

FRANCHISING CODE

FURTHER SUBMISSIONS TO THE SENATE INQUIRY THE FRANCHISING AND OIL CODES OF CONDUCT

Derek Minus
Franchising Code Mediation Adviser
Oil Code Dispute Resolution Adviser

1 November 2018

NOTE: The views expressed in this submission are my own and may not be representative of the Commonwealth Government of Australia or the Department of Jobs and Small Business and the Department of Environment and Energy.



Office of the Franchising Mediation Adviser
T 1800 472 375 • adviser@franchisingcode.com.au

TABLE OF CONTENTS

1. THE CODE ADVISER	3
1.1 Franchising Mediation Adviser	3
1.2 Consolidation of Mediation Services	3
1.3 Role of ASBFEO	4
2. DISPUTE RESOLUTION UNDER THE CODES	8
2.1 Information about the Franchise Industry	8
2.2 Effectiveness of dispute resolution by OFMA	9
2.3 Multi-Party Mediation	11
2.4 Collective Bargaining Exemption	12
3. DETERMINATIVE PROCESSES	13
3.1 Is a Determinative process required?	13
3.2 The nature of Arbitration	14
3.3 Objections to Arbitration - Overcome	18



1. THE CODE ADVISER

1.1 Franchising Mediation Adviser

On 1 December 2016, Dispute Resolution Associates Pty Ltd (**DRA**), was appointed as the Mediation Adviser for the Franchising Code by The Hon Michael McCormack MP, then Minister for Small Business, and as the Dispute Resolution Adviser for the Oil Code by The Hon Josh Frydenberg MP, then Minister for the Environment and Energy.

Under a contract with the Commonwealth Government, DRA has been responsible for providing the Adviser functions under the Codes and managing the administrative functions of the:

Office of the Franchising Mediation Adviser, see www.franchisingcode.com.au

Office of the Oil Code Dispute Resolution Adviser, see www.oilcode.com.au

Additionally, but not relevant to this Inquiry, DRA is also appointed as the Horticulture Mediation Adviser, see www.horticulturecode.com.au

1.2 Consolidation of Mediation Services

We note that the ACCC submission to the Senate Inquiry (Page 13, Submission 45), contains the recommendation:

"The ACCC considers that there is duplication in the current mediation arrangements and consideration should be given to consolidating mediation advisory services to a single entity. For example these roles could be consolidated into the Australian Small Business and Family Enterprise Ombudsman's office."

Firstly, in respect to the consolidation of mediation services, it should be noted that back in May 2009, the Department of Resources, Energy and Tourism in its review of the Oil Code made the observation that:

RET notes that there may be opportunities for the Government to amalgamate the procurement of dispute resolution services under the various industry codes. For instance, there are broad similarities between the dispute resolution mechanisms available to parties to a dispute under the Oilcode, Franchising Code of Conduct and Horticulture Code of Conduct and the same provider is currently providing dispute resolution services for all three Codes. Thus, RET considers there is merit in examining



whether there are any opportunities to amalgamate the procurement of dispute resolution services under the various industry codes.

Recommendation

10. The Government should examine opportunities to amalgamate the procurement of dispute resolution services under the Oilcode, Franchising Code of Conduct and Horticulture Code of Conduct.

Secondly, the Commonwealth government in 2011 implemented this recommendation. Since that time the dispute resolution services under the Franchising Code of Conduct, Oilcode and the Horticulture Code of Conduct have all been amalgamated under a single provider. Currently, as explained in Section 1.1 above, that appointed Adviser is DRA.

1.3 Role of ASBFEO

The further recommendation by the ACCC was that the Adviser services could be consolidated into the office of the Australian Small Business and Family Enterprise Ombudsman (ASBFEO).

Also, when the Adviser appeared before the Committee on 8 June 2018, Ms Butler asked:

"So you would argue that we need to have an option for a party—perhaps the Australian Small Business and Family Enterprise Ombudsman—to be able to refer a matter to arbitration without consent and also for there to be some infrastructure to allow the arbitration to occur."

