

## Submission to the Parliamentary Joint Committee on Corporations and Financial Services

### Inquiry into the operation and effectiveness of the Franchising Code of Conduct

#### Consent

I request that my submission be published with my name on the internet as a public submission.

#### Introduction

My name is:

Brian Harry Potts FCA, FCPA.

Chartered Accountant, Registered Tax Agent and Registered Company Auditor

Contact Mobile

Landline

Fax

Email

Qualified as an accountant in 1969.

Commenced public practice in 1976, building the practice to be one of the largest accounting practices between Newcastle and the Gold Coast with 3 offices, 35 staff and over 6000 clients.

Retired from the practice in 2002 without ever having had adverse comment nor disciplinary proceedings instigated by any professional or statutory body.

I made the decision to invest in a franchise business (Video Ezy/Video Ezy Express/Franchise Entertainment Group) to **provide financial and employment security** for my son and daughter as we live in an area of high unemployment.

This decision was made after **placing reliance on franchisor statements, the franchise agreement and the disclosure document most of which are at best false & misleading.**

**The franchisor has acted in a way that constitutes harsh and unconscionable conduct, breached all aspects of good faith, breached the Franchising Code of Conduct on numerous occasions, engaged in unmitigated bullying and has shown a distinct lack of ethical or moral behavior since the franchise agreement was entered.**

**I have engaged in 2 ACCC sanctioned mediations, the mediation process being nothing but an embarrassment to the Franchising Code of Conduct and the ACCC.**

The investment made is now worthless with **total losses exceeding \$600K.**

I am 70 years of age and now **working to try and keep the family home** and repay significant loans incurred in relation to the franchise business.

## Submission A

### Operation & Effectiveness of the Franchising Code of Conduct

My experience is that:

- 1 – The only **effective provisions** within the Franchising Code of Conduct relate to the **dispute resolution process**, which **in itself is useless** if either party **does not wish to act in good faith and seek a fair resolution to any dispute**.
2. The Franchising Code of Conduct is **not effective in ensuring full disclosure** to potential franchisees **of the likely performance of a franchise** and worse case scenarios.
3. Should a franchisor **embellish the financial performance of a franchise by the provision of false and/or misleading information**, with the franchisee relying on the information provided and then incurring financial loss, there is **no recourse after having entered the franchise agreement other than the dispute resolution process**.
4. The Franchising Code of Conduct **provides no relief to a franchisee** when a disclosure document includes false & misleading statements and is not kept up to date.
5. The Franchising Code of Conduct **does not provide any form of relief to a franchisee when a franchisor breaches any formal agreement (including those made at mediation) other than the dispute resolution process**.
6. The Franchising Code of Conduct is **totally ineffective** when one party to a dispute “will not cooperate” with the other party.
7. The Franchising Code of Conduct **does not provide effective relief to a franchisee when a franchisor fails to act in good faith** other than to **resort to the dispute resolution process**.
8. **Administration of the operative provisions of the Franchising Code of Conduct by the ACCC is nonexistent.**

### Summary

The Franchising Code of Conduct is a document which relies heavily on the obligation of good faith and **is heavily biased toward a franchisor**. Should either party to a franchise agreement suffer any form of disadvantage due to a lack of good faith caused by the actions of the other party, the ACCC appears to be unable to take any action under the Code to remedy the situation other than to engage in the dispute resolution process. If this process is unsuccessful, there appears to be **no option but to enter civil litigation** rendering the Franchising Code of Conduct useless.

