



# POAAL

Post Office Agents Association Limited  
ACN 006382314

Submission to the

## Parliamentary Joint Committee on Corporations and Financial Services

### Review of the Franchising Code of Conduct

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Post Office Agents Association Limited

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11 September 2008

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

Dear Secretary,

### **Inquiry into the Franchising Code of Conduct**

The Post Office Agents Association Limited (POAAL) submits the attached paper for consideration by the Parliamentary Joint Committee on Corporations and Financial Services for the above Inquiry.

POAAL represents the business interests of thousands of small business people. They include the owner/operators (Licensees) of almost 3000 Licensed Post Offices (LPOs). LPOs form almost 80% of Australia's network of post offices. POAAL members are also drawn from Mail Contractors who deliver mail and parcels under contract to [REDACTED] and about 650 Community Postal Agents.

As the peak industry body representing a network of 3000 franchised operators in the Australian postal industry, POAAL has a major interest in the Franchising Code of Conduct. Moreover, POAAL was a significant contributor to the original Code of Conduct.

If the Committee would like to clarify or discuss any matters raised in our submission, POAAL representatives would be available for discussion.

Yours faithfully,

Ian Kerr  
CEO

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## Introduction

The Post Office Agents Association Limited (POAAL) welcomes the opportunity to provide a written submission on behalf of its members to the Parliamentary Joint Committee on Corporations and Financial Services review of the *Franchising Code of Conduct*.

This submission addresses the Joint Committee's focus on

- Rights of franchisors and franchisees
- Obligation of franchisors and franchisees to act in good faith
- Interaction between the Code and the *Trade Practices Act* especially section 51AC
- The operation of the Dispute Resolution Processes (Part 4 of the Code)
- Other related matters

There is no doubt that the business model known as franchising is expanding rapidly throughout the world. It is emerging in Australia as a popular means of undertaking business. Although much has been done to establish a framework in which these businesses operate, there is a need to regularly review performance to ensure that it remains relevant to the needs of the community.

POAAL acknowledges the work of the Government in ensuring that regular reviews of the *Code* are undertaken. The amendments to the Franchising Code announced by the Federal Minister for Small Business & Tourism on 15 August 2007 and which came into effect on 1 March 2008 are an important example. Implemented following the recommendations of the Matthews Committee, they provide key advances in the framework for the franchising industry in Australia.

Inevitably in these issues there are questions about the proper role of government. On the one hand there are suggestions that governments should have a minimal involvement, relying on the free market to find an appropriate framework. Business is inherently risky and citizens have a responsibility to inform themselves when making business decisions. Governments are also rightly cautious about assuming risks that should be borne by properly informed citizens.

More recently, however, governments have needed to respond where large businesses have demonstrated a lack of responsibility to properly inform their investors and key stakeholders about the changing nature of business risks or the impact on their investment. In some cases these have had catastrophic results for stakeholders. The HIH investigations are but one example.

Governments need to find the balance of establishing a regulatory framework that influences trade without stifling its performance. Confidence in such a framework attracts business and investment to the jurisdictions that can create it.

## Rights of Franchisors and Franchisees

In this part of the review POAAL wishes to draw the attention of the Committee to a number of matters. These relate to: -

- Disclosure of information
- Information required to initially invest in a franchise.

### Disclosure of Information

It is an established principle that a properly informed market place is more likely to perform effectively when risks and opportunities are universally understood. To apply this principle, various regulatory authorities have extended and refined their requirements with respect to disclosure. This has been particularly so in industries such as banking and the financial services sector. These rules prescribe the extent, accuracy and regular availability of information that needs to be available to interested parties. The principles apply equally to those making what is often a substantial investment in franchising.

Good disclosure principles should provide information to the potential or existing franchisees about the product, the nature of the operations, all fees and charges, proposed business or network changes and information that enables them to compare business opportunities with other franchising companies.

The current requirements of the Code are that, following the initial purchase, a disclosure statement need only be provided once every 12 months and then only upon request by the franchisee.

In contrast, other authorities have identified at least five periods where disclosure is particularly relevant<sup>1</sup>.