In answer to these suggestions, as we understand the current legislative framework under which the ASBFEO is established, there would have to be a fundamental change to the charter of that organisation to allow it to play the role suggested.

The legislation enabling the ASBFEO, is the *Australian Small Business and Family Enterprise Ombudsman Act 2015*:

Section 71, provides that the ASBFEO may recommend that parties to a dispute take part in an alternative dispute resolution (ADR) process which is defined as:

Alternative dispute resolution processes means procedures and services for the resolution of disputes, and includes:

(a) conferencing; and

(b) mediation; and



- (c) *neutral evaluation; and*
- (d) *case appraisal; and*
- (e) *conciliation; and*
- (f) *prescribed procedures or services;*
- but does not include:*
- (g) *arbitration; or*
- (h) *court procedures or services.*

Paragraphs (b) to (f) of this definition do not limit paragraph (a) of this definition.

Section 73 prevents the ASBFEO from itself conducting any form of ADR process:

"an alternative dispute resolution process recommended by the Ombudsman must not be conducted by the Ombudsman; or a delegate of the Ombudsman; or a person assisting the Ombudsman"

As specified in the definition of ADR in its enabling Act, "arbitration" is not an identified ADR process that it can refer a dispute to. So the ASBFEO currently has no power to even refer disputes to arbitration let alone conduct them.

In its submissions to the Inquiry (25 May 2018, Submission 130) the ASBFEO advised:

Introduce mandated arbitration - the powers of the Office of the Franchising Mediation Advisor (OFMA) be expanded to be able to direct parties to arbitration where a resolution is not reached through mediation. Franchisees do not feel they are equal partners in a mediation based on 'good faith' as the franchisor can draw on information from across its network and its greater resources to build and represent its case. Where a resolution is not reached franchisees feel unable to fight the matter further due to the high cost and time taken to pursue civil action through the judicial system.

Further in response to a Question on Notice (QoNAns 12_ASBFEO_October 2018) the ASBFEO stated:

Alternative dispute resolution is a robust model that is extremely effective in helping parties resolve disputes without the need to resort to litigation, particularly in terms of its low cost and speedy process. In accordance with the Australian Small Business and Family Enterprise Act 2015, the



Ombudsman can currently recommend only the following forms of alternative dispute resolution:

- Conferencing
- Mediation
- Neutral evaluation
- Case appraisal; and
- Conciliation.

These forms of alternative dispute resolution rely on parties coming to the process in good faith and agreeing on a resolution. As stated before the Committee, we believe that these forms of resolution should be enlarged by legislative change to the Australian Small Business and Family Enterprise Act 2015 to include arbitration to further increase the effectiveness of the overall processes. For example, independent commercial arbitration could be applied where critical facts are in dispute (say, in a mediation) or where parties are otherwise deadlocked.

In terms of its own role, the ASBFEO was only recently reviewed (see the report commissioned by Treasury: **Review of the Australian Small Business and Family Enterprise Ombudsman, June 2017**). That report specifically considered whether the role of the ASBFEO should be expanded to undertake the functions currently provided by the Mediation Adviser.

The Report concluded (para 2.4.1):

There is no evidence of a gap in the ASBFEO's assistance function at present. One stakeholder suggested the ASBFEO's assistance function should expand to include dispute resolution services under the Franchising Code of Conduct, the Horticulture Code of Conduct and the Oil Code of Conduct, which are mandatory industry codes of conduct prescribed under the Competition and Consumer Act 2010. A mediation adviser provides dispute resolution services under the codes, informing parties of the dispute resolution procedures available to them and, where the parties request mediation, nominating a specific mediator. However, expanding the assistance function of the ASBFEO is considered infeasible due to differences in:



- the roles of the ASBFEO and the mediation adviser in mediation
 - The Act provides for the ASBFEO to recommend a group of dispute resolution providers and the parties to the dispute must choose the provider. In contrast, the mediation adviser must nominate a specific provider which the parties to a dispute must use.
- the types of parties to which the ASBFEO and the mediation adviser provide dispute resolution services
 - The Act limits the ASBFEO to assisting small businesses, whereas the mediation adviser can assist all businesses, small or large, as well as consumers. This highlights that combining the disputes resolution services of the ASBFEO and the mediation adviser would require both legislative change and a fundamental change in the ASBFEO's role. If the ASBFEO's assistance function was strengthened in future to include in-house mediation or adjudication for example, many stakeholders would no longer consider the current arrangements to separate it from the advocacy function to be adequate. Given this risk, the ASBFEO's assistance function should only expand in response to a clearly identified gap.



