Chapter 7

Dispute resolution in franchising

The need for a dispute resolution process

7.1 Previous chapters have described a range of behaviours and circumstances that can strain the working relationship between franchisee and franchisor, potentially leading them into dispute and, if not resolved, towards franchise failure.

7.2 Professor Lorelle Frazer, who is currently engaged in collaborative research with the ACCC into causes of conflict in franchising, told the committee:

> The most common cause appears to be because franchisees' expectations about franchising are mismatched for two main reasons. Sometimes it is the franchisee's own naivety and sometimes it is the result of franchisors making misleading statements in an attempt to recruit the franchisees. There is certainly a gap between what franchisees expect to find and the reality. That leads initially to disappointment, then to blame and often to a breakdown in the relationship. It can result in a dispute or even failure of the business. It affects their health and personal relationships. So it has quite an impact.[1]

7.3 Post Office Agents Association Limited (POAAL), in reflecting on disputes in franchising in overseas jurisdictions including the United States, noted:

> …the franchisor /franchisee relationship can easily cause conflict if either side is incompetent (or not acting in good faith). For example, an incompetent franchisee can easily damage the public's goodwill towards the franchisor's brand by providing inferior goods and services, and an incompetent franchisor can destroy its franchisees by failing to promote the brand properly or by squeezing them too aggressively for profits.[2]

7.4 Franchise failure can have devastating consequences for franchisees:

> …when franchisees fail they will accumulate substantial debt or loss of personal assets including family homes, forcing individuals or family to go bankrupt and into poverty adding a financial and medical burden on the government and taxpayer…employees are also made jobless and creditors including other small to medium business are financially affected.[3]

7.5 Former franchisees who have been through such failure frequently liken the experience to a breakdown in a personal relationship, using the analogy of divorce or even death.

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1 Professor Lorelle Frazer, *Proof Committee Hansard*, Brisbane, 10 October 2008, p. 3

2 POAAL, *Submission 101*, p. 9

3 Mr Leicester Ramsey, *Submission 56*, p. 4

7.6 Franchisors also stand to suffer when a relationship with a franchisee breaks down, with interruptions to royalty flows when a unit franchise stops trading and the potentially negative effect on the overall brand.

7.7 Other franchisees in a network can also suffer as a consequence of the publicity associated with disputes:

> …there is potential brand damage that will be done and that brand damage can have its own backwash effect on other franchisees, which in the global context of a particular franchise could do more damage than may have occurred as a result of the particular misconduct that has affected the franchisee concerned.[4]

7.8 Clearly, it is in the best interests of all parties if disputes can be resolved before a franchise fails and without the need for recourse to expensive litigation.

Existing mediation provisions

7.9 As previously outlined in paragraph 3.34, Part 4 of the Franchising Code of Conduct (the Code) sets out mediation procedures to be followed in resolving franchising disputes. Parties are initially obliged to try to agree about how to resolve a dispute but, in the event that they cannot, may refer the matter for mediation. When either party seeks to put a mediation process in place, section 29(6) states: 'The parties must attend the mediation and try to resolve the dispute'.[5]

7.10 Parties may agree to appoint a particular mediator. Where they cannot agree, either party may approach the Office of the Mediation Adviser (OMA), which will then appoint a suitably qualified and experienced mediator.[6]

7.11 The Department of Innovation, Industry, Science and Research (DIISR), which has responsibility for providing policy advice on franchising to the Minister for Small Business, Independent Contractors and the Service Economy, submitted the following information to the committee regarding the current operation of the OMA:

> OMA statistics indicate that around 75 per cent of mediations conducted through the OMA result in a binding settlement.[7] Under the terms of the Government contract with the OMA, the maximum fee for the mediator is $275…per hour. The cost of the mediation is shared between the parties involved (unless otherwise agreed). On average, mediations cost each party

4 Mr Graeme Samuel, ACCC, *Proof Committee Hansard*, Melbourne, 5 November 2008, p. 84

5 See Part 4 of the Franchising Code of Conduct

6 Franchising Code of Conduct, section 29(3)(b)

7 Note that the Franchising Code of Conduct does not formally provide for binding settlements. A mediation process may or may not lead to a mutually agreed outcome, and the Code does not include a process for enforcing agreements reached at mediation.