## Submission

### (B)

#### Effectiveness of dispute resolution under the Franchising Code of Conduct

My experience is that the **dispute resolution process is not effective and a waste of time** for the following reasons:

1. Mediation was held in Newcastle on 1 September 2014 resulted in a **partial agreement** being made between the parties.
2. There were 2 important elements of that agreement with 1 element being attended to by the franchisor with the **2<sup>nd</sup> element being totally ignored (breached) by the franchisor.**
3. Mediation held in Canberra on 7 September 2016 with the **franchisor frustrating the whole process by;**
  - (a) refusing to have it held in Newcastle as previously.
  - (b) **delaying the agreed date several times** (franchisor was too busy).
  - (c) **refusing to provide the mediator with a position paper** even after the mediator directed him to do so.
  - (d) During the course of the Canberra mediation the **franchisor refused to enter any form of conciliatory discussion.**
4. Following the second unsuccessful mediation **a complaint was lodged with the ACCC and OFMA** with a copy being sent to a number of parties including the Mediation Advisor to the Commonwealth Government.
5. The Mediation Advisor to the Commonwealth Government phoned and **suggested a third mediation take place.** This was **declined for the following reasons;**
  - (a) The **first mediation settlement agreement was not adhered to by the franchisor.**
  - (b) the **second mediation was frustrated and obstructed by the franchisor due to his toxic attitude.**
  - (c) **a third mediation would only be obstructed further** with no option but to proceed to litigation which was the same option after the second mediation , but with the added cost of a third unsuccessful mediation.

6 – Following the unsuccessful ACCC sanctioned mediations under the Franchising Code of Conduct the following parties were approached **seeking any form of assistance** without success;

- (a) ACCC (including OFMA) on numerous occasions.
- (b) Fair Trading NSW
- (c) Australian Federal Police (on advice from Fair Trading NSW)
- (d) Australian Securities & Investment Commission
- (e) Office of the NSW Small Business Commissioner
- (f) Small Business & Family Enterprise Ombudsman
- (g) NSW Police Fraud Squad (theft of funds from marketing funds – civil matter)
- (h) CPA Australia (marketing fund financial statements -franchisor refused to provide documentation))
- (i) Company Auditor’s & Liquidators Board (independence and competence of marketing fund auditor)
- (j) Leslie Williams (State Member)
- (k) Luke Hartsuyker (Federal Member)
- (l) Franchise Redress - Queensland
- (m) ABC investigations
- (n) Fairfax investigations
- (o) Local media organizations “Port News” and “Port Macquarie Independent”
- (p) Brief submitted to Maurice Blackburn for class action potential (not large enough – commercial matter)
- (q) Brief submitted to Shine Lawyers Brisbane (case has merit but need an upfront payment of \$100K (plus extra if the defendant requests security for costs).

### **Summary**

**The dispute resolution process is only effective if you have the parties to a dispute willing to engage the mediation process in good faith and seeking a genuine resolution.**

**Should one party be unwilling to resolve a dispute, irrespective of the circumstances and committing so called “serious breaches” of the Franchising Code of Conduct, then **the process is in no way effective with the ACCC unwilling to assist.****

## Submissions

(C, D, E, F) - No submissions made

## Submission

(G)

### Enforcement of breaches of the Franchising Code of Conduct

My experience is that **there is no enforcement**, or even **acknowledgment, of any breach of the Franchising Code of Conduct** by the ACCC, **despite serious allegations made and documentary evidence provided to them.**

I am only aware of **one case whereby the ACCC** has acted on the **enforcement of breaches** of the Franchising Code of Conduct.

The **ACCC refuses to assist, comment or offer any assistance** in relation to enforcement matters.

## Submission

(H)

### Any related matter

- 1 – Store closed and exit fee demanded.
- 2 – Losses incurred even with family working for free.
- 3 – Contradictory statements made by franchisor.
- 4 – Threatened, intimidated & bullied by franchisor.
- 5 – Franchisee committee eliminated by the franchisor.
- 6 – Marketing and marketing facilities decreased, eliminated and redeployed in another franchise.
- 7 - Marketing funds misappropriated.
- 8 - Marketing fund financial statements not detailed, included false & misleading statements not transparent.
- 9 – Marketing fund auditor replaced by non independent auditor without notifying franchisees.
- 10 – Franchisor’s field visits nonexistent.

## Summary

**Being a franchisee has destroyed the lives of myself, my family and caused severe financial distress at 70 years of age.**

**Attached are several documents which may be of interest to support my submissions.**