2. DISPUTE RESOLUTION UNDER THE CODES

2.1 Information about the Franchise Industry

When it appeared before the Inquiry on 21 September 2018, the Australian Competition and Consumer Commission (ACCC) was asked

We really don't know how many franchisees there are out there. Do we need to have an understanding of this, and who should undertake that responsibility? Should there be a registration? If they've got an ABN number, off they go. So what happens? What should happen?

The ACCC's answer to this Question on Notice (QoNAns 14_ACCC_October 2018) was that:

Understanding the number of franchisees or franchise systems is not required to effectively regulate a sector. The ACCC already regulates a number of sectors without having this information ... Knowing the number of franchisees or franchisors operating is unlikely to change our approach to enforcement or compliance.

Whilst this may be true for regulators, the exact opposite applies to "service providers". For any organisation that is providing a service to an industry it is vital to know the dimensions of its market so that it can effectively target its message and efficiently service the industry needs.

Without relevant and recent industry statistics we are left with just innuendo and opinion. For these reasons we would commend the recommendation of the 2008 Federal Parliamentary Joint Committee investigation into the Franchising Industry:

Recommendation 7 (paragraph 7.28)

The committee recommends that the government require the Australian Bureau of Statistics to develop mechanisms for collecting and publishing relevant statistics on the franchising sector.

Improved collection of statistics on franchising in Australia, with a focus on disputes and dispute-related unit franchise turnover, will help in developing a better understanding of how extensive disputation truly is.



2.2 Effectiveness of dispute resolution by OFMA

In our earlier Submissions (No. 37, May 2018) we provided an analysis of the franchised businesses with disputes that we have assisted with mediation, since appointed as the OFMA and DRA over a 16-month period. We have now updated this information for the 21-month period from 1 January 2017 to end September 2018 and provide the analysis below.

Although we cannot confirm that the disputes referred to OFMA and DRA represents the complete picture of the nature of franchising disputes in Australia, we believe that the information this data provides is illustrative of the nature and number of disputes in the franchising industry and of the current problems so far identified by the Inquiry and their possible solution.

For clarity, the statistics analysed below only report disputes dealt with by OFMA under the Franchising Code of Conduct. There were 70 separate disputes relating to franchising operations lodged separately under the Oil Code with the Office of the Oil Code Dispute Resolution Adviser that have been left out of the statistics below and need to be considered separately.

Franchising Statistics

For the 21-month period from 1 January 2017 to 30 September 2018, OFMA has:

- received and answered 1,258 enquiries (average 60 per month)
- referred 477 disputes to panel mediators
- these disputes involved 202 different franchisors
- of the disputes referred, 325 mediations have been concluded
- 79% of the disputes were settled completely or to some extent
- 80% of respondents rated the service they received from OFMA as *Good* or *Excellent*
- 85% of respondents were *Satisfied* or *Very satisfied* with the Mediator appointed
- the average cost of the mediations was \$3,184 inc GST, compared to \$3,000 in 2008 despite a 20% increase in mediator fees (2% per annum).



There are clear messages that emerge from the statistics:

The Good

- Over **90 per cent** (185) Franchisors had 1, 2 or 3 disputes lodged against them
- these disputes accounted for 50% (242) of all of the disputes lodged.

This information supports what major franchisor organisations have been saying:

- that there are few problems experienced by the vast majority of franchisors in the course of their operations,
- that disputes that do occur can be quickly, effectively and inexpensively resolved by the existing Franchising Code mediation procedures which have been in place for the past 20 years.