> approximately $1,500 and average completion time after the appointment of the mediator is five weeks.[8]

7.12 The Department clarified in verbal evidence to the committee that the costs cited are only for the time directly spent in mediation and do not take account of any preparation or advice costs on the part of franchisor or franchisee, nor any financial loss suffered if either party has to close their business in order to attend and participate in the mediation.[9]

7.13 The Department also provided information on the level of activity of the OMA:

> The latest report from the OMA indicates that the OMA has received around 3,064 dispute enquiries since 1 October 1998. Over the same period, 919 appointments were scheduled with mediators. The number of dispute enquiries received by the OMA each year is generally stable, averaging around 365 enquiries each year since 2002. This is despite the growth of the franchising sector over the same period. The largest number of dispute enquiries relate to the retail trade industry, including motor vehicle, fuel and food retailing.[10]

7.14 It identified 'Terms of Termination/Exit Arrangement' as the most frequently mediated issue and further noted that: 'The majority of the referrals to the OMA are from the ACCC, solicitors and industry representatives (such as the Franchise Council of Australia)'.[11]

7.15 The lower number of referrals from franchisees is inconsistent with claims in franchisee submissions to the committee that there is significant disputation in the sector. This is likely to reflect a combination of lack of confidence by franchisees in mediation processes (discussed further below); use of mediators other than those appointed by the OMA; and the establishment of internal dispute resolution mechanisms in some franchise systems.

7.16 Mr Scott Cooper hypothesised:

> Contrary to reports suggesting that levels of dispute remain low in franchising, one could suggest that the inability to afford the cost of even engaging a lawyer sees franchisees surrendering to the pressure of the franchisor and soldiering on. Alternatively, the franchisee accepts total defeat and walks away as opposed to raising a dispute and fruitlessly throwing good money after bad.[12]

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8 Department of Innovation, Industry, Science and Research*, Submission 137*, p. 3

9 Ms Sue Weston, Department of Innovation, Industry, Science and Research, *Proof Committee Hansard*, Canberra, 17 October 2008, pp. 13-14

10 Department of Innovation, Industry, Science and Research, *Submission 137*, p. 3

11 Department of Innovation, Industry, Science and Research, *Submission 137*, p. 4

12 Mr Scott Cooper, *Submission 15*, p. 15

7.17 POAAL put forward a number of reasons why franchisees might choose not to engage in mediation through the OMA, including fear of retribution; potentially high costs; a sense that franchisors are unlikely to engage in meaningful negotiation; and the possibility that franchisors will draw out the process in order to pressure the franchisee into giving in to franchisor demands.[13]

7.18 The committee heard evidence of some disputes being resolved by parties other than mediators appointed through the OMA (as provided for in the Code). For instance, the Lottery Agents Association of Victoria (LAAV) advised that numerous 'soft' mediation outcomes have been achieved before the Victorian Small Business Commissioner. LAAV also indicated, however, that in more difficult cases this mediation is less successful:

> The Small Business Commissioner's processes do not succeed to the same extent…when an issue is aggressively pursued by one of the parties. The fact is that the mediation process only requires both parties to attend. It does not require either party to do anything but be there. To be successful, mediation requires there to be goodwill from both parties. When that is not the case then mediation fails...[14]

7.19 A related issue raised is a potential lack of understanding of the OMA's responsibilities with respect to franchising. To assist with public recognition of the OMA's franchising mediation role, the ACCC suggested that consideration be given to changing its title to more clearly identify the office's relevance to the franchising sector.[15]

Committee view

7.20 The committee recognises that franchising dispute referrals to the OMA are not completely indicative of the level of disputation within the sector. This is part of the broader problem of a deficiency of statistical information collected in Australia about franchising, as noted by the committee in Chapter 3. This is discussed further below, starting at paragraph 7.23.

7.21 The committee also agrees with the ACCC that greater awareness and understanding amongst franchisees and franchisors of the OMA's role would be promoted by a more suitable name. Therefore, the committee recommends that the name of the Office of the Mediation Adviser be changed to the Office of the Franchising Mediation Adviser, in order to make the office's role in the franchising sector more readily apparent to franchisees and franchisors seeking assistance in dispute resolution.

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13 POAAL, *Submission 101*, p. 9

14 LAAV, *Submission 45*, p. 3

15 ACCC, *Submission 60*, p. 22

Recommendation 6

7.22 The committee recommends that the name of the Office of the Mediation Adviser be changed to the Office of the Franchising Mediation Adviser and that the Franchising Code of Conduct be amended to reflect this change.

