our only remaining option to protect our asset. 25 March 2008 (about 2 weeks after our trial finished) the ACCC began proceedings against ███ in the Federal Court. We received Judgement in our favour on the 30 May 2008. ███ Pty Ltd has appealed the entire judgement and we are now awaiting the date to be set for the appeal to be heard. The Appeal will most likely be heard February or March 2009, three years and over $650,000.00 after Hoy Mobile requested mediation and almost three year from when we lodged our complaint with the ACCC. Our five year agreement will expire before the appeal is heard.

The following details what occurs when the franchisor refuses to attend mediation and your only recourse is litigation. Mediation only works when both parties are reasonable and compromise can be reached. If the other party refuses to mediate there is no other recourse but litigation and the only benefit to the letter you receive from the Office of Mediation Advisers (OMA) is in cost arguments at the end of what is an extraordinary long and expensive fight.

In November 2005 Hoy Mobile began raising issues directly with the franchisor. When no meaningful response was received from the franchisor we decided to seek legal advice.

We retained a solicitor in March 2006 to assist us with the issues we were having with our franchisor, his advice was to follow the code. It was not until this meeting that I was fully aware of the Code of Conduct and the option it offered in the form of mediation with the OMA. This was because the franchisor never provided a copy of the code with our disclosure document. We were told mediation was compulsory and the total cost for his preparation and attendance would cost less than $10,000.00. We gladly deposited $5000.00 into his trust account and thought finally our franchisor would start to answer the questions we were asking and would take the issues we were raising seriously because "The Code" said he had to. Unfortunately this is not what occurred, our solicitor limited our dispute to a simply request for a copy of the disclosure document we were issued with in 2002. When this was not forthcoming we instructed our solicitor to request mediation. Mediation did not occur, the franchisor simply claimed they did not have a copy of the 2002 document and the 2004 copy they supplied was no less favourable and they could not understand what our issue was or why we needed the document.

Our next step was to get advice from a barrister as to what our options were. One of those options was to lodge a complaint with the ACCC. This was in May 2006, two months after first retaining a solicitor to represent us. Our solicitor had never lodged a complaint with ACCC before but believed I would not be taken seriously by the ACCC unless I could prove it was systematic. While my solicitor and the barrister wrote a detailed letter to the franchisor setting out all our issues, I set about emailing copies of the Code and wrote a letter to my fellow franchisees attaching a survey with the aim of gathering the evidence required to have the ACCC "take me seriously". I was still somewhat naïve at this time and thought what I was embarking on would be quickly resolved, it had not occurred to me that I was merely provoking the beast and almost three years later I would still not have closure.

Within the same time frame I had made contact with the ACCC originally to clarify which of my issues fell under the jurisdiction of the ACCC as I was still having difficulty and still do have difficulty understanding the difference in the legal terms used and who polices what areas. It was then that I discovered that it was not my responsibility to prove if the franchisor was systematically breaching the code and in fact I could be "tainting" the evidence. I advised my solicitor what I had been told and asked should I proceed with lodging the complaint again I was advised to wait. It is now June 2006 and the costs were already approaching $10,000.00 the letter stating all our issues had been sent late May 2006 and we still had not received a reply. In fact we never received a reply to that letter. My solicitor wrote letters of follow up stating we would report the behaviour to the ACCC, this still did not encourage any meaningful responses.

By early July 2006 the franchisor had become aware that I was trying to organize a franchisee association on an informal basis and also that we had significantly

breached the agreement ourselves. This was the beginning of several threats of termination. My solicitor then advised it would cost about $1,000.00 for him to write and lodge the complaint to the ACCC and that to save money I should write and lodge the complaint myself. I did this mid July 2006 by this stage we had been issued with a breach noticed in relation to another matter with the franchisor and were on stock and commission hold. I have never felt so intimidated before, I was totally out of my depth and could not believe what was occurring. The two responses I received to this were firstly from my solicitor, that the money being withheld was not significant enough to warrant the cost of seeking relief by way of an injunction. The response I received from the ACCC was they could not offer immediate relief that can only be obtained through the courts. At the time I thought the ACCC were not doing their job and my solicitor was incapable of protecting my rights. It has taken some time for me to accept that the people dispensing this information were not trying to be difficult and unsupportive but they have to work within a system that does not provide for immediate relief that is affordable. When our second commission payment was not forthcoming (this is the only cash flow our business has) the amount being withheld was enough to now warrant spending a similar amount in seeking relief through the court. Around the 17 July 2006 my Barrister began preparing to file an injunction. On the same day without notice the franchisor released our commission payment. I do not believe this was coincidence.