The Bad

- Less than **10 per cent** (17) Franchisors had 4 or more disputes lodged
- These disputes represented 50% (237) of all the disputes lodged.

This information supports what affected franchisees within a small number of franchise systems are saying about problems they are experiencing.

Because of the lack of any multi-party mediation procedure mandated by the Code of Conduct or any inexpensive determinative procedure (like arbitration), these franchisees do not have a viable, inexpensive determinative process that can be utilised by franchisees to obtain a final and binding resolution.

Franchisees that are unable to resolve their disputes by mediation are required to take their disputes to court litigation which does not provide an effective, efficient or inexpensive dispute resolution process for small businesses.

Also, it is significant that one of the franchisors with multiple disputes is actually an exemplary company which regularly lodges matters with the OFMA so that it can use the Code's dispute resolution processes to notify, mediate and resolve identified performance issues within its franchisee network.

The Ugly

It would be reasonable to treat these statistics with caution as there is evidence that many franchisees have no knowledge of the existence of the Code of Conduct. There may well be significant unhappiness and financial difficulty being experienced by a large number of franchisees in the industry in certain franchise systems, but those disputes are not being referred to OFMA.



2.3 Multi-Party Mediation

The Adviser has been involved in trying to assist multiple franchisees from the same franchise network who have similar complaints about the franchise system or actions of the franchisor.

Although the Adviser's actions under the Code are limited to setting individual matters for mediation by separate mediators, where possible the Adviser has negotiated with both franchisees and franchisors to provide a single mediator to manage multiple disputes. This has allowed matters to proceed expeditiously, at a reduced cost whilst providing a more robust and involving process for all participants.

Allowing different franchisees within the same franchise system to bring common complaints together within the same mediation, assists the franchisor to better understand the range of opinions and evens out the power balance that exists between the franchisor and franchisees. Although multi-party mediations need to be skilfully executed by experienced mediators, often supported by other facilitators, particularly where the groups are large (over 20 franchisees), they have been successful in resolving matters where there has been significant ongoing dispute.

In its submission of 11 May 2018, the ACCC discussed the utility of multi-party mediations. It stated that:

The Franchising Code does not expressly state that mediators may undertake multi-franchisee mediation when disputes of a similar nature arise within a franchise system. The ACCC is aware of Franchisors refusing to attend multi-party mediation on this basis and insisting on addressing disputes on an individual basis. Multi-party mediation has a number of benefits, such as:

- *assisting to shift the imbalance of bargaining power that exists between the Franchisor and Franchisee when resolving disputes*
- *creating a more efficient process and use of resources.*

The ACCC then offered explicit support for multi-party mediations. It recommended that:

Amend the Franchising Code to allow a mediator to undertake multi-franchisee mediations when disputes with similar issues arise.



The ACCC notes that the application of any such provision would need to be considered in conjunction with the other requirements under the Franchising Code e.g. that parties not be compelled to attend mediation in states and territories other than where their franchised business is based.

The Adviser supports these recommendations.

2.4 Collective Bargaining Exemption

The Adviser dealt with the need for a collective bargaining exemption for franchisees in its original submissions. A collective bargaining group occurs when two or more competitors get together to negotiate terms, conditions and prices with a supplier or customer. These arrangements can sometimes be prohibited by the provisions of the *Competition and Consumer Act 2010*.

On 23 August 2018, the ACCC released a paper requesting submissions on whether the ACCC should approve franchisees forming a collective bargaining group and on what terms.

As noted earlier, increasingly groups of franchisees from the same system that are in dispute with their franchisor in respect of a similar issue, are banding together to seek support and share the costs of dispute resolution by participating in a single mediation.

The Adviser supports the ACCC providing franchisees a general exemption that allows them to engage in multi-party mediations with the franchisor without the risk of being found to have been engaging in an unauthorised and unapproved bargaining group.



3. DETERMINATIVE PROCESSES

3.1 Is a Determinative process required?

In our previous submission we set out the reasons why a determinative process is needed as part of the Franchising Code.