If these guidelines were modified for the franchising industry they would involve providing information when:

- the franchisee is selecting the franchise operation from a particular company
- changes are being made to the nature of the operation or areas adjacent to the franchisee
- payment arrangements are changing
- a franchisee is actively seeking information (which may coincide with the other four times)
- immediately prior to making a firm commitment to purchase or when renewing a franchise agreement.

Companies registered on the Australian Stock Exchange must also commit to a regime of continuous disclosure. Given that many franchise operations, including those that operate in the Postal industry, exceed in total the level of

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<sup>1</sup> See ASIC Regulatory Guide 168



investment and turnover of companies on the ASX, it is sensible that similar principles should apply to franchisors including government business enterprisers.

The disclosure regimes<sup>2</sup> in other sectors of the business community are a useful guide to test the effectiveness of the disclosure regime for franchising organisations.

ASIC has found that the average investor has difficulty absorbing the large volume of information in some disclosure statements. Such investors are therefore deterred from using the information to make decisions.

POAAL can confirm from its own experience with licensees/franchisees that this is the case. A short form of advice is considered essential to provide a summary of defined core information relating to the business.

Using other regulatory authorities as an example it is recommended that the following characteristics should be mandatory in a disclosure document for franchisees:

- simple, easy-to-understand wording able to be comprehended by people unfamiliar with the industry involved;
- site-specific information about the proposed operation rather than generalisations, (franchisee-specific information must be declared in a prominent fashion, not hidden away);
- greater details regarding the number and type of disputes with individual franchisees, including the number involving legal action, franchise-specific dispute resolution or dispute resolution through the OMA;
- the franchisor's future business plans and targets (both existing and future franchisees need this information to make informed decisions about future investment such as refits or expansion);
- a reliable and informed contact point at the franchisor for the franchisee
- information of likely closures of existing franchises and opening of new franchisees in nearby sites (generalisations such as "...the franchisor reserves the right to open new outlets at its discretion" are unacceptable);
- any special arrangements that the franchisor has with other companies or suppliers which impact on franchisees, especially where there is some financial benefit to the franchisor; and
- any other changes that may have an impact on the turnover or value of the franchise, including plans to extend the operations of company outlets, loss leader campaigns etc.

In addition it should be incumbent on the franchisor to ensure that any changes to the Disclosure Statement are reasonable and explained in full. The implication for the franchisee needs to be clearly spelt out so that the franchisee can understand and properly consider the effect of the change on their business.

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<sup>2</sup> See ASIC Regulatory Guide 168

It is an established principle in both ASIC and ASX requirements that failure to disclose appropriate information or giving incorrect, misleading or false information is subject to penalty provisions of the law. This includes personal accountability for directors of the organisations involved. Similar provisions should exist for disclosure statements or information provided by franchisors.

It is recommended that franchisors must commit to a continuous process of disclosure similar to the disciplines imposed on companies listed with the Australian Stock Exchange.

### **Information required to initially invest in a franchise.**

Just as many potential franchisees are not properly prepared for the nature of responsibilities of a franchise business so it is that franchisors are not necessarily prepared for the launch of their business as a franchise model. Many seem to be unaware of the discipline and processes that need to be in place for a franchise system to work effectively as a business.

One model for this preparation is that published by the Australian Stock Exchange under the topic of "Is your organisation ready to list?" Many franchise models have the characteristics similar to those organisations seeking to raise public funds to undertake their operations.

In the example of [REDACTED], over one billion dollars is estimated to be invested by franchisees in that franchising model. This is far in excess of most initial public offerings associated with a listing on the stock exchange.

It makes sense that the discipline of companies listing on the exchange should also apply to those establishing franchising models that are planned to involve substantial capital investments.

The ASX suggests that the following should be considered by companies planning to list:

- What are your organisation's long-term goals and strategies?
- Are there skill gaps at the senior management and board level?
- How will these be resolved in a listed environment?
- Are directors and senior managers prepared for greater disclosure, accountability and transparency after listing?
- Is your organisation's culture ready for listing?
- Are there tax issues to be resolved?
- Are strategies in place to retain key employees and key customers?
- What initiatives (e.g. acquisitions) need to be completed before listing?
- Are your operational, financial and management information systems sufficiently robust for a listed organisation?
- Have you taken account of corporate governance best practice?
- Is the timing right for a listing, in terms both of the business and of market conditions?



