

**DAVID LIEBERMAN AND ASSOCIATES  
LAWYERS\* & MEDIATORS**

3 September 2008

The Chairperson

Parliamentary Joint Committee on Corporations and Financial Services  
Inquiry into the Franchising Code of Conduct.

**By email:** [corporations.sen@aph.gov.au](mailto:corporations.sen@aph.gov.au)

Dear Senators

I am writing this submission as a former ACCC Commissioner who, during that term, was responsible for publicising the Code within the franchise community. I am also a nationally accredited mediator and on the OMA Panel. In that capacity, I have undertaken a large number of franchise mediations.

I have a number of concerns about the operation of the Code:

1. During mediations it frequently becomes apparent that the franchisee has declined to seek professional advice prior to entering into the Franchise Agreement. This is most evident when the franchisee is most in need of advice lacking relevant business experience often of the most basic kind. In one example, the franchisee had not inquired into the nature and likelihood of payment of debts owing to the previous franchisee when taking over a franchise. In this case, the franchisee had relied on those debts but they were in fact worthless

**Recommendation:** For "unsophisticated" franchisees, it be mandatory that business, legal or accounting advice (preferably at least two of those three) be obtained by the franchisee before entering into the agreement and that the franchisor contribute to the cost of that of the franchisee obtaining that advice.

2. Frequently, the parties fail to follow reasonable directions prior to the mediation eg to exchange documents leading to delay and costs. I recognise that the mediation is voluntary and that giving the mediator

power to compel may be detrimental to the process. I have no recommendation but note the point as a concern.

3. Often a party does not act in a manner that could reasonably be considered to be acting in "good faith". Today, the Code requires that:

*The parties must attend the mediation and try to resolve the dispute.  
(Code Clause 29(6))*

While adding a provision that the parties must mediate in "good faith" may be helpful at the time, it raises the same issues as to impartiality and potential for a party to seek review should the mediator take the view that a party was not acting in good faith. In such a case, if "good faith" was a requirement of the mediation provisions of the Code, the mediator would be expressing a view that a party was not in compliance with the Code.

For that reason, I consider the current language in the Code should remain.

4. Other dispute resolution models.

In about 75% of my OMA mediations, an agreement is reached which leaves the parties generally both a bit unhappy but able to move forward.

I have considered whether other models might work such as "med/arb" where the parties try first to mediate and, if that fails, ask the mediator to arbitrate. There are problems with this model as it may cause each party to be less frank with the Mediator in the mediation. In addition, it may cause the parties to not try hard in the mediation (which is indeed hard work).

Similarly, asking some form of tribunal to decide will achieve a result but may, more often than not lead a Solomon like decision in which the parties abdicate their roles in trying to find a workable resolution. Perhaps there could be a role for a form of tribunal after mediation.

Whatever its weaknesses, mediation does allow the parties an opportunity to quickly seek a resolution.

5. Often by the time a dispute is referred to the OMA, the relationships have soured to an almost irreconcilable point. Ideally parties should have a way to communicate issues early and perhaps contractual ways can be found to encourage early contact to take place. One approach with which I am familiar, is for the Franchisor to have a voluntary system which provides for review of an issue by an internal panel and then, if still unsatisfied, by an external independent panel, funded by the franchisor, to review the dispute, quickly and at a high level, and

make recommendations to management. Such a system is without charge to the franchisee and does not take away any rights the franchisee may have. I would see such an approach being more applicable to larger franchise systems.

Some relevant sections of the Code are **attached**

I hope that the above may be of assistance.