As identified at 1.3, the ASBFEO has also recognised that a binding determinative process (arbitration, which is specifically excluded by their Act) is needed.

The ACCC was asked about the use of a binding arbitration process:

ACTING CHAIR: What are your views about binding arbitration? We heard from ASBFEO that they do triage and they use all of the resources that are available to them and try to be very efficient about what they do. But 15 per cent are just stuck. The power differential, which we've discussed with every witness throughout the course of the day, including yourselves, means that the next step, taking it to court, just isn't happening. So we've got an impasse here. Is binding arbitration required, and who would do it?

Mr Grimwade: I would just refer to an earlier answer I gave, which is: we would support more effective dispute resolution. I don't think we have a strong view in relation to: should it be constitutionally achieved for binding arbitration to be available? I think we'd be looking at anything which would deliver more effective resolution, particularly for that 15 per cent of disputes, as you talked about, that are unresolved.

The ACCC response recognises the particular reason a determinative process needs to be introduced into the Code, "more effective resolution" for disputes that are not resolved through a meditative intervention process.

The Franchise Council of Australia in its primary submission (No. 29 dated 4 May 2018) echoed the concerns that have been expressed regarding the difficulty for franchisees and small businesses of obtaining just outcomes under the Code which does not provide a determinative resolution methodology:

"An aggrieved franchisee or franchisor with a strong legal case has access to justice, albeit at a cost. This is often with the prospect of harm to the franchise relationship and considerable delay that may see a matter only determined well after the expiry of the franchise agreement. This serves to further consolidate th (sic) economic harm that gave rise to the initial dispute that remained unresolved leading to the legal action.



We are aware, however, of select accounts of parties arriving at a resolution through mediation that they are not happy with but felt pressured into accepting due to the cost, delays and combativeness of escalating the matter further to the Federal Court.

Anecdotal information suggests some parties have tactically used the barriers to taking a matter to the Federal Court and the comparatively advantaged position of the franchisor in terms of accommodating time delays, legal capability and financial resources, to assert its position and hold out for a mediated outcome that is to their liking, knowing the smaller counter-party has few realistic options to accepting a mediated 'solution'.

This is not simply a matter for the franchise community but small businesses involved in commercial disputes more generally.

The challenges around small businesses being able to access justice through available mechanisms have been the subject of a number of high-level inquiries in recent years, including via the Productivity Commission (2014) and Harper Review on competition policy (2014), and is currently the focus of an inquiry by the Australian Small Business & Family Enterprise Ombudsman.

The Constitution impedes the formation of legislated tribunal-type mechanisms that seek to extend a determinative mandate beyond administrative matters, into matters seeking a commercial judgment. For the Commonwealth (sic) jurisdiction, these matters need to be resolved through the Courts or via agreed commercial arrangements between the parties."

3.2 The nature of Arbitration

Arbitration has an ancient history as a dispute resolution process. It is mentioned in historical texts as being used in Babylonian times. In the Middle Ages, when King Henry II was establishing the Royal Courts and the jury system in England, arbitration existed as an alternative dispute resolution process that was used for trade disputes and trade with foreigners, which was otherwise unenforceable.

Unlike "litigation" which involves adjudication by an unbiased and generally uninformed judge, arbitration can be seen as determination by a knowledgeable industry "expert". Arbitrators are empowered under many legislative schemes to act as experts and conduct the resolution of the dispute first by attempting conciliation and then if that fails, determining the matter as an "expert".



That is, the arbitrator is empowered to conduct an “inquisitorial process” to use their business and technical expertise and call for evidence in order to determine a matter.

Some facts about arbitration processes may be helpful:

- The Australian Constitution, s51 (xxxv), identifies power in the Commonwealth Government to make laws for the peace, order, and good government of the Commonwealth with respect to “conciliation and arbitration” for the prevention and settlement of industrial disputes extending beyond the limits of any one State.
- Arbitration (by expert Tribunal Members) not litigation, is used as the primary process of dispute resolution in the 90 or so administrative Tribunals, which determine hundreds of thousands of disputes each year in Australia.
- Arbitration is universally used in international commercial dispute resolution (often frequently coupled with mediation or conciliation).
- Arbitration (not mediation) is the usual mechanism for the resolution of franchising disputes in most of the rest of the common law world as well as in civil law countries.

