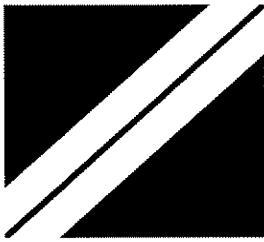

Motor Trades Association of Australia

Committee Secretary
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary

I refer to MTAA's appearance before the Committee at the public hearing in Canberra on 17 October 2008 and provide the following supplementary submission for consideration of the Joint Committee on Corporations and Financial Services' Inquiry into the Franchising Code of Conduct (the Code).

I would like to draw the Committee's attention to a number of submissions to the Inquiry which argue that the dispute resolution provisions of the Code are adequate in their current form, and that the Code does not require amendment. These include the submissions of the Trade Practices Committee, Business Law Section of the Law Council of Australia and the Department of Innovation, Industry, Science and Research.

MTAA rejects such submissions and argues that the current dispute resolution remedies available under the Code do not sufficiently protect the interests of franchisees; nor do they provide adequate recourse for parties in dispute.

The submissions referred to above have relied on information from the Office of the Mediation Advisor (OMA) as an indicator of the success of the current mediation process. That includes the statistic that 75 per cent of all mediations conducted through OMA result in a binding settlement. On this point, the Association respectfully submits that whilst a 'binding settlement' may mark the conclusion of a dispute, it does not always mean that the parties have come to some positive and mutually agreeable outcome.

In many cases a settlement may be reached in circumstances where the franchisee party feels it has little choice but to agree to what is being offered by the franchisor in the absence of an effective legal remedy for franchisees. The imbalance in negotiating power often means that franchisees agree to a settlement on the basis that they do not have reasonable prospects of success in taking legal action or where if they do have some reasonable prospect of success they can't afford to litigate the matter.

Mediations are often not conducted in a genuine manner by franchisors, in that representatives who have no real capacity to make decisions on the franchisor's behalf are sent to participate in the mediation. This does little to resolve the dispute, or give the franchisee comfort that the dispute is being treated seriously.

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The submissions in question have also proposed that despite the weaknesses of mediation, a party is free to commence legal proceedings. However, where a franchisee party is looking for a less costly alternative to commencing legal proceedings, this remedy is of little comfort. It is MTAA's view that there should be a requirement that the parties must attend and engage in the mediation process 'in good faith' to resolve the dispute. The Association believes that mediation is an affordable alternative to commencing legal proceedings and often provides results in a much more timely fashion. However, it is the view of MTAA that mediation, as it currently stands under the Code, is not sufficient to protect the interests of franchisee parties and the Code should be amended to require good faith negotiations between the parties.

It should also be noted that OMA statistics have estimated that the majority of referrals to the OMA are from solicitors and industry representatives such as the Franchise Council of Australia. This indicates that those franchisees that either do not have collective industry support, or access to legal representation are less likely to use mediation as a means of resolving their disputes with franchisors. Given that mediation is proposed to be an accessible and cost effective alternative to litigation, it raises questions as to whether the current system is effective, given that it is not clear that it is necessarily utilised by those said to be its target audience.

Additionally, OMA statistics have suggested that just fewer than 1000 disputes have been mediated since the inception of the OMA in 1998. This is in comparison to the 60,000 franchise units that are in operation in Australia. Even those who support the current system have agreed this is a very low number of recorded mediations. In MTAA's view, a system that is under utilised by those parties it is designed to assist, suggests that the system is not necessarily providing franchisees with a process that provides the results and outcomes that is expected from alternative dispute resolution. This point also substantiates MTAA's view that parties should have an obligation to mediate genuinely, in good faith, and with a legitimate attempt to resolve the dispute.

The Association supports the submission of John Levingston, Barrister-at-Law, Arbitrator and Mediator on the mediation panel of the OMA. Mr Levingston's submission highlights the current deficiencies of the mediation process, including the fact that there is no formal requirement to bargain in good faith and no sanctions where parties do not participate in good faith. Mr Levingston also points out that the Code is deficient in so much that it does not provide sanctions where parties do not have authorised persons attend the mediation. This can result in significant problems with franchisees being unrepresented and having limited bargaining power in the mediation process. MTAA further believes that the views of a practising OMA mediator such as Mr Levingston, should be given considerable weight as to considering the strengths and weaknesses of the mediation process.

MTAA also opposes those submissions to the Committee that have suggested that the current obligations under common law and section 51AC of the TPA provide sufficient protection to franchisees and that it is not necessary to include an obligation on the parties to act in good faith.

The Association is of the view that the implied common law duty can be contracted-out of through simple drafting of a franchise agreement. A particular submission to the Committee suggested that an implied common law duty to act in good faith is widely known and an accepted legal principle (thus not needing the term to be an explicit provision of the Code). However MTAA argues that it is not an absence of knowledge of the conduct that constitutes acting in good faith which has lead to disputes on this point. Rather it is the ability for franchisors to include provisions in franchise agreements which go against this duty, and nevertheless permit conduct not in "good faith" to occur, pursuant to the agreement. MTAA recommends that the only remedy to this deficiency under the Code is to include in the legislation an express obligation to act in good faith.

Secondly, the current provision at 51AC(4)(k) only indicates that a court may 'consider' whether the parties have acted in good faith, when determining whether unconscionable conduct has occurred. This element is one consideration amongst several, and MTAA submits that its inclusion in section 51AC(4)(k) is not sufficient to compel parties to act in good faith; as even when they fail to do so, their conduct may not reach the high benchmark of 51AC, and will therefore not constitute 'unconscionable conduct' under the TPA.

In conclusion, it is the recommendation of MTAA that the dispute resolution provisions of the Code need to be amended to include a requirement for parties to mediate genuinely and that an express provision for parties to act in 'good faith' be included in the Code.

Yours faithfully

MICHAEL DELANEY
Executive Director

12 November 2008