Most of these questions need to be answered by potential franchisors. Companies prepare for an IPO via a prospectus. Using the same principles, potential franchise investors need a document with similar reporting and disclosure.

A new franchised operation could be licensed to operate only when this assessment has been completed satisfactorily.

In the current *Franchising Code of Conduct* issued by the ACCC the disclosure requirements vary depending on the expected turnover of the franchisee. If it is less than \$50,000 a short form document is provided. Over that amount a long form document is required.

In our view the turnover criteria should apply to the total franchise model, not just an individual franchise. People are potentially investing in the total business as well as their particular area of operation.

Just as a prospectus is subject to approval and scrutiny by the Australian Securities and Investments Commission, so a prospectus for a franchising company should be subject to the governance review of a relevant authority.

It is recommended that an organisation contemplating establishing a franchise operation be required to demonstrate that it can meet similar criteria just as the ASX and ASIC provide scrutiny over companies prior to their listing.

## **Obligations to Act in Good Faith**

POAAL agrees that there is an urgent need to have an explicit obligation to act in good faith incorporated into the Code. This needs to match or enhance that dealt with in the *Trade Practices Act*. The current provisions do not create an explicit and positive obligation to act in good faith and this emphasis needs to be addressed in the Code.

At common law, in the absence of a partnership, employment relationship or specific contractual requirement, there is no obligation upon contracting parties to act in good faith in connection with their dealings. However, this principle is only suited to an adversarial situation, where the parties have opposing and competing interests. It is ill suited to a franchising relationship where the parties are expecting to work together collaboratively in a de-facto partnership.

In a partnership there is a legal obligation on the partners to act in good faith towards each other. A franchising relationship operates more like a partnership (at least commercially) than a contract and so the good faith principle should apply. There should be a mutual good faith obligation.

From our experience, in the absence of an express good faith obligation, [REDACTED] does sometimes act in bad faith or disregards the interests of the franchisee. When challenged, [REDACTED] relies on the strict wording of



the Code to protect itself. This black letter or literalist approach is inconsistent with the spirit of a franchise.

To ensure that the spirit (of collaboration) is respected it is recommended that the Code contain a specific requirement that the parties operate in good faith.

## **Interaction between the Code and the TPA**

### **(S51AC - UNCONSCIONABLE CONDUCT IN BUSINESS TRANSACTIONS)**

POAAL has drawn the attention of the ACCC to a number of events considered to be the misuse of power by ██████████ in undertaking business relationships with its Licensees and mail contractors. These include situations where aspects of the area of the LPO subject to ██████████ control have been varied by ██████████ without agreement, using ██████████'s capacity to delay or frustrate the outcome of mediation, and refusing to consider price changes for mail delivery where fuel costs have significantly escalated. Although the ACCC has investigated these matters it has concluded that the test required under the Trade Practices Act related to unconscionable behaviour has not been met to the level required for a prosecution to succeed.

An alternative is to establish companion elements in the *Franchising Code* where the ACCC is empowered to require explanations of franchisors about their behaviour. If appropriate, those companies could be put on notice that the pattern of their behaviour needs to be modified if it is not to receive some sanction from the ACCC. It is far better to cull out trends that start to constitute a misuse of power rather than try to redress problems or seek remedies once it has occurred.

It is recommended that the *Franchising Code* be expanded to deal with behaviour of franchisors that reflect unconscionable conduct that is not subject to the same strict tests and penalties required in section 51 of the *Trade Practices Act*.

## **Dispute Resolution Processes**

The ACCC acknowledges that it receives approximately 1,000 complaints each year from consumers and businesses about franchising<sup>3</sup>. However, many complaints fall outside the jurisdiction of the ACCC and the *Trade Practices Act 1974* because they are of a private contractual nature or cannot be substantiated to the degree required to allow further action.

Our experience is that a satisfactory outcome is rarely obtained for our members from the process managed by the OMA.