The next significant event to occur was a meeting at the franchisors head office around 21 August 2006 at this meeting we were advised that their intention was to terminate our agreement. The termination notice was not forthcoming until after my solicitor wrote a letter and stated at the end that he was forwarding a copy onto the ACCC. It is now the 28 August and my legal costs are over $10,000.00 the franchisor

has not answered any of the issues raised in the May 2006 letter and my only recourse is to begin legal proceeding as the ACCC again advised they could not offer immediate protection. My solicitor is on leave and because he is a sole practitioner I am now briefing his agent. I was told the proceeding were likely to cost me around $300,000.00 (this figure was quoted by both my solicitor and his agent) and that my matter stood a good chance of succeeding, for reasons I did not quite comprehend at the time but more importantly there was no other way of restraining the franchisor from acting upon the termination notice without an injunction. Our business was worth because of the trailing commissions and store fitout about the same amount. At the time we thought it was commercially sensible to begin proceedings to prevent the termination and to protect our asset. By the end of September 2006 our legal costs were approaching the $40,000.00 mark by the end of 2006 the costs had reached $140,000.00. The court ordered mediation which we attended to no avail in November 2006. The franchisor had made it clear from the beginning that they were going to fight us all the way and this was one promise that they did indeed stick to.

We had to subpoena the carriers to obtain the evidence we required and even this process was not easy and cheap. We had to provide an undertaking to the court that we would not disclosed the information we read before we were allowed to view the documents. Once I viewed the documents I was certain our issue had merit and was an issued that affected every [redacted] franchisee and I was not allowed to tell my fellow franchisee or the ACCC. The carriers each charged between $1000.00 to over $3000.00 for producing the documents. I was beginning to realise just how tough and expensive the fight was going to become and we had not even progressed to the discovery stage yet.

It was already February 2007 twelve months since we first retained a solicitor. The franchisor had already filed a Notice of Motion for security of costs which took me by surprise but apparently this is a common tactic. To avoid the cost of this motion being heard my husband and I agreed to be held personally liable for the costs. Each Notice of Motion with preparation and court appearance time costs from $5000.00 to $20,000.00 depending upon the complexity of the issue. In effect if we lost or stopped the proceeding without a settlement in place, we had just guaranteed our own bankruptcy. We were left with two choices settle or win. To settle we had to at least recoup our legal costs otherwise bankruptcy was still a strong possibility.

I lost count of how many Notices of Motions and court appearance were made throughout the matter but most occurred around the time of discovery in June 2006 by the end of June my costs had increased to just under $230,000.00. I was fast approached the $300,000.00 that was originally stated and it was clear we were not going to make the first hearing dates, my naivety was lost, this was replaced with scepticism and Justice seemed so unobtainable. I was now working on my own matter to keep the costs down and to assist my solicitor. I had no choice I was underfunded and under resourced. I learnt how to research case law through the discovery process because the franchisor was not parting with documents easily and we were advised by the franchisor that in January 2007 they had lost a lot of data in relation to commissions, due to an IT issue.

During this battle over discovery the ACCC were actively investigating the franchisor and they had evoked their powers under section 155 and obtained documents from the carriers and the franchisor and similar to our subpoena the ACCC was not allowed to share the information they gathered. Even knowing they were under a full ACCC investigation the franchisor's fighting spirit was not dampened. The hearing

was adjourned to September 2007 a full twelve months since we first filed the injunction.

Two weeks prior to the September hearing the solicitors for the franchisor advised my counsel of the Court of Appeals decision in regards to the Ketchell case. So when the September hearing date arrived the franchisor argued that the matter could not proceed to trial as there was no contract between the parties because the franchisor did not follow section 11 of the code of conduct and the agreement is illegal. The Ketchell decision had now added another complex layer on an already complex case and the hearing was adjourned to December 2007. The costs were now close to $380,000.00 and no hearing had yet occurred.

I have no idea at the moment how much the franchisor has spent defending these proceeding but I went into court with one barrister and one lawyer and the franchisor appeared with senior counsel, junior counsel and a city law firm, I would image their costs are even higher. When you take the time to do the math, at this stage I would estimate over $750,000.00 had been spent in total by the parties in just legal costs by the end this estimate would double.

Just when we had come to terms with the September adjournment my own solicitor had an oversight and forgot to serve one of the forensic accounting reports this then allowed the franchisor to seek a further adjournment and our trial was set down to begin 12 February 2008. The costs further increased with forensic accounting reports by the end of December 2007 our costs were $480,000. At this stage the court was advised of our financial hardship so when the franchisor defaulted on the next court deadline they were ordered to pay my costs of that appearance forthwith. It took two months to receive the $4,000.00 they were ordered to pay forthwith and

this only occurred when my solicitor wrote to advise he would relist the matter before his Honour.

Leading up to a trial date counsel spends an enormous amount of time preparing because of how complex our matter had become, our trial which was set down for five days in September 2006 had now been set down for nine days. For everyday that is set down roughly the same amount is spent in preparation. Roughly with preparation the trial was going to cost $100,000.00 and this doesn't include extras such as the court fees or transcripts. The transcripts for our trial which ended up running for close to three weeks without closing submissions were approximately $16,000.00. The court fees were about the same. By the end of the trial our total costs for running the matter were over $650,000.00.

Our trail finished with close submissions on 12 March 2008. The ACCC lodged proceedings against [redacted] on 25 March 2008. The judgement was handed down in our favour on 30 May 2008 and finalised with cost orders on 16 June 2008. 4 July 2008 [redacted] served the Appeal Notice. We anticipate the Appeal being heard February or March 2009. A full three years from the first request for mediation. Almost three years from lodging our complaint with the ACCC and 7 months after our agreement expires.