The latest edition of “Getting the Deal Through” **Franchising 2019**¹ provides a country-by-country overview of dispute resolution procedures available for franchising disputes. Selected comments by its specialist legal reporters are:

BRAZIL: In an ongoing conflict situation, we believe that the most reliable method of resolution is the non-adversarial approach. Ideally, the parties involved should seek to settle their differences via mediation and arbitration chambers. This will enable them to settle the matter in the speediest, least bureaucratic and most efficient manner compared with a court of justice.

CANADA: Choice of forum clauses are generally enforced by the Canadian courts, thus making it possible for the parties to choose that a non-Canadian court resolve any dispute or claim arising from any agreement. In addition, mediation and arbitration are viable and recognised mechanisms of dispute resolution across Canada.

CHILE: Arbitration is very often seen in franchising contracts in Chile. This applies to contracts when all the parties are Chilean and also to contracts where the franchisor is a foreign company.

¹ Published by Law Business Research Ltd, London



CHINA: For foreign franchisors, it is recommended to resolve legal disputes through the arbitration process as arbitration allows them to bypass the local court system, where bias based on protectionism and corruption is a legitimate concern. The major arbitration bodies in China are able to appoint foreigners as arbitrator.

DENMARK: There are no compulsory dispute resolution procedures in Denmark. Furthermore, there are different voluntary facilities in place for settling disputes outside the ordinary court system, which include mediation not facilitated by the courts and arbitration, often favoured in large commercial disputes. Both of these are subject to agreement between the parties.

The principal advantage of arbitration is that it has a long tradition in Denmark. For many years well-established arbitration institutions, supported by close cooperation with the ordinary courts, have created a solid basis for arbitration proceedings in Denmark.

GERMANY: Franchisors and franchisees are also entitled to submit all or certain disputes to arbitration. Mediation is also increasingly recognised as a form of joint resolution. Nevertheless, given the mediation does not end with an enforceable judgement for one of the parties, franchisors and franchisees usually agree on mediation proceedings as only the first stage of dispute resolution. Arbitration in Germany offers a number of advantages, such as significant flexibility (for example, number of arbitrators, place and language of the arbitration proceedings), potential cost and time efficiencies, greater confidentiality and a binding enforceable and non-appealable resolution of the dispute.

INDIA: The dispute resolution procedures relevant for franchise transaction would be conciliation, mediation, arbitration and litigation. However, arbitration is a preferred mode of dispute resolution for commercial contracts, especially international contracts as litigation in India is usually a highly cost- and time-intensive exercise. Conciliation and mediation mechanisms are non-binding in India and have therefore not been very popular in the commercial sphere.

JAPAN: Foreign franchisors' principal advantage in choosing arbitration is that the proceedings can be conducted in English or any other language as agreed in the franchise agreement. In case of litigation, the language must be Japanese. In addition, arbitrators may be more familiar with franchise business than Japanese judges.



MALAYSIA: Arbitration is often promoted and considered as better and more efficient than litigation when resolving franchise disputes, saving both money and time. Arbitration's rules of evidence and procedure are more relaxed and simple, which usually means it takes less time and less money to bring a franchise dispute to resolution.

NETHERLANDS: Franchise agreements will generally contain a dispute resolution clause, in which a competent court or a form of arbitration is explicitly chosen.

NORWAY: Mediation is not compulsory for matters relevant to franchising. If the parties agreed in mediation, it is solely up to the parties to reach a solution, the mediator holds no authority to settle the dispute. Further, the parties may agree to solve potential disputes by arbitration, which may be chosen for commercial disputes as the parties can agree that the solution shall be subject to confidentiality.

RUSSIA: There are various types of dispute resolution procedures available and relevant to franchising. Instead of resorting to litigation in local courts, the parties can contractually agree on the arbitration of the franchising dispute. If there is no arbitration clause in a contract, the contract may not be submitted to arbitration. Mediation is also available as an alternative method of resolution of a franchising dispute.