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<sup>3</sup> ACCC web site September 2008

Franchisees are often reluctant to proceed with the OMA review because:

- they lack skills to adequately document the dispute, especially when compared to the resources available to the franchisor;
- they fear later retribution from the franchisor;
- costs are high, particularly if the dispute is over a minor matter;
- franchisors often come to mediation resolved to maintain their original position or send a representative to mediation lacking the authority to achieve a result;
- franchisors draw out proceedings, placing immense pressure on franchisees, who, faced with the mounting costs of mediation and the need to return to their business, succumb to the franchisor's demands.

A better model is a dispute resolution process involving a stepped process with early discussion and resolution at lowest management level. This includes provision for higher referral if the dispute is not resolved quickly and to the satisfaction of both parties. Such a system was established through negotiation with [REDACTED] by POAAL.

In other overseas jurisdictions similar problems seem to exist. In the United States it has been noted the franchisor/franchisee relationship can easily cause conflict if either side is incompetent (or not acting in good faith). For example, an incompetent franchisee can easily damage the public's goodwill towards the franchisor's brand by providing inferior goods and services, and an incompetent franchisor can destroy its franchisees by failing to promote the brand properly or by squeezing them too aggressively for profits.

Franchise agreements in the United States are described by industry authorities as unilateral contracts or contracts of adhesion wherein the contract terms generally are advantageous to the franchisor. This is especially the case when there is conflict in the relationship. The legal internet website NOLO, ([www.nolo.com](http://www.nolo.com)) in a recent article indicated that one of "Ten Reasons Not to Buy a Franchise" was the "Lack of Legal Recourse", which indicates "As a franchisee, you have little legal recourse if you're wronged by the franchisor. In the USA most franchisors make franchisees sign agreements waiving their rights under federal and state law and in some cases allowing the franchisor to choose where and under what law any dispute would be litigated. The Federal Trade Commission (FTC) investigates only a small minority of the franchise-related complaints it receives."

In the United Kingdom, there are no franchise-specific laws. Franchises are subject to the same laws that govern other businesses. For example, franchise agreements are produced under regular contract law and do not have to conform to any further legislation or guidelines. There is some self-regulation through the British Franchise Association (BFA). However there are many franchise businesses that do not become members, and many businesses that refer to themselves as franchisors that do not conform to these rules. There are several people and organisations in the industry calling for the creation of a framework to help reduce the number of "cowboy" franchises and help the industry clean up its image.



On 22 May 2007<sup>4</sup>, hearings were held in the UK Parliament concerning citizen-initiated petitions for special regulation of franchising by the government of the UK due to losses of citizens who had invested in franchises. The Minister of Industry, Margaret Hodge, conducted hearings but resisted any government regulation of franchising with the advice that government regulation of franchising might lull the public into a false sense of security. The Minister of Industry indicated that if due diligence were performed by the investors and the banks, the current laws governing business contracts in the UK offered sufficient protection for the public and the banks.

It is recommended that the ACCC undertake specific research into the effectiveness of the current dispute resolution processes and recommend improvements.

## **Other Matters**

In this section POAAL would like to discuss the following matters.

- Cooling Off periods
- Research and Verification
- Performance of the Franchisor
- Training
- Relationship between franchisor and franchisee representative organisation
- Ready access by franchisee to an authority person at the franchisor
- Conveying information in writing

## **Disclosure and Cooling Off Periods**

The ACCC *Franchising Code of Conduct* provides for the potential franchisee to be provided with various documents, including the disclosure document, at least 14 days before entering into a franchise agreement.

It has been the experience of POAAL with [REDACTED] that it is unusual for this period to be properly observed. Often the document is provided on the day the final transaction for transfer takes place.

In the circumstances, it is our opinion that a period of at least 30 days should be provided to the prospective Licensee either prior to the agreement or as a cooling off period after the document is provided. Under the Code the current cooling off period is seven days.

At the time of a franchisee changeover the franchisor should not be able to surreptitiously include changes, which have an adverse impact on the new franchisee including reducing or restricting payments or conditions.

