

## Submission to Joint Committee on Corporations and Financial Services Inquiry into Franchising Code of Conduct.

### INTRODUCTION

I wish to submit to the above inquiry on the question of Commission Agency Agreement as it is being enacted by [REDACTED] in Australia.

These agreements are being issued to recruited agents to sign before taking up an agency. Experiences in Tasmania have pointed to the fact that this particular company is not providing a finalized copy of agreement to the clients leaving the question of business viability and practicalities of operating to be discovered after the contract has been entered into.

As mentioned in the introduction to the inquiry, the commissioned agents are also involved in a contractual arrangement between two independent parties with continuous obligations. And as with the franchising code, these relational contracts are prone to adaptation as time passes and circumstances change or have been misrepresented and there is strong evidence that the Company exercises the control and takes a commission on every aspect of the business, whether they have an interest in it or not.

On referral to such dispute mechanism as the Oil Code, once again it appears that the commissioning Company has the power to engage the full gambit of the law overwhelming the ability of what is ostensibly a very small business to compete equally. This mechanism is undertaken by a lawyer acting as arbitrator who charges \$330 per hour and requires an upfront fee of \$1,650 as a deposit.(See Appendix 1) Those who have been evicted are not going to be able to access the disputes arrangements as by the time the arbitrator is called in, the business arrangement has irrevocably broken down and the argument is over the remaining assets. By this time it is too late to settle the dispute so that the agent can return to work.

### CURRENT CONTRACT ARRANGEMENTS

There seems to be four styles of contracts:

1. Petrol companies own the site and employ the staff.
2. Retailers own the site and seek the petrol company out themselves.
3. Retailer is a franchisee where the company owns the site and franchises out.
4. Commissioned agents put in by the petrol company but their return is only on commission and the petrol company takes commission on every cent that is taken at the station.

[REDACTED] does not appear to have any operating under 1., but varies between the other three depending on the sites, but seem to prefer 4, but that is the area most fraught

with misunderstanding. Many of their agents cannot, and cannot be expected to, meet the unrealistic targets the company is setting in their contracts in Tasmania. Copy of a contract can be found in Appendix 2.

## **The Tasmanian Experiences**

### **Case 1**

The first time I was made aware of the difficulties of these arrangements was when I was called by a commissioned agent who had been told that as she was not abiding by the terms of her agreement that she would have to relinquish the site she was occupying within five days. Part of the agreement was the occupation of a house which was integral to the site and where she had set up house with her husband and three children.

They had signed the agreement in February and they were told in April that they were not complying with the terms of the lease. They informed me that they had not received a copy of the contract that had been signed in February and despite numerous emails and phone calls, they only received what appeared to be a doctored copy when their lawyer requested it. But at that time they were already in dispute.

Efforts to bring the parties together to discuss the differences failed as the Company refused to discuss the matter with a third party. The situation was complicated as the agent was a fairly recent migrant and had English as a second language. It appears that the Company had been targeting some of those people who had run small businesses on the mainland and offered inducements to take up these contracts. This led to considerable misunderstanding on both sides as to the effect of the details of the contract. The agent did not engage a lawyer to start with and therefore was unable to verify some of the details of the contract that were in dispute and at the stage of eviction, it was unclear whether the breach was fact or not. The lock out included physical exclusion of the agent from the site, lock changes on the business and confiscation of the day's takings.

In any event, the police were called to undertake the eviction, but with local intervention were prevented under State Law from evicting the family from the house and they could only seek notice of two months to leave the premises. This left the police having to prevent the agent from entering the business side of the property to collect their belongings and stock. As much of their stock was perishable and after a week, they were asked to remove it, but with nowhere to put it had to be dumped and thus they were considerably out of pocket.

### **Case 2**

As a result of publicity from Case 1, I was contacted by some eight other agents contracted to this Company.

Once again, a woman and her husband were agents in the north-west, her husband took sick and was admitted to hospital. Within hours, the woman was contacted to see how she was going to continue running the business. She sought time to find some assistance and lesser hours so that she could visit her husband but that was denied.

The company once again moved in and prepared to evict this agent for breach of contract. Once again, there were goods and equipment owned by the agent that were taken over by the company without any real ability to recover them.

### **Case 3**

An agent at St Helens was closed down without any notice after the Company decided that the agent was not meeting their targets and once again goods and equipment were in dispute.

### **Case 4**

This time was in Zeehan on the West Coast of Tasmania, this service station was only one providing a cash petrol service. This time apparently the agent was being pushed to stop taking small accounts in a town as it was a breach of the lease. This would mean a 30 day account situation, but the petrol was sold and accounted for daily and it was seen as a breach because the funds could not be banked on a daily basis.

During the dispute, the agent had an accident and was taken to hospital in Hobart. At this point the petrol station was closed by the Company and the agent locked out. This left the town without a petrol station and this has caused great hardship there. The Council has tried to intervene and open it, but without any long term solution, so it had to give up trying to have the station operate again and the Company just pulled out.