UNITED KINGDOM: There is a strong emphasis on resolving disputes without resorting to litigation, and different forms of alternative dispute resolution, such as mediation, are encouraged. It is common for franchise agreements to contain provisions requiring the parties to consider mediation before commencing proceedings, or that disputes are to be resolved by way of arbitration, rather than through the courts.

UNITED STATES: Arbitration is only available if the parties agree to use it. Franchise agreements often include arbitration clauses. The Federal Arbitration Act generally provides for enforcement of contractual arbitration provisions in all states and supersedes state law governing arbitration. The United States is a party to the New York convention on the Recognition and Enforcement of Foreign Arbitral Awards and will respect and enforce the parties' choice of arbitration by non-US arbitration panels, which may include the parties' agreement to conduct the arbitration outside the United States. In addition, some franchise agreements include mediation clauses.



3.3 Objections to Arbitration - Overcome

In Australia, despite the ASBFEO, OFMA and ACCC, the three main entities involved in regulating and resolving disputes in the franchise industry, recognising that there is a need within the Code for a determinative process for the resolution of disputes, there exists significant misunderstanding about the nature of arbitration procedures.

For example, The Coffee Club which has a “franchise family of more than 200 who own and operate over 450 cafes across Australia and six other countries” stated in its submission (No. 77, 4 May 2018):

The Coffee Club does not believe that a more formal dispute resolution process would be of benefit as that would require a large amount of work to be undertaken and at significant cost. Any dispute resolution process which can result in a binding decision is similar to a court trial, albeit in a different forum, and would encourage parties to focus on procedural technicalities rather than on reaching a mutually acceptable solution. Parties to a franchise agreement already have the option to use court processes if they wish.

Yet, the very nature of arbitration processes, especially where provided under legislation, require that the arbitrator avoid procedural technicalities to focus on the substantial equities of the case:

For example, section 49 of the New South Wales Civil Procedure Act 2005 defines the nature of Arbitration Procedure as (emphasised):

Procedure (cf Act No 43 1983, section 10)

(1) Subject to this Act and any directions given by the referring court, the procedure at arbitration is to be determined by the arbitrator.

(2) Subject to the rules of evidence, an **arbitrator must act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms.**

The New South Wales Civil and Administrative Tribunal (NCAT) consolidates the work of 22 former tribunals into a single point of access for specialist tribunal services in NSW. NCAT deals with a broad and diverse range of matters, from tenancy issues and building works, to decisions on guardianship and administrative review of government decisions and provides services that are prompt, accessible, economical and effective. It has over 250 Tribunal Members who hear and decide cases in accordance with the law and the evidence presented.



Section 38(4) of the *Civil and Administrative Tribunal Act 2013 No 2* [NSW] provides the Procedure of the tribunal (emphasised):

The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case **without regard to technicalities or legal forms**.

Similarly, the Franchise Council of Australia in its Supplementary Submission (No. 29.1, September 2018) to the Senate Inquiry made the following (Part B) Observations and Recommendations regarding Issue 10, Dispute resolution mechanisms:

The FCA does not support suggestions to supplement mediation with any form of arbitration or any new Tribunal, for the following reasons:-

- 1. This would immediately create an adversarial environment, which runs entirely contrary to the principles of mediation. Fewer disputes would proceed to mediation, the parties would be less open to negotiated settlements and access to justice would be significantly reduced;*
- 2. Mediation is well suited to franchising, where both parties are typically small businesses and their assets are essentially intangible. Neither party can typically afford for a dispute to continue. As a consequence both parties have a genuine vested interest in achieving a negotiated outcome, as they know an early compromise solution will usually yield the best net outcome;*
- 3. Arbitration would almost certainly lead to higher costs of dispute resolution and delayed resolution of disputes;*
- 4. There are few if any arbitrators in Australia who would have the requisite experience to act in a franchise arbitration. The appointment of franchise mediators is more flexible, and the franchise sector suits the facilitative nature of a mediator's role;*
- 5. The courts have been effective in enforcing franchisee rights, with most franchising cases yielding favourable results to franchisees;*
- 6. Unlike the US, where arbitration is often used to avoid the risk of excessive punitive damages, there is no need for arbitration in place of litigation, noting that the costs of arbitration are also very significant*



