



Australian Government

**Department of Innovation
Industry, Science and Research**

**Parliamentary Joint Committee on
Corporations and Financial Services'
inquiry into franchising**

**Submission by the Department of
Innovation, Industry, Science and
Research**

September 2008

Overview

The Department of Innovation, Industry, Science and Research (IISR) regularly engages with the franchising sector and provides policy advice to the Minister for Small Business, Independent Contractors and the Service Economy on franchising matters, given the sector's small business focus.

The Government funded Office of the Mediation Adviser (OMA), which was set up in 1998, appoints mediators to assist franchisors and franchisees resolve their disputes through mediation. IISR monitors industry representations and the OMA statistics with a focus on identifying any systemic problems faced by the franchising sector that impede the operation of the Franchising Code of Conduct (the Franchising Code), a mandatory code under the *Trade Practices Act 1974* (Trade Practices Act). The Australian Competition and Consumer Commission (ACCC) is responsible for investigating complaints and, where necessary, taking enforcement action against anyone who fails to comply with the Trade Practices Act, including the Franchising Code.

Background

The Franchising Code prescribes certain minimum conditions in franchise agreements, requires franchisors to disclose specific facts to franchisees and to follow set procedures to assist franchisees undertake their due diligence prior to entering into the franchise agreement. The Franchising Code also prescribes a dispute resolution procedure (discussed in more detail below).

IISR assisted with the implementation of the outcomes of the review of the disclosure provisions of the Franchising Code undertaken in late 2006. Following the review, the Code was amended to increase the transparency, quality and timeliness of disclosure of information by the franchisor to existing and prospective franchisees. The amendments became effective on 1 March 2008 and key changes to the Code include:

- a prohibition on seeking franchisee waiver of liability for any verbal or written representations made by the franchisor;
- franchisors must provide a copy of the franchise agreement to franchisees in the form it is to be executed;
- names and contact details of past franchisees must be disclosed by the franchisor, unless those franchisees have requested that the details be withheld; and
- the franchisor must disclose any materially relevant facts (such as certain court proceedings) to the franchisee in writing, within 14 days (rather than 60 days) of becoming aware of it.

Dispute resolution process under the Franchising Code

The Franchising Code obliges parties to a franchise relationship to attempt to resolve disputes through direct negotiations. Where parties fail to reach an agreement through direct negotiation, either party may refer the matter to mediation with a mediator of their choice or request that the OMA appoint a mediator. The OMA can be contacted 24 hours per day, seven days per week via a toll-free telephone number, fax, email or website. Its services are nationally accessible.

Once the mediation is requested by either party, it is mandatory for both parties to attend the mediation and try to resolve the dispute. Should one side not attend mediation then the other side may start legal proceedings for breach of the Trade Practices Act. Alternatively, it might contact the ACCC asking it to investigate and take action.

Under the Franchising Code, if neither party wants to go to mediation then it is not compulsory. However, mediation is often the preferable option for both parties since it is usually quicker and cheaper than litigation. It is also informal, confidential and easily accessible.

OMA statistics

Statistics on mediated outcomes and costs

OMA statistics indicate that around 75 per cent of mediations conducted through the OMA result in a binding settlement. Under the terms of the Government contract with the OMA, the maximum fee for the mediator is \$275 (including GST) per hour. The cost of the mediation is shared between the parties involved (unless otherwise agreed). On average, mediations cost each party approximately \$1,500 and average completion time after the appointment of the mediator is five weeks.

Statistics on dispute inquiries and referrals

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.

The nature and bases of each dispute mediated since 2005 is at **Attachment A**. Only non-identifying data has been provided so that the confidentiality of the mediation process is not compromised. It should be noted that there may be one or more basis of each mediated dispute and, therefore, that dispute may be included in more than one category within the table at Attachment A. Since the data is collected prior to mediation, it does not accurately reflect all the issues actually discussed and the statistics are indicative only.

By way of clarification of the two categories – 'Terms of termination/exit arrangements' and 'Renewal of franchise' – termination refers to either a franchisee or franchisor choosing to end a franchise agreement early (prior to the end period stipulated in the franchise agreement). Non-renewal refers to either a franchisee or franchisor refusing to enter into another agreement when the previous agreement comes to an end. According to the OMA, the significant variations in the numbers within each category (or 'spikes') in a given period are often unexplained.

The number of dispute inquiries received, and the number of disputes mediated, by the OMA are low relative to the estimated 60,000 franchise units in operation in Australia¹.

The majority of the referrals to the OMA are from the ACCC, solicitors and industry representatives (such as the Franchise Council of Australia).

¹ Franchising Australia 2006 Survey, Conducted by Professor Lorelle Frazer, Griffith University

Nature of issues raised in mediation	2005		2006		2007		2008		Total
	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	Jan-Jun	Jul-Dec	
Terms of Termination/Exit Arrangements	5	6	4	9	14	9	8	8	55
Alleged Misrepresentations by Franchisor (site/profit/support etc.)	4	11	13	8	5	7	4	4	52
Franchisee's failure to Follow the System	6	3	9	13	2	3	5	5	41
Amounts Unpaid by Franchisee	4	10	4	4	3	4	7	7	36
Inadequate Support, Training, Assistance	6	4	4	1	10	8	3	3	36
Poor Management/ Communication by Parties to Agreement	3	4	5	4	1	11	4	4	32
Franchisor Failing to Refer Enquiries and/or Supply Product Territory	5	0	0	0	4	7	2	2	18
Inadequate Disclosure	5	1	1	3	2	5	1	1	18
Variation of Agreement/Unfair Agreement Terms	2	0	2	2	5	3	1	1	15
Unprofitability of Franchise	3	2	0	6	2	0	0	0	13
Advertising Fund / Inadequacy / Fees	1	1	1	2	5	2	0	0	12
Alleged Misleading & Deceptive Conduct by Franchisor	1	0	0	0	3	1	6	6	11
Amounts Unpaid by Franchisor	0	0	0	0	3	3	4	4	10
Franchisor's failure to Follow the System	1	2	3	1	1	1	1	1	10
Premises and/or Premises Refurbishment	0	0	3	7	0	0	0	0	10
Renewal of Franchise	6	1	2	0	0	0	0	0	9
Competing with Franchisor	0	0	0	0	1	6	2	2	9
Lease/Rent	3	1	0	2	1	1	0	0	8
Invoice Procedures of Franchisor	0	0	0	0	1	3	1	1	7
Trademark/Intellectual Property Issues	0	1	1	0	1	1	0	0	5
Abandonment	1	0	0	1	0	1	0	0	4
Franchisor Appointing Additional Franchisees / Corporate Outlets	0	0	0	0	3	0	0	0	3
Poor System	0	0	0	0	3	0	0	0	3
Franchisee Damaging Brand	0	0	0	0	1	0	0	0	1
Mediation settlement rate (%)	76	73	73	64	76	77	73	73	