Sincerely,

David Lieberman

**Attachments**  
**Franchise Code of Conduct**

**11 Advice before entering into franchise agreement**

- (1) The franchisor must not:
  - (a) enter into, renew or extend a franchise agreement; or
  - (b) enter into an agreement to enter into, renew or extend a franchise agreement; or
  - (c) receive a non-refundable payment (whether of money or of other valuable consideration) under a franchise agreement or an agreement to enter into a franchise agreement;unless the franchisor has received from the franchisee or prospective franchisee a written statement that the franchisee or prospective franchisee has received, read and had a reasonable opportunity to understand the disclosure document and this code.
- (2) Before a franchise agreement is entered into, the franchisor must have received from the prospective franchisee:
  - (a) signed statements, that the prospective franchisee has been given advice about the proposed franchise agreement or franchised business, by any of:
    - (i) an independent legal adviser;
    - (ii) an independent business adviser;
    - (iii) an independent accountant; or
  - (b) for each kind of statement not received under paragraph (a), a signed statement by the prospective franchisee that the prospective franchisee:
    - (i) has been given that kind of advice about the proposed franchise agreement or franchised business; or
    - (ii) *has been told that that kind of advice should be sought but has decided not to seek it.*
- (3) Subclause (2):
  - (a) does not apply to the renewal or extension of a franchise agreement with a franchisor; and
  - (b) does not prevent the franchisor from requiring any or all of the statements mentioned in paragraph (2) (a).

**Part 4 Resolving disputes**

**24 Definitions**

In this Part:

*complainant* means the person who starts the procedure under clause 29.

*parties* means the complainant and the respondent in a dispute arising under a franchise agreement or this code.

*respondent* means the person with whom the complainant has a dispute.

**25 Mediation adviser**

A mediation adviser is to be appointed for this Part by the Minister.

**26 Internal complaint handling procedure**

A franchise agreement entered into on or after 1 October 1998 must provide for a complaint handling procedure that complies with clauses 29 and 30.

**27 Code complaint handling procedure**

A party to a franchise agreement who has a dispute with another party to the franchise agreement may start the procedure under clause 29.

**28 Choice of procedure**

A party to a franchise agreement who has a dispute with another party to the franchise agreement may, at any time, choose to use the procedure under clause 26 or 27.

**29 Procedure**

- (1) The complainant must tell the respondent in writing:
  - (a) the nature of the dispute; and
  - (b) what outcome the complainant wants; and
  - (c) what action the complainant thinks will settle the dispute.
- (2) The parties should then try to agree about how to resolve the dispute.
- (3) For mediation under a franchise agreement:
  - (a) if the parties cannot agree under subclause (2) within 3 weeks, either party may refer the matter to a mediator; and
  - (b) if the parties cannot agree about who should be the mediator, either party may ask the mediation adviser to appoint a mediator.
- (4) For mediation under this code, either party may ask the mediation adviser to appoint a mediator.
- (5) Subject to subclause (5A), the mediator may decide the time and place for mediation.
- (5A) Mediation under this code must be conducted in Australia.
- (6) *The parties must attend the mediation and try to resolve the dispute.*

- (7) For subclause (6), a party is taken to attend mediation if the party is represented at the mediation by a person who has the authority to enter an agreement to settle the dispute on behalf of the party.

### **30 Mediation under the code**

- (1) The mediation adviser must, within 14 days after referral under paragraph 29 (3) (b) or subclause 29 (4), appoint a mediator for the dispute.
- (2) After mediation under this code has started, the mediator must tell the mediation adviser, within 28 days, that mediation has started.

### **30A Termination of mediation**

- (1) This clause applies if:
  - (a) at least 30 days have elapsed after the start of mediation of a dispute; and
  - (b) the dispute has not been resolved.
- (2) If either party asks the mediator to terminate the mediation, the mediator must do so.
- (3) Subject to subclause (2), the mediator may terminate the mediation at any time unless satisfied that a resolution of the dispute is imminent.
- (4) If the mediator terminates the mediation of a dispute under this clause, the mediator must issue a certificate stating:
  - (a) the names of the parties; and
  - (b) the nature of the dispute; and
  - (c) that the mediation has finished; and
  - (d) that the dispute has not been resolved.
- (5) The mediator must give a copy of the certificate to:
  - (a) the mediation adviser; and
  - (b) each of the parties to the dispute.

### **31 Conditions**

- (1) This Part does not affect the right of a party to a franchise agreement to take legal proceedings under the franchise agreement.
- (2) The parties are equally liable for the costs of mediation under this Part unless they agree otherwise.
- (3) The parties must pay for their own costs of attending the mediation.