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<sup>6</sup> Westminster Hall, Tuesday 22 May 2007- Franchise Industry

For instance, [REDACTED] often demands that the new Licensee agrees to a floor plan for the post office premises either immediately prior to or on the day of the take over. After a few months the franchisee discovers that the floor plan significantly favours the franchisor and handicaps the franchisee in the operation of their business.

A new or pending franchisee is too inexperienced to understand the implications of the changes at the time of take-over and finds it difficult if not impossible to reverse changes at a later date. Similar examples are changes to security requirements, fit outs and product mix.

The Cooling Off period should include these changes implemented at time of transfer of the franchise. Alternatively the *Franchising Code of Conduct* should be amended to prevent changes at a time when the franchisee is new, inexperienced or vulnerable.

It is recommended that the prior disclosure period be extended to 30 days and the cooling off period to 14 days.

### **Research & Verification**

When considering a franchise purchase the ACCC recommends that the investor undertake research to understand from others how the system works and the relationship with the franchisor.

This is good advice but difficult too implement on an individual basis especially in country areas. It is almost impossible to undertake reasonable research in a Greenfield site where is no past history to assist with business assessments of the investment potential.

It is recommended that appropriate research material should be provided by the franchisor in a prospectus type document. Details of any industry franchisee association should also be provided to prospective investors.

### **Performance of the Franchisor**

In the USA the Franchise Business Review conducts research amongst franchisees on a regular basis. These evaluate franchisee satisfaction against five criteria of:

- Training and Support
- Systems
- Relationship with Franchisor
- Financial Opportunity
- General satisfaction.

Each of the criteria has sub-categories that are assessed as part of the evaluation. For example in Training it also assesses

- Initial training
- Opening support
- Ongoing training and support
- Field support
- Advertising and promotion



Independently conducted research assessing franchisor performance against these criteria should be undertaken by each franchisor and made available in the company's disclosure document. It would provide an incentive for the franchisor to ensure its franchisees rated the company well and inform incoming investors of the company's performance.

It is recommended that the ACCC undertake independent research amongst franchisees and franchisee representative organisations on a regular basis using the standards used by the USA research to test the effectiveness of franchise operations in Australia. It is further recommended that this information be published on the ACCC website and made available to franchisees in an appropriate prospectus.

## **Training**

One of the key elements in a successful franchise operation is that the franchisors offer franchisees significant training, which is not available to individuals starting their own business. Although training is not free for franchisees, it is supported either through the franchisor's traditional franchise fee or as a separate fee/charge.

In Australia there remains little recognition amongst a number of franchise operators of the value of training. This is often consigned to a couple of days standing over the shoulder of other operators.

POAAL has had numerous experiences where poor performance of franchisees has resulted in a dispute with [REDACTED] even to the extent of allegations of fraud. A common outcome when the facts are revealed is the lack of understanding by the franchisee of the organisation's processes and systems leading to error.

This training process should also be used by the franchisor to make a reasonable assessment of the new franchisee's skills and ability to operate in the business.

The key priority in the transfer or sale of franchises is the purchaser's capacity to pay not the capacity to undertake the role.

A disciplined training program would identify those that cannot undertake the role effectively thus maintaining the quality and consistency of the franchise.

Training of franchisees is poorly implemented by [REDACTED]

It is recommended that training to accredited industry training standards be required in the Code to ensure that the interests of the community, franchisee and franchisor are safeguarded.

## Relationship between franchisor and franchisee representative organisation

It has long been the experience of POAAL that an active franchisee representative body is a material element in successfully undertaking a franchise operation. Once a franchise operation reaches a certain critical mass there are key benefits to both franchisor and franchisees by establishing a representative body for franchisees.

In brief it is an effective means to negotiate:

- changes to operations;
- introduce or withdraw products and services;
- marketing campaigns; and
- commissions or payments.

If used properly such bodies also give the franchisor the benefit of front-line input about customer responses, new ideas to enhance or expand the business and to identify faults or inefficiencies in the operations that have been implemented.