### **Other comments on cases**

On four other occasions, I have been made aware of difficulties with the contracts that have in the most part not been provided with contracts. Some of these had already left the sites but had lost considerable amounts of money during this process.

The first case I was advised that there had been three people contracted to work that site in the previous 18 months and all had apparently failed to meet targets. This site is on the main road between Hobart and Launceston and attracts a considerable passing trade.

## **CONTRACT EXPECTATIONS**

It appears from my cases that the expectations of the company and those of the agents are entirely different. Many agents have gone in believing they are running their own small business and that they were able to set their hours of work, their days of banking, their ancillary businesses to petrol selling as their way of delivering a service to the community.

This is not the expectation of the Company. They expect to take a commission on every single good and service, they require daily banking and expect the hours of opening in some sort of range of about 16 hours. This is not really understood or described to the agent in the contract – nor is it a fair contract as agents are working for less than \$5 per hour and it gives them little opportunity to employ anyone to help them so they can abide by the other parts of the contract.

There is an expectation by the Company for a target to be reached in takings, yet they are not prepared to assist in providing equipment for any ancillary business such as fast food outlets, mechanical repairs etc.

There is a regular turnover of agents in some of the sites, yet no maintenance or repairs are carried out by the company and agents can be caught out for not complying with local council regulations and are up for the costs of repairs etc when their contract is finalized. There does not appear to be a regular inspection of premises in between agents.

## CONCLUSIONS

Many of the agents who have contacted me could be considered naïve and inexperienced in dealing with many of these sorts of contracts, but they are ordinary small business people who have become out their depth in these business arrangements. Some have been recruited through I believe false and misleading representations.

The methods of contract operation are very one sided and in some cases have shown unconscionable conduct on behalf of the company, especially during termination procedures.

There is no health and safety advice provided and there is no accredited training by the company to allow the agent to operate within the terms of the contract. They are basically on their own once they have signed on the dotted line and put up substantial collateral as a guarantee. It is this money that is at risk without any similar undertaking by the Company.

Mediation methods are costly and come too late in any dispute to be taken up fully by the agents, leaving many agents without any ability to start again in some other enterprise. There is no provision for all assets to be frozen until an agreement of termination has been worked out. It begs the question as to what all the funds that are forfeited through closures of sites are being used for.

The staff of this petrol company appear to be on some sort of contract which encourages certain stand-over tactics to get agents to “comply”. We have been told of threats, harassment and even assault in some cases.

The Workplace Ombudsmen has some responsibility for the Independent Contractors Act 2006. But in the case of a Commission Agent, it is not deemed as a subcontractor and as

such does not fall within the scope of this Act. So that avenue is not available to commission agents.

The last Government's AWAs are still operating within many petrol companies and as such have denied the agents and their staff any rights under the employer employee legal relationship. Certainly the staff of agents appear to have no rights at all.

## **RECOMMENDATIONS**

**That a review be undertaken by the Government of all these types of contracts with a view to bring standard guidelines and responsibilities across the nation.**

**That the ACCC has an opportunity to play a role in looking at the conduct of companies that use these sorts of employment contracts and ensure there is balance in their contracts.**

**APPENDIX ONE**

**OILCODE MEDIATION PANEL**

**[REDACTED] - INFORMATION & RESUME**

**Name and Contact Details**

[REDACTED] Solicitor and Mediator  
[REDACTED]  
Phone: [REDACTED]  
Fax: [REDACTED]  
Email: [REDACTED]

Business hours: Normal

Willing to travel to suit convenience of parties

**Resume**

[REDACTED] is an experienced commercial mediator who has conducted over 800 mediations. He has been a member of several industry mediation or dispute resolution panels for several years and has wide mediation experience over a range of disputes.

[REDACTED] has otherwise practised for 38 years as a solicitor in commercial and general litigation and for 14 years as a commercial mediator and arbitrator. Specific advanced qualifications include:

- Law Institute of Victoria accredited specialist in mediation;
- Institute of Arbitrators & Mediators Australia grade 2 arbitrator and advanced mediator;
- LEADR advanced mediator

Between 1988 and 1998 [REDACTED] was a member of the council of the Law Institute of Victoria and served as president of the Institute from 1994 to 1995. He has also chaired or served on numerous Law Institute and Law Council of Australia committees.

Some of [REDACTED] other current appointments include:

- Sessional Commissioner of Victorian Commission for Gambling Regulation;
- Board member and former chairman of legalsuper, the principal legal industry superannuation fund;
- Member of the Victorian Essential Services Commission Appeals Panel.

Prior roles include:

- Chairman of council of Financial Services Conflict Resolution Scheme;
- Credit Ombudsman appointed by Credit Ombudsman Service;
- Member of national board of directors of LEADR;
- Member of the Victorian Legal Practice Board;

## **OILCODE Dispute Resolution Adviser Mediation Under Section 44 - What to Expect**

You are about to take part in a mediation consistent with the principles contained in Part 4 of the Oilcode.