Statistical measures of disputation in franchising

7.23 The committee notes the useful franchising survey results collated by the Asia-Pacific Centre for Franchising Excellence, Griffith University, in its biennial Franchising Australia surveys. However, though these surveys do collect information on dispute levels, it is sourced only from existing franchisors, meaning that dispute levels as a proportion of franchisees are not measured. A franchisor with 100 franchisees could be in dispute with one or all of them, but this is not reflected in the results. This deficiency is in addition to the high proportion of franchisor respondents who choose not to respond to the question on disputes (see paragraph 3.22).

7.24 In the absence of comprehensive data, the true extent and nature of disputation in the sector is unclear. Ms Jenny Buchan pointed out to the committee:

> …there are currently no useful statistics available about the true nature of disputes, serial offenders (if any), the speed and cost of the process, etc. I submit that the OMA could release sanitized statistics that are far richer than the bland numbers currently available without compromising the mediation process.[16]

7.25 As referred to earlier in this chapter, the OMA is only one avenue for dispute resolution. Statistics relating to disputes resolved through internal processes, before an agreed mediator or through an alternative path (including recourse to state or territory based processes) are not centrally captured, meaning that it is not possible to form an accurate picture of the number of disputes being taken to mediation in the sector.

7.26 Data on the extent of disputes where no mediation action is taken is also not available.

Committee view

7.27 It is difficult to assess the efficacy of current mediation provisions in the Code in the absence of a reliable understanding of the true extent of disputation in the sector. The committee therefore recommends that the government require the Australian Bureau of Statistics (ABS) to develop mechanisms for collecting and publishing statistics relating to the franchising sector, with a focus on franchise disputation and dispute-related franchisee turnover, using information collected from both franchisees and franchisors. This may be appropriately undertaken as part of existing business surveys, or as a new survey directed at the sector only.

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16 Ms Jenny Buchan, *Submission 89,* p.7

Recommendation 7

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.

Effectiveness of mediation

7.29 Views put to the committee on the utility of the current mediation arrangements under the Code were polarised. For instance, the Franchise Council of Australia (FCA) stated:

> The mediation based dispute resolution process is highly effective and considered world's best practice. It is quick, low cost and effective in over 81% of cases, which is a phenomenal result.[17]

7.30 In stark contrast to this statement, many submissions to the committee revealed substantial dissatisfaction amongst franchisees, and also some franchisors, regarding the current operation of the mediation provisions.

Franchisee views

7.31 Mr Gavin Butler submitted:

> A franchisor can approach mediation…with no intention of achieving resolution because they know their franchisees generally cannot afford to take them on through the court processes.
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> … … …
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> …my assessment of mediation is all about the franchisor using their deep pockets and bargaining power to exit the franchisee with as little as possible and to ensure they silenced the franchisee from ever saying anything negative about the franchisor.[18]

7.32 Another franchisee indicated:

> The mediation process was a joke, because as soon as I tried to discuss the attached report, the franchisors representative threatened to leave …[19]

7.33 Ms Nicole Hoy wrote:

> …until there is a method put in place that can provide affordable and immediate relief, it is near impossible for the average franchisee to enforce their rights under their agreement or under the code.
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> … … …

17 FCA, *Submission 103*, p. 6

18 Mr Gavin Butler, *Submission 3*, pp. 1-2

19 Name withheld, *Submission 7*, p. 1

> Mediation only works when both parties are reasonable and compromise can be reached. If the other party refuses to mediate there is no other recourse but litigation…[20]

7.34 Mr Ray Borradale described a situation in which:

> Mediation was openly used to force a franchisee into additional cost where the franchisor would not entertain any issue in dispute after proclaiming beforehand that any agreement reached in the presence of a mediator would be discarded after mediation.[21]

7.35 Discussing mediation processes more broadly, Mr Borradale further contended:

> Mediation continues to allow a rogue franchisor the ability to use the process to further drain the finances of a franchisee and where the opportunist franchisor can flaunt that there is no requirement to abide by any agreements made in mediation.[22]

7.36 George and Ruth Nimbalker wrote:

> The dispute resolution process as it stands now does not work; the office of the OMA is not effective and has no powers to stop the franchisors with the big pockets and sleek lawyers.[23]