Sadly it is also the experience of POAAL that the franchisors, in our case [REDACTED], can sometimes view these bodies in an adversarial manner. This occurs in particular when the franchisor:-

- is attempting to misuse its bargaining power;
- imposes new requirements on franchisees without just reward; and
- makes changes to undermine the effectiveness of the franchise network and the investment that franchisees have made in the business.

One example includes [REDACTED] sending its sales force to redirect clients from the franchisee to the corporate operation when a client has reached a certain scale.

A strong franchisee representative body helps to keep balance in the relationship between the small business owners of the franchise and the larger corporation. It can be a forum to resolve business strategy as well as provide sensible governance and dispute resolution facilities well before there is a need to call on government agencies or authorities to mediate.

It is recommended that the Commission mandate the establishment of an independent franchisee representative body in all franchising systems with more than, say, 25 franchisees.



## **Ready access by franchisee to a person in authority at the franchisor**

A successful franchise system requires ready access for the franchisee to a person of authority from the franchisor. Too often issues become arguments because the person within the franchisor is untrained or operates without authority when attending to questions or concerns from franchisees.

It should be part of the assessment made of organisations contemplating establishing a franchise system that they have a proper process in place to manage the day-to-day demands of a franchisee network.

It has been POAAL's experience that without this measure in place:

- undertakings by franchisors, relied upon by franchisees, are not honoured;
- franchisees can be bullied or harassed into following the inappropriate directions of an ill-informed agent of the franchisor; and
- issues that are misunderstandings or matters that require prompt responses quickly turn into disputes.

It is recommended that the Code require that a representative with the authority of the franchisor negotiate in good faith with the franchisee.

## **Conveying information in writing**

Again it has been the experience of POAAL that agents of a franchisor often initiate changes or make demands on franchisees via the telephone or other informal means. Franchisees get advice about changes to commissions, how rewards for franchisees are calculated as well as a host of other details that the franchisee relies upon in undertaking their business.

Very few of these directions or advices are provided in writing by the franchisor. In subsequent disputes or misunderstandings there is no record of what was said or undertaken. In these circumstances the franchisee is at a severe disadvantage and this acts to the detriment of the relationship and the success of the franchisee's business. There are many examples where this has occurred in the system operated by [REDACTED].

It is recommended that in the interest of good governance in a franchise system that instructions, new advice and requirements and undertakings be committed to writing by the franchisor before the franchisee is required to react to them.

## Summary of Recommendations

In summary it is recommended that

- franchisors must commit to a continuous process of disclosure similar the disciplines imposed on companies listed with the Australian Stock Exchange;
  - an organisation contemplating establishing a franchise operation be required to demonstrate that it can meet similar criteria just as the ASX and ASIC provides scrutiny over companies prior to their listing;
  - to help establish the appropriate spirit of collaboration that the *Code* has a specific requirement that the parties operate in good faith;
  - the *Franchising Code* be expanded to deal with behaviour of franchisors that reflect unconscionable conduct that is not subject to the same strict tests and penalties required in section 51 of the *Trade Practices Act*;
  - the ACCC undertake specific research into the effectiveness of the current dispute resolution processes and recommend improvements;
  - the prior disclosure period be extended to 30 days and the cooling off period to 14 days;
  - appropriate research material should be provided by the franchisor in a prospectus type document (details of any industry franchisee association should also be provided to prospective investors);
  - the ACCC undertake independent research amongst franchisees on a regular basis using the standards used by the USA research to test the effectiveness of franchise operations in Australia;
  - the above information be published on the ACCC website and made available to franchisees in an appropriate prospectus;
  - training to accredited industry training standards be required in the Code to ensure that the interest of the community, franchisee and franchisor are safeguarded;
  - the ACCC mandate the establishment of a franchisee representative body in all franchising systems with more than, say, 25 franchisees;
  - the Code require that a representative with the authority of the franchisor negotiate in good faith with the franchisee; and
  - in the interest of good governance in a franchise system that instructions, new advice and requirements and undertakings be committed to writing by the franchisor before the franchisee is required to react to them.
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## Glossary

ACCC	Australian Competition and Consumer Commission
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
LPO	Licensed Post Office
OMA	Office of the Mediation Advisor
POAAL	Post Office Agents Association Limited
TPA	Trade Practices Act