Mediation is a process by which an independent and neutral Mediator helps the parties to negotiate a settlement they can live with even if they do not get everything they first wanted. The Mediator does not hand down a decision like a judge.

Mediation is informal - it is just like a normal meeting around a table. The Mediator will try to help everyone to be as comfortable as possible. Mediation can occur even though legal action may have commenced.

Normally, the Mediator will contact each person separately before the date of the mediation to listen to their side of the story. The Mediator may want copies of relevant documents to be sent to him/her. Then a time to meet and the venue for mediation will be set down.

A mediation meeting will usually go like this:

1. The person making the claim will explain his or her side of the story to the Mediator and to the other party - this generally takes anything from 5 to 30 minutes
2. The Mediator will then ask some questions
3. The other party will then explain its side of the story
4. The Mediator then asks further questions
5. There is then general discussion of the problem
6. The Mediator may meet with each party separately to discuss the problem
7. There are further separate and joint meetings until a solution is found. Occasionally there may need to be an adjournment until another day
8. Finally the agreement may be written down and signed by both sides

The people who know most about the problem will be at the mediation. It is essential that people who attend have **settlement authority** otherwise time will be wasted and settlement opportunities damaged.

**The mediator must be advised who will be attending no later than three working days prior to the mediation.**

These are the things you can do for the mediation to be successful:

- Prepare your explanation carefully and present it clearly indicating what you see as the heart of the problem - a typed summary may be helpful or you can use a whiteboard.
- Listen very carefully to the other side without interrupting.



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- Be prepared to listen, understand and acknowledge the other person's perspective of the problem.

Mediation is confidential and what is discussed cannot be produced in court to the extent the law allows. Mediation is a successful process with the majority of cases resulting in agreement in one mediation meeting.

You are required to pay to the Mediator the estimated mediation fees before the mediation. The Mediator will also provide you with a Mediator appointment agreement and you are also required to sign and return the agreement to the Mediator before the mediation.

The costs of the mediation are shared equally between the parties. These costs are expected to be approximately \$1650 per party. This is much cheaper than court action. The Mediator will ask for payment of estimated fees in advance.

## OILCODE DISPUTE RESOLUTION ADVISER

The Oilcode applies to all fuel re-selling agreements in Australia. It provides a process for resolving petroleum supply disputes. Under this process a person with a petroleum dispute contacts the Dispute Resolution Adviser's (DRA) office for assistance in resolving a dispute.

Areas covered by the Oilcode include:

- Certainty of supply of certain petroleum products
- Disclosure documents and information given to fuel resellers
- Advice sought by fuel resellers before entering a fuel reselling agreement
- Cooling off period after entering a fuel reselling agreement
- Length of fuel reselling agreements
- Renewal, renegotiation, variation and termination of fuel reselling agreements
- Fuel resellers forming or belonging to associations
- Dispute resolution

There are 2 main areas of dispute covered by the Oilcode:

- Disputes about supply of a declared petroleum product
- Other disputes, including
  - disputes arising between parties to a fuel reselling agreement
  - disputes under the Oilcode's provisions concerning terminal gate pricing arrangements
  - disputes under the Oilcode's provisions concerning a fuel reselling business

A declared petroleum product means any of the following temperature corrected motor fuels:

- ULP,
- A product consisting of a blend of ULP and ethanol (for example, E10),
- A product consisting of a blend of ULP and 1 or more biofuels other than ethanol,
- PULP (other than a PULP proprietary product),
- Diesel fuel other than a diesel proprietary product.

In section 42 cases where a wholesale supplier's supply of a declared petroleum product has been interrupted or where there is a shortfall of supply a wholesaler may so advise the DRA. The wholesaler may supply to the DRA the following information

- The location of the wholesale facility at which the interruption or shortfall has occurred; and
- The declared petroleum product affected by the interruption or shortfall; and
- The expected duration of the interruption or shortfall; and
- The reason why the interruption or shortfall has occurred.

Section 43 matters relating to non-supply of a declared petroleum product may be referred to the Dispute Resolution Adviser (DRA). The DRA will ask that you forward the details of the dispute to our office. The DRA will then contact the other party and encourage resolution of the dispute directly. In cases where this is not possible, the DRA may request documents from the parties, in order to make a non-binding determination in relation to the dispute.

Many disputes are settled at the initial stages of telephone facilitation and direct negotiations. Non-binding determinations and mediation are therefore unnecessary in such cases.

Section 44 matters relating to any other matter arising from a fuel re-selling agreement can be resolved through mediation or another process. A party may contact the DRA, after attempting to resolve the dispute directly with the other party, either by telephone or in writing to request that a mediator be appointed to assist in resolving a section 44 dispute.

The parties are free to go to court or appoint their preferred mediator and are not required to use the DRA's mediators.

If parties do wish for the DRA to assist, they need to provide to the DRA the information listed on the section 44 Notice of Dispute attached.

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