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

12 September 2008

Dear Secretary,

Inquiry into Franchising Code of Conduct.

Franchising is a critical part of the Australian commercial landscape. It continues to grow and its governance is a vital small business issues.

The Code is accepted as being here to stay and I welcome that. However, any mandatory code should not unduly stifle the developments of franchises yet on the other hand franchisees need to be adequately protected. Franchisees are usually in a captive situation and that needs to be factored in the regulatory mix. Further franchises need transparency and good faith by all concerned.

Both franchisors and franchisees need to be fairly treated by the Code. The Code should be the rules of the game for both.

Franchise contracts are by their nature, and in comparison with traditional contracts, incomplete. This allows a degree of flexibility necessary to respond to changing business conditions. Another aspect common to franchise agreements, is that one party may exercise more power with respect to controlling the overall nature of the business agreement; in the case of franchising the franchisor, as the owner of the brand and the business system, occupies this position.

Any Code needs to be dynamic and regularly reviewed and updated if need be. Consequently this Inquiry is most welcome. I note the terms of reference and have taken these into account in this submission.

In my opinion there are five important areas that need review. These are,

- **The Definition of a Franchise.**

Agency issue

The four point definition of a Franchise for the purposes of the Code (section 4 (1)) is very prescriptive and inflexible. Whilst prescription may appear to lead to certainty it is also often a road map for avoidance.

In my view the Committee should look at this issue, in particular agreements that are agency arrangements or are simply called agency arrangements which for all intents and purposes have franchise characteristics but may lack one of the four necessary criteria. In particular the issue of payment of moneys as required under the current definition. In agency arrangements that payment may be by way of commission and hence falls outside the definition.

It is my view that the Code should have the flexibility to give protection to what appear to be franchises even though not all of the four points are met or where avoidance measures appear to have been used.

20% Rule.

The other definitional issue is the requirement that the Code only applies if the franchise relates to 20% or more of the turnover of the franchisee. That appears to be anomalous and leads to odd demarcations. Surely a franchise is a franchise and the appropriate rules should apply.

- **The Obligation to act in “good faith”.**

Parties to a franchise agreement should have a statutory obligation to act in “good faith”.

There should be no controversy about that.

This was recommended to the Federal Government back as far as 1981 in the “Pengilly Report”.

This suggestion has been opposed in the past as “good faith “is in section 51AC but that is no reason for it not being part of the Code as well and enforced as part of the Code. The two provisions should ideally co exist. In any case “good faith “is only a factor in section 51 AC, I suggest that it should be more than that in the Code.

- **End of agreement issues**

The Code needs to cover end of agreement issues. The parties should agree at the outset on their entitlements and responsibilities when the agreement expires. This should amongst other issue cover goodwill and the conditions that relate to a renewal of the franchise. A formula for compensation of goodwill should the franchise not be renewed should also be included in the agreement.

Oil code covers termination issues and whilst imperfect some guidance can be gained from that Mandatory Code.

Consideration should also be given to removing/modifying the right of a franchisor to include, in a franchise agreement, the right to unilaterally terminate a franchise agreement. Currently this is dealt with in clause 22 of the Code (termination on reasonable notice). It is recommended that if such a right was to be maintained, adequate compensation or a guaranteed buy-back be provided for and included in the disclosure document.

Finally, in relation to end of agreement issues, the franchisee's right to unilaterally vary a franchise agreement. should be removed. Again some have said that this issue would be dealt with through section 51AC of the TPA- a unilateral variation clause is a factor that may indicate a franchisor has engaged in unconscionable conduct. However in section 51AC it is only a factor. I suggest that it be a prohibition in the Code.

- **Dispute Resolution**

The Code has a mandatory process of dispute resolution but it is imperfect. There are difficulties in getting the parties to mediation in a timely fashion, mediation at times becomes like a court case and mediation outcomes are uncertain and often cannot be enforced.

Intervention needs to be more timely and flexible.

Serious consideration needs to be given to giving a greater role to the ACCC or some other body to actively intervene in franchise disputes and have a cease and desist type of power or the infringement notice power that is in the Fuel Watch Bill currently before the Parliament.

Codes involving interdependent parties such as franchisor and franchisee must have an effective dispute resolution regime and one to effectively deal with breaches of the Code but not a regime that by its very nature can cause delay and hence aggravates matters.

- **Role of ACCC and interaction with Section 51AC.**

The ACCC is often not able to respond to franchise complaints in a timely manner. Many complaints are not seen as fitting into ACCC priorities and hence are not pursued by the ACCC.

The ACCC approach often appears to be too evidence based in its assessment of complaints generally and in particular franchise matters.

The ACCC should be prepared to step in where it sees systemic issues and seek to resolve them short of litigation, with litigation always there as a last report. See comments above.

Section 51AC

In relation to section 51 AC, it is noted that the Ministerial Council on Consumer Affairs has accepted amending the TPA to prohibit “unfair’ conduct in some situations. That concept should cover section 51AC and in particular small business captive situations, such as franchising.

Conclusion.

I welcome the opportunity to expand on this submission.

I note that there are many submissions to the Committee in relation to individual franchise issues. The ACCC should be asked to report to the Committee on its assessment of each complaint, some of which have been assessed in depth by the ACCC prior to this.

Yours truly,



Hank Spier
Principal

Background to author.

I am a former CEO of the ACCC.

Spier Consulting P/L consults to the private sector on trade practices and regulatory issues.