7.37 Some submitters argued that the power imbalance between franchisor and franchisee that permeates pre-contractual arrangements and the life of the franchising agreement also renders current mediation processes unsuccessful. As expressed by Mr Peter Moon:

> There will always be disagreements but with the current system when the "David and Goliath" disputes occur, it is invariably the case that the Goliath Franchisor "outguns" the franchisee in every material aspect which all too often renders truth and fairness a very impotent tool in seeking recourse. The pendulum is weighted too far in favour of the franchisor. It is certainly time to bring a better balance back to the world of franchising.[24]

7.38 There was support for this contention from the Law Institute of Victoria:

> We are aware of the existing remedies available to franchisors, however are concerned that franchisees can often be significantly disadvantaged in a franchise commercial relationship…under this dispute resolution process, franchising disputes can escalate quickly, often resulting in expensive

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20 Ms Nicole Hoy, *Submission 8*, pp. 1-2

21 Mr Ray Borradale, *Submission 16*, p. 7

22 Mr Ray Borradale, *Submission 16*, p. 20

23 George and Ruth Nimbalker, *Submission 67*, p. 4

24 Mr Peter Moon, *Submission 93*, p. 1

> litigation. As a result, this dispute resolution process is often not viable for franchisees with limited resources, facing closure of their business.[25]

Franchisor views

7.39 However, some franchisors strongly contested this negative perspective. They instead indicated to the committee that there is potential in the current dispute resolution system for franchisees to act capriciously, raising spurious claims that franchisors are then obliged to disclose to their other franchisees and which can damage the brand. Mr Geoffrey Cope, Managing Director of the Fibrecare Group, wrote:

> I feel there is a view amongst franchisees that if they aren't happy they can get out of their agreements if they cause a bit of a stir. This is because the law is in their favour and they only have to make allegations of being misled or mistreated to cause problems for the franchisor. Like most franchisors we can't afford expensive litigation, so we will usually try to settle even if we are 100% in the right.[26]

7.40 7-Eleven also suggested that some franchisees take advantage of current Code requirements:

> The current mediation and disclosure requirements in the Franchising Code have in certain instances invited franchisees to use litigation proceedings, or the threat of them, as a form of commercial blackmail in recognition that the Franchisor is at an immediate disadvantage in relation to such proceedings because it has to include the details of it in its Disclosure Document which both Franchisees and Franchisors know affects the Franchisor's brand and probably its market position, and can affect the goodwill of other associated franchisees. Unscrupulous Franchisees can use those concerns as leverage to extract settlements or concessions from Franchisors.
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> … … …
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> …I genuinely believe that many franchisors rush to settle mediation of even spurious claims to project their brands, as the balance of protection seems to now be in imbalance between Franchisor and Franchisee.[27]

Limitations of mediation

7.41 The dispute resolution process currently in the code has been described as '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.[28]

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25 Law Institute of Victoria, *Submission 159*, p. 2

26 Fibrecare Group, *Submission 144*, p. 9

27 7-Eleven, *Submission 105*, pp. 4-5

7.42 Some submitters and witnesses commented that representatives at a mediation may not have full authority to negotiate an outcome (despite this being a requirement under the Code):

> Parties can come along to mediations and…really just go through the motions…Perhaps they do not have authority to actually negotiate fully at the mediation. Perhaps the requisite senior people are not present at the mediation. That is often an indication that they are going through the motions. Those mediations just do not get anywhere, principally for the reason that if in the event in this industry parties have access to legal advice if the advice is the distributor believes that there is no legal action that can be brought, there is very little incentive to actually offer some settlement. The franchisee for its part realises on its legal advice that perhaps it is very difficult and very expensive to take any action, particularly if 51AC does not provide an adequate remedy.[29]

7.43 Furthermore, the main aim of the franchisor may be in negotiating an exit arrangement, rather than a resolution that would enable a franchisee to continue trading:

> At the mediation maybe all that is on the table for discussion is that the dealership is coming to an end…Maybe all that is the subject of negotiations is how you are going to end the relationship…[30]

7.44 Others emphasised that, although mediation is intended to be a low-cost option, it is sometimes still beyond the resources of franchisees facing business failure and, potentially, loss of substantial investments. According to Mr Leicester Ramsey,