We consider these concerns unfounded and offer this commentary:

1. *"creation of an adversarial environment"*

Mediation processes are born out of the adversarial litigation environment and were originally described as forms of "alternative" dispute resolution. Therefore, mediation does not need collaborative, cooperating parties to be successful. A skilful and experienced mediator does make a difference in achieving an agreed outcome.

However, a necessary condition is that the parties be willing to negotiate in good faith and try to achieve an outcome. Where this condition is missing the mediation process will fail by design. A determinative procedure is then required.

2. *"Arbitration would almost certainly lead to higher costs of dispute resolution and delayed resolution of disputes."*

Because of the necessity to make a determination according to law, arbitration would be more expensive than a mediation process. But that does not mean that every matter needs to be arbitrated. As illustrated above, 80% of the matters were settled at mediation. Parties will still choose the cheaper and effective option.

Arbitration would, therefore only be required for those 20% of matters that do not result in a satisfactory resolution at mediation. The correct comparison is therefore the price of "justice" under the litigation system versus a fixed price arbitration process. If the franchisor was required to pay for the entire cost of the arbitration (where there had been a failed mediation in which it participated) it would also put pressure on franchisor to achieve a reasonable settlement with the franchisee at mediation.

3. *"Mediation is well suited to franchising ... neither party can typically afford for a dispute to continue."*

Mediation is well suited to the resolution of franchising disputes if the parties are acting in good faith to resolve the conflict. But where a party is using the process to avoid an outcome (e.g. repayment of the franchise fee as they have failed to complete the agreement) then there is no impetus to resolution. In fact the party with the superior economic power can just refuse to agree, safe in the knowledge that the franchisee is unable to afford to take the matter to litigation.

4. *"There are few if any arbitrators in Australia who would have the requisite experience to act in a franchise arbitration."*



Of the 100 mediators appointed to the Franchising Mediator List there are already 12 people who are qualified, experienced and available as arbitrators.

5. *"The courts have been effective in enforcing franchisee rights, with most franchising cases yielding favourable results to franchisees".*

This is most certainly not the case with matters that go to trial usually resulting in a loss for the franchisees (see Pizza Hut case; *Virk Pty Ltd (In Liquidation) ACN 132 822 514 v. Yum! Restaurants Australia Pty Ltd ACN 000 674 993*).

Whilst, it is generally accepted that beneficial legislation does exist to assist franchisees, most cannot avail themselves of it because of the crippling cost of the litigation system and the economic imbalance between the parties in respect of, and ability to absorb the litigation costs and delays.

6. *"There is no need for arbitration in place of litigation, noting that the costs of arbitration are also very significant."*

As discussed above, there are many different types of arbitration processes, in tribunals, referred by courts or consumer orientated. It is not a one-size fits all scheme but can be tailored to the particular nature and type of disputes.

One of the most recent and well-known examples of a simple, straightforward, accessible and inexpensive worldwide system of arbitration, is that provided for the resolution of Domain Name disputes by the World Intellectual Property Organisation (WIPO).

This is a fixed-price scheme costing between US \$1,500 and US \$4,000 depending on the number of arbitrators selected, which has resolved 41,000 disputes since it was introduced in 1999. The arbitration is conducted "on the papers" submitted by the parties to the arbitration panel which then delivers an award within three weeks.

In consultation with stakeholders, it is possible to design a similar process that can be available for the resolution of non-complex matters that parties want to refer to arbitration. Such a system would provide access to justice for small business franchise owners and franchisees, which have failed to reach agreement at a mediation.

In this way, a quick decision by an experienced industry "expert", using a flexible determination process, can deliver a binding decision at much less cost than attempting to conduct litigation in a Federal Court.

