

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
Australia

BY EMAIL - corporations.joint@aph.gov.au
Mail Copy To Follow

Dear Sir/Madam

Inquiry into the Franchising Code of Conduct

Thank you for the opportunity to provide a submission to the Federal Parliamentary Joint Committee on Corporations and Financial Services (the Committee) Inquiry into the Franchising Code of Conduct and related matters.

Background: My company, Icesherbert Pty Ltd as Trustee for The G Clarke Family Trust Pty Ltd T/A Inosoft Solutions (in liquidation) provided IT and related business services to members of the Franchise Industry (namely [REDACTED] Pty Ltd).

Through my dealings with [REDACTED] I observed systemic bullying and intimidation of franchisee's, a complete disregard for the adverse impact of poor franchisor management decisions on franchisees, an unwillingness to empower franchisees through a comprehensive education and professional development process, management deliberately engaging in deceptive and misleading conduct with respect their dealings with both franchisees and others, a total disregard for the conditions of enforceable undertakings entered into with the ACCC, and of greater concern an abuse of market power through various collusive agreements designed to reduce competition.

In any event the liquidation of my business was in fact a direct result of the blatant disregard for the Trade Practices Act by [REDACTED] Pty Ltd.

While I understand your inquiries primary focus is related to the Franchising Code of Conduct my submission primarily highlights that the Committee would not be serving the broader interests of the community as a whole if it did not take this opportunity to address the underlying issue that has lead to the need for this inquiry.

In closing I thank you for your time and advise that should the committee deem it of benefit I would be pleased to provide oral evidence in support of my submission.

Yours faithfully

Garry Clarke

Garry Clarke [REDACTED]

Submission

The committee members will be well aware that the Australian Small Business Sector, of which franchisee's play a major part, makes a significant contribution to the economy and in fact it has been said that collectively the Small Business sector is the largest employer in Australia.

Despite this contribution and the vital importance of that contribution to the long term success of the economy the small business sector has been largely neglected and nowhere is that neglect more evident than in the alarming growth in the number of business liquidations that are a direct result of a larger business's total disregard for their obligations under the Trade Practices Act (TPA).

Unfortunately the cost of this widespread non compliance is largely hidden and as such the substantial cost to the Australian economy has been, for too long, overlooked.

As a result of my own experience I have undertaken considerable research in this area and have identified that the rising cost of continued inaction significantly out ways the cost of appropriately addressing the core issue behind the blatant disregard for the TPA by particularly larger businesses in their dealings with smaller business's.

Overview of the types of cost;

- ❖ Increased costs to consumers
- ❖ Lost taxes
- ❖ Lost wages and entitlements
- ❖ Increased dependency on the welfare system
- ❖ Increased costs to the health system
- ❖ Increased costs related to government inquiries
- ❖ Family breakdowns
- ❖ An indeterminable cost being the lost opportunity's

Based on my experience and supported by both my research and comments by others in their submissions to this inquiry it is clear **the root cause of the issues** being created for franchisees and other small business's **is not a result of a significant deficiency** in the Franchise Code of Conduct or the provisions in the TPA **but rather it is a direct result of the absolute and abhorrent refusal** by the Australian Competition & Consumer Commission (ACCC) to take appropriate action against a larger business that has demonstrated a complete disregard for the TPA in relation to their dealings with a smaller business.

My research into the **community's perceptions of the ACCC's effectiveness** has revealed that the ACCC has **an extremely poor reputation** and they are in the vast majority of cases referred to as a **"lame duck" or "toothless tiger"**. Of greater concern and from my discussions with various members of the **legal and accounting profession's** it is simply regarded that **making a formal complaint to the ACCC about a breach of the TPA is a total waste of time.**

While I am quite sure that ACCC Commissioner Mr Graeme Samuel will do his best to refute these assertions, the fact remains that the ACCC regards that;

- ❖ All complaints to the ACCC by a Small business related to adverse outcomes resulting from their dealings with a large business are "Contact Disputes"

- ❖ Small Business has no right to expect the ACCC to provide them with Pro-Bono legal services
- ❖ With respect small business to large business dealings, the TPA is self administering

With respect my own dealings with the ACCC related to the [REDACTED] matter I have spoken to a number of ACCC staff including [REDACTED], [REDACTED] and [REDACTED].

On the whole I found the attitude of these three people in particular appalling with [REDACTED] failing to appropriately investigate my claim, [REDACTED], following an initial conversation, refusing to take or return calls. With respect [REDACTED] he is best described as a conceited and condescending individual who, when questioned as to why the ACCC had not identified the numerous breaches of the TPA five separate lawyers had advised me were clearly evident in the brief I had provided both the lawyers and ACCC, responded with "Maybe I'm just smarter than the lawyers you've spoken to".

I have enclosed for your perusal a copy of the correspondence I received from the ACCC advising that they would not be pursuing [REDACTED] for their blatant disregard of the law and highlight point (iii) the potential for action to have a worthwhile educative or deterrent effect;

This point is of particular interest because the long term effect of the ACCC's refusal to take action in relation to a small business raising issues of a larger business's non compliance with the TPA has only served to educate larger business's with a propensity to disregard the TPA that they are in fact immune from prosecution by the ACCC. While many are not as blatant in their acknowledgement of this as the party mentioned in [REDACTED]'s submission to the inquiry the broad understanding in the business community is that I can do as I please as the ACCC can't or won't do anything.

This leads me to a number of recommendations that are designed to address the specific issues related to the weakness's in the Franchising Code of Conduct, the issues that the boarder small business community are encountering as a result of their dealings with a larger business who totally disregards their obligations under the TPA, and of greatest importance restores the general community's faith that the ACCC is doing its job in the way that they have every right to expect.

RECOMMENDATIONS

1. A full overhaul of the ACCC that at a minimum
 1. Replaces the current discretionary powers with respect investigation and prosecution for a breach of the TPA with a set of operational parameters that are in line with those that apply to federal and state police agencies.
 2. A replacement of staff who are incapable of properly investigating a matter with staff who have the skills needed to thoroughly investigate complaints.
 3. Implements a zero tolerance strategy designed to educate those with a propensity to disregard their obligations under the TPA that they are no longer immune from prosecution for breaches of the TPA.
 4. The establishment of a mediation unit within the ACCC. The purpose of this unit would be twofold
 - ❖ to replace existing industry funded ombudsmen and dispute resolution process's with a party that is totally impartial.
 - ❖ Intervene in disputes between small and larger business's where the primary issue of the dispute is related to a breach of the TPA.

5. Changes the culture in the ACCC so that it no longer discriminates between a general consumer and business consumer.
2. Full integration of all existing Industry Codes of Conduct into the TPA
3. Amendments to the current legal process related to a prosecution by the ACCC for a breach of the TPA so as the damages aspect related to the breach is run in parallel with the ACCC's case. This would replace the existing high cost and absurd scenario where in effect the ACCC's case is rerun as part of the damages case.