> While mediation is significantly cheaper than litigation, the cost of participating in the process may represent a significant expense for many franchisees.[31]

7.45 Mr Damien Hansen confirmed that costs were a prohibitive factor in trying to resolve a dispute with his franchisor:

> …the mediation and legal system was out of my reach.[32]

7.46 The Franchisees' Association of Australia pointed out that in these circumstances franchisees often feel they have no choice but to accept whatever mediation terms they are offered:

> The truth is that many franchisees settle, but only in despair, having no alternative, especially given the imbalance in bargaining power.[33]

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28 Mr Hank Spier, Spier Consulting, *Submission 151*, p. 3

29 Mr Robert Gardini, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 9

30 Mr Robert Gardini *Proof Committee Hansard*, Sydney, 9 October 2008, p. 9

31 Mr Leicester Ramsey, *Submission 56*, p. 4

32 Mr Damien Hansen, *Submission 1*, p. 4

7.47 The ACCC also acknowledged the quandary faced by franchisees in dispute:

> The nature of franchising means many are small- or medium-sized businesses where owners have a large share of their wealth at stake…Consequently, franchisees involved in disputes with their franchisors sometimes stand to lose (or have already lost) a significant share of their personal assets and may not be able to afford litigation.
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> Serious franchising disputes can escalate quickly and a franchisee may feel forced to accept whatever settlement the franchisor proposes because they have limited financial resources and do not see any alternative.[34]

7.48 In light of these comments, the relatively high settlement rate cited for the OMA mediations is potentially misleading. The blunt settlement figure provides no indication either about the relative satisfaction of the parties with the mediation outcome, or whether the mediation outcome subsequently occurs. According to Mr Robert Gardini:

> …the high settlement rate of motor vehicle dealer disputes under mediation is not representative of a high rate of dealers receiving equitable resolutions to their disputes. Although mediation is being sought more frequently by dealers, this is merely indicative of their inability to seek adequate redress in the court system, and not a testament to the effectiveness of the settlement process. It should not be forgotten that 'settlement' can encompass…any one scenario on a continuum of outcomes, including (at best) the circumstance of a satisfactory outcome for both parties, to the more realistic results whereby a dealer is reluctant but can live with the terms of the settlement, and finally (arguably the most common outcome) where a dealer has little choice but to accept any offer in the absence of either adequate legal redress or the ability to fund costly legal proceedings.[35]

Suggested improvements to the mediation process

Good faith in mediation

7.49 The committee received a range of evidence suggesting that, if parties were required to mediate in good faith, more meaningful results might be achieved. Mr John Levingston, an OMA mediator, characterised the current absence of a good faith provision as 'surprising':

> Good faith has become an element of domestic commercial activities though well known and of long standing in international commerce and equity. One of the problems for good faith in franchising activity arises from the common law approach to good faith where it is regarded as a mere implied term which can be expressly excluded by contract. More recently,

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33 Franchisees' Association of Australia*, Submission 51*, p. 18

34 ACCC, *Submission 60*, p. 20

35 Mr Robert Gardini, *Submission 92*, p. 3

> good faith has become a subject of statute where it is recognised as an element of unconscionable conduct, but, surprisingly, good faith is not identified as an express requirement under the Franchise Code.[36]

7.50 Mr Levingston has also pointed out that an obligation for parties to act in good faith during mediation is already a part of the court rules in operation in New South Wales.[37]

7.51 Mr Robert Gardini suggested:

> …settlements and the dispute resolution would be significantly enhanced where the parties had a positive obligation to mediate in good faith. If the code were amended to include such a provision there would be a greater chance of equitable settlements as both parties would have to make genuine attempts to reach resolution.[38]

7.52 In relation to the dispute with her franchisor, Ms Deanne de Leeuw considered that:

> If good faith provisions had been in there, I potentially could have used that to say, 'We need to be dealing with each other honestly and reasonably and this is my problem. Can we sort it out?'[39]

7.53 Competitive Foods Australia Pty Ltd told the committee:

> …the real problem is that, if you do not have standards of conduct that can hold franchisors accountable, you will not have a successful mediation. On the other hand, if you put in standards of conduct, particularly for good faith, you may in fact nip a lot of big problems in the bud because people could then go to mediation quickly and easily on small problems. Franchisors could be held accountable because of their good faith obligations, and they could resolve their difficulties before it becomes a big problem.[40]

7.54 The insertion of a good faith provision into the Code was a key recommendation of the 2008 inquiry into franchising by the Economic and Finance

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36 John Levingston, 'Franchise mediations: Experience, problems and solutions (reflections of a franchise mediator), (2008) 19 ADRJ 83, p. 91

37 John Levingston, 'Franchise mediations: Experience, problems and solutions (reflections of a franchise mediator), (2008) 19 ADRJ 83, pp. 91-92

38 Mr Robert Gardini, *Proof Committee Hansard*, Sydney, 9 October 2008, pp. 3-4

39 Ms Deanne de Leeuw, *Proof Committee Hansard*, Canberra, 17 October 2008, p. 69

40 Mr Tim Castle, Competitive Foods Australia Pty Ltd, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 36

Committee of the South Australian Parliament.[41] Mr Tony Piccolo MP, representing the Economic and Finance Committee, told the committee:

> The current code requires you to attend mediation. It does not require you to attend mediation in good conscience or in good faith. Unfortunately, in reality that is how it is treated in practice. It requires you to participate in a process. If you drag the process out as a franchisor your position to bargain with the franchisee is strengthened. You weaken their position even further than it is already. There has to be some discussion about good faith dealing…[42]

7.55 The committee was cautioned that the notion of good faith mediation could introduce complications for mediators. Mr David Lieberman, a former ACCC commissioner and currently a nationally accredited mediator and member of the OMA panel, raised the question of the mediator's position with regard to assessing whether the good faith obligation has been met:

> While adding a provision that the parties must mediate in "good faith" may be helpful…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.[43]

7.56 However, the committee contends that there are clear indicators of whether mediation is taking place in good faith, including whether a party attends at all; whether they attend in a timely matter; whether they attend in person; and whether they demonstrate an intent to work towards a mutually agreeable settlement.

Alternative dispute resolution mechanisms

7.57 Having regard to both the limitations of mediation as it currently exists and the high, often prohibitive, costs of litigation, many submitters and witnesses asked the committee to consider the introduction of alternative dispute resolution mechanisms in franchising. Suggestions put forward included an increased focus on pre-mediation strategies; the creation of a tribunal to make determinations; or the introduction of a franchising ombudsman.

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41 In recommendation 7.2.18, 'The Committee recommends amending the Franchising Code of Conduct by inserting a provision imposing a duty to act in accordance with good faith and fair dealing by each party of the franchise relationship.' SA Parliamentary Economic and Finance Committee, *Franchises*, May 2008, p. 98

42 Mr Tony Piccolo MP, Economic and Finance Committee, Parliament of South Australia, *Proof Committee Hansard*, Melbourne, 5 November 2008, p. 60

43 David Lieberman & Associates, *Submission 31*, p. 2.

Pre-mediation processes

7.58 Mr David Lieberman submitted that, for there to be a realistic prospect of resolving disputes satisfactorily, such that the working partnership between franchisee and franchisor can continue, there is a need for pre-mediation processes:

> 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…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…[44]

7.59 This notion was supported by POAAL, who cited the example of how they have negotiated an internal mediation process with their franchisor on behalf of their members:

> A better model is a dispute resolution process involving a stepped process with early discussion and resolution at lowest management level. This includes provision for higher referral if the dispute is not resolved quickly and to the satisfaction of both parties. Such a system was established through negotiation…by POAAL.[45]

Tribunal

7.60 The committee received some suggestions that a low-cost tribunal be introduced to sit above the current mediation process, to make determinations on disputes without the need for recourse to litigation. According to Professor Andrew Terry:

> I am not sure that there is a very high success rate for mediation in terms of settlements that arise out of it. Because of confidentiality you do not know how many of those franchisees are entirely happy with the settlement or felt like they had no option but to make a settlement with the franchisor…I would have thought there would…be an argument for a specialist tribunal.[46]

7.61 When asked what powers he envisaged such a tribunal having, Professor Terry responded:

> A tribunal like a consumer claims tribunal that sits out of the court structure with limited appeal rights on law back into the court structure. A mediator is not empowered to give a decision, of course, and nor would an ombudsman be, but a tribunal would have the power to make a decision in cases under a certain threshold.[47]

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44 David Lieberman and Associates, *Submission 31*, p. 2

45 POAAL, *Submission 101*, p. 9

46 Professor Andrew Terry, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 74

47 Professor Andrew Terry, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 74

7.62 Ms Jenny Buchan, speaking in relation to current circumstances in New South Wales, cautioned that adding a new layer to franchising dispute resolution through the creation of an additional tribunal might dilute franchising expertise:

> I understand the reason that having a low-cost tribunal is attractive. I have hesitation, though, about dissipating the expertise too broadly. Currently, the understanding of what is a functioning franchise essentially sits in three places. It sits amongst the mediators. It sits in the Federal Court; some Federal Court judges are gaining a pretty good idea of what is a functioning franchise. And it sits in the Industrial Relations Court in New South Wales. So, I think when you are thinking about a tribunal or another potential avenue of dispute resolution you do need to consider how broadly you want to dissipate the understanding of what is a franchise.[48]

7.63 It is necessary to note that there are constitutional limitations on the powers and role of a tribunal. As Mr Brendan Bailey pointed out in his submission to the committee:

> The powers of a tribunal at the Commonwealth level are limited by wording in the Australian Constitution. A Commonwealth tribunal may make an assessment of the rights between parties but it is unable to enforce its own order because enforcement is a judicial function – a matter for the courts…[49]

7.64 The powers of any Commonwealth tribunal are substantially less broad than those of state tribunals, due to the separation of powers doctrine set out in the Australian Constitution. Under state legislation, state tribunals are able to hear consumer, trading, tenancy and other disputes and make determinations, but Commonwealth tribunals are limited to review of administrative decisions. As explained by the Hon. Justice Garry Downes AM:

> The judicial power of the Commonwealth cannot be exercised by the executive. It can only be exercised by the judiciary.
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> In Australia, reviewing administrative decisions on the merits is not an exercise of judicial power, any more than the making of original administrative decisions is an exercise of judicial power. Both are exercises of executive or administrative power. The review of Commonwealth administrative decisions on their merits is appropriately carried out by tribunals not courts. The validity of Commonwealth administrative review tribunals is not in doubt.
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> However, determining disputes between landlord and tenant or resolving a consumer's claim for compensation does involve the exercise of judicial power. The separation of powers doctrine governing the Commonwealth

48 Ms Jenny Buchan, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 82

49 Mr Brendan Bailey, *Submission 152*, p. 3

> Government precludes Commonwealth tribunals from exercising this or any judicial power.[50]

7.65 This suggests that the introduction of a franchising tribunal at the federal level would not materially assist in overcoming current frustrations regarding the lack of enforceability of mediation outcomes, because the tribunal would not be empowered to enforce judgements. Mr Bailey commented that the existing codified mediation process recognises this constitutional limitation:

> Mediation is a valuable mechanism to assist in dispute resolution, particularly when it is assumed that the parties look to continue a working relationship…Mediation is not an exercise in making a binding determination that can be enforced by the mediator – it never is. That does not mean that mediation is not valuable. Litigation is expensive but the Franchising Code of Conduct should not be found lacking simply because it pays due regard to the limitations imposed under the Commonwealth Constitution and offers a relatively low cost dispute resolution mechanism…that will not be undone by a finding of constitutional invalidity.[51]

A franchising ombudsman

7.66 The committee received suggestions that the introduction of a franchising ombudsman may assist in dispute resolution:

> I would have thought there is a role for an industry ombudsman. There needs to be someone who by their experience and the authority of the position can attempt to have some influence.[52]

7.67 The Economic and Finance Committee of the South Australian Parliament also recommended that the introduction of an ombudsman be considered.[53]

7.68 A potential model for such an ombudsman is the Banking and Financial Services Ombudsman, who is empowered to consider disputes involving services provided by a bank or affiliated financial institution to individuals or small businesses, where the amount being claimed is less than a set amount (currently $280,000).[54] The

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50 The Hon. Justice Garry Downes AM, 'Overview of Tribunals Scene Australia', Speech delivered to the International Tribunal Workshop, Canberra, 5 April 2006. http://www.aat.gov.au/SpeechesPapersAndResearch/speeches/downes/OverviewTribunalsSceneApril2006.htm , viewed on 17 November 2008

51 Mr Brendan Bailey, *Submission 152*, p. 3

52 Professor Andrew Terry, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 74

53 SA Parliamentary Economic and Finance Committee, *Franchises*, May 2008, p. 98

54 See Terms of Reference for the Banking and Financial Services Industry Ombudsman at http://www.abio.org.au/abioweb/ABIOWebSite.nsf/0/B385C2D0F3E87335CA256C0E0045047A/$file/BFSO+Terms+Of+Reference+1-1-07.pdf , viewed on 17 November 2008

committee notes that the ability of a franchising ombudsman to be effective might be constrained by limits on the financial magnitude of disputes that could be heard.

Arguments for maintaining the status quo

7.69 The committee also received submissions indicating that it is not necessary to change existing franchising dispute resolution procedures. In particular, the FCA contended:

> …that any new tribunal or any arbitration or ombudsman process is unlikely to offer any material benefits to franchisees, and is likely to be more costly.[55]

7.70 The Law Council of Australia endorsed this position:

> …the dispute resolution processes contained in the Franchising Code are adequate in their current form and the inclusion of a new binding alternative dispute process (based around expert determination by an Ombudsman or expert) is not warranted.
>
> Franchising is a contractual business arrangement pursuant to which a franchisee is granted a right to operate a franchise business. It is appropriate that disputes regarding franchise agreements, which cannot be resolved through the mediation processes contemplated by the Code, are resolved in the manner contractually agreed by the parties to the franchise agreement. If the parties determine that disputes will ultimately be resolved by Courts, this is entirely appropriate.[56]

7.71 Mr Robert Gardini, despite outlining substantial concerns regarding the efficacy of current mediation processes, acknowledged that changing aspects of the dispute resolution model might not fix existing problems. He suggested addressing overall conduct in franchising and improving remedy as a useful alternative:

> I do see some expansion of dispute resolution procedures, but moving to a tribunal or a franchise ombudsman may be just creating another level of unnecessary red tape and an institution that perhaps does not achieve anything better than is currently achieved. In a regulatory sense, let us get to the fundamentals: if we are striving for a minimum affect of regulation let us look at the adequacy of the code and whether we need a good faith provision in the code, which I support, and whether we look at an effective remedy at law that deals with the small number of serious complaints that exist in this industry. I…have a hesitation about creating new entities that in fact may not deliver. Let's keep it simple. Let's provide an effective remedy, because if you do that then I think the result will follow that there will be

55 FCA, *Submission 103*, p. 6

56 Law Council of Australia, Trade Practices Committee, Business Law Section, *Submission 141*, p. 11

realistic settlements or improved satisfaction through the mediation process.[57]

Committee view

7.72 The committee supports any efforts by franchisors and franchisees to engage in constructive and fair internal complaint handling and dispute resolution procedures, avoiding the need for formal mediation to be triggered. Such procedures are already allowed for in the Code, which states that parties should 'try to agree about how to resolve the dispute' before resorting to mediation.[58]

7.73 Inevitably, some disputes cannot be resolved this easily, and the committee recognises that there is substantial dissatisfaction in the sector about the outcomes of existing mediation processes. In the absence of both parties engaging meaningfully in the process, resolving franchising disputes through mediation can be a flawed process. However, the Code's current mediation provisions do at least provide franchisees and franchisors wanting to constructively resolve their dispute with a less costly resolution option than litigation.

7.74 The committee does not support the introduction of alternative dispute resolution mechanisms to overcome the problem of parties approaching mediation uncooperatively. A Commonwealth tribunal sitting between mediation and the courts would most likely add another layer of complexity and expense to the process without achieving improved outcomes, given the need to ensure appeals to the courts and the constitutional uncertainty over how binding its decisions would be.

7.75 It is the committee's view that many of the issues which lead to franchising disputes, and hence the need for mediation or alternative dispute resolution mechanisms, may be mitigated by the introduction of an explicit obligation into the Code for all parties to a franchise agreement to act in good faith. This would apply more broadly than a simple requirement to approach mediation in good faith. The pros, cons and implications of including such an obligation in the Franchising Code of Conduct are discussed in detail in Chapter 8.

7.76 Enforcement options are discussed in Chapter 9.

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57 Mr Robert Gardini, *Proof Committee Hansard*, Sydney, 9 October 2008, p. 11

58 See 29(2) and 29(3) of Part 4 of the *Trade Practice (Industry Codes—Franchising) Regulations 1998*.