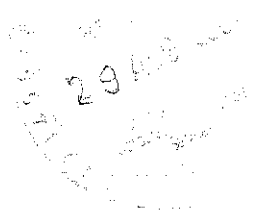


Committee Secretary
Parliamentary Joint Committee on
and Financial Services,
Department of the Senate
P.O. Box 6100 Parliament House
CANBERRA. ACT 2600



Inquiry into Franchising Code of Conduct

I wish to make a submission to the Senate Parliamentary Committee Inquiry into the Operation of Franchise Businesses, and the Franchising Code of Conduct.

In May 2007, a complaint was made by me to the Australian Competition and Consumer Commission against [REDACTED] and [REDACTED] the National Franchisor and the W.A. Master Franchisee respectively of the [REDACTED] Franchise System.

I enclose a copy of letter dated 28 June 2007, from the ACCC, addressed to my parents who participated in discussions with the ACCC, which summarises the main issues detailed in the complaint, and the manner in which National Franchisor and Master Franchisee, conducted the business to the detriment of profitability of the store operations, and ultimately resulting in total loss of capital invested by me in the franchise business and significant residual debt when the business was terminated on four days notice due to Franchisor's/Master Franchisees' failure to obtain renewal of lease of the premises, despite my serving notice on Master Franchisee, 90 days prior to expiry of my Agreement, of my intent to extend the term of the Franchise Agreement for a further ten years in accordance with the original Agreement.

I have submitted all relevant documents to the ACCC, however I have received no further information from ACCC regarding completion of their assessment, or the results thereof.

I trust this information is satisfactory for inclusion in your enquiry. Perhaps you could liaise with ACCC if you require more details on any aspects of the complaint, or their assessment of the issues, and you can take this letter as my consent for ACCC to release relevant documents to you.

Yours faithfully

Graeme L Ross



Australian
Competition &
Consumer
Commission

Our ref: [REDACTED]
Contact officer: [REDACTED]
Contact telephone: 08 [REDACTED]

PO Box 6381
East Perth WA 6892

3rd floor
East Point Plaza
233 Adelaide Terrace
Perth WA 6000

ph (08) 9325 0600
fax (08) 9325 5976

www.accc.gov.au

28 June 2007

Dear Mr and Mrs Ross

Complaint against [REDACTED], [REDACTED] and [REDACTED]

I refer to your meeting with [REDACTED] of this office on Tuesday 8 May in relation to your son's complaint against [REDACTED] and [REDACTED]. Thank you for the material and documents you provided at that meeting. A detailed assessment of that material is underway.

Briefly, I understand the background to your complaint to be:

- On 12 December 1997 Graeme Laurence Ross purchased an existing [REDACTED] franchised store at the Grove Shopping Centre; the term remaining on the franchise was 8 years and 3 months to 27 February 2006.
- The lease was due to expire on 14 March 2001 with an option to renew for 5 years; an extension was granted on 18 October 2001 to 14 March 2006.
- 28 November 2005 ~ GL Ross exercised his option to renew his franchise agreement for a further term of 10 years from 28 February 2006.
- 13 February 2006 ~ [REDACTED] advised [REDACTED] (WA) P/L that the lessors were unwilling to grant a new lease.
- The operation of the franchised business was made difficult by the master franchisee for WA, [REDACTED], engaging in conduct which included:
 - harassment, bullying, and intimidating and unprofessional behaviour;
 - enforcement of pricing policies which did not cover operating expenses;
 - irrational, harsh and oppressive application of dress code;
 - ongoing inaccurate and unfavourable store inspection reports;
 - inconsistent application of standards and operational requirements;
 - unilateral alteration of the franchise agreement and operations manual;
 - failing to act in good faith and failing to adhere to agreed resolutions; and
 - failing to make timely arrangements to renew the lease.



At this stage and to assist our assessment of the matter, we have written to the national franchisor and WA master franchisee requesting information on the operation of the franchise arrangements in Western Australia.

We will write to you again when our assessment is complete.

By way of background, The ACCC's role is to protect the interests of the public by seeking general compliance with the provisions of the *Trade Practices Act 1974* (TPA). The ACCC is able to take enforcement action, where it considers the conduct merits such action. In that regard, the ACCC's enforcement focus is on areas of high economic and consumer detriment.

The issue of unconscionable conduct was raised at our meeting. Section 51AC of the TPA prohibits a corporation, in connection with the supply of goods or services, engaging in conduct that in all the circumstances is unconscionable. This provision provides a list of non-exclusive factors that may be taken into account in assessing whether the conduct is unconscionable. These include the relative bargaining strengths of the parties; whether, as a result of the stronger party's conduct, the other party was required to meet conditions not reasonably necessary to protect the stronger party's legitimate interests; whether the target business could understand any documentation used; and the use of any undue influence, pressure or unfair tactics by the stronger party.

It is important to note that the court will determine whether a business has engaged in unconscionable conduct by considering all the circumstances. Each of the factors in isolation may not amount to unconscionable conduct, but may do so when considered cumulatively and evaluated in light of all the circumstances. Equally, however, conduct that may be unconscionable in one set of circumstances may not be unconscionable in another set of circumstances.

It is not the role of the ACCC to provide legal advice or make authoritative determinations of law. These are matters for private legal advisers and the courts. Whether particular conduct contravenes the TPA is ultimately a matter that can only be determined by a court on application by either the ACCC or another party that has a concern with a particular matter or who suffers loss or damage as a result of offending conduct. In many circumstances private actions are more appropriate because they are aimed at remedying a particular dispute between the parties.

Federal Parliament has extended the jurisdiction of the Federal Magistrates Court (FMC) to allow litigants to take advantage of the streamlined and accessible forum offered by the FMC. The FMC can now deal with claims about misleading or deceptive conduct, unconscionable conduct, industry codes, and other consumer protection issues, and may award damages up to a maximum of \$750,000.

I have enclosed an ACCC leaflet for your information. Should you have any queries, please contact [REDACTED] on [REDACTED]

Yours sincerely

Larry Kelly
Deputy Director



The Trade Practices Act and the ACCC—an overview

The *Trade Practices Act 1974* is a Commonwealth law that was introduced to enhance the welfare of Australians by promoting competition and fair trading and providing for consumer protection.

The Trade Practices Act aims to prevent corporations and businesses from:

- behaving anti-competitively or unconscionably
- contravening an industry code of practice
- treating consumers unfairly or deceptively
- limiting third party access to nationally significant infrastructure
- reducing competition in the telecommunications industry.

The Act also provides for examining and monitoring prices of selected goods and services (for example, postal services) in the Australian economy.

Who does the Trade Practices Act apply to?

The Act applies to all corporations operating within Australia, including the commercial activities of government. The Act also applies to the activities of individuals operating a business, including professionals such as doctors, lawyers and accountants.

What is the role of the ACCC?

The ACCC is responsible for administering the Trade Practices Act. It may be able to help you if you believe you are the victim of a breach of the Act.

How does the ACCC decide which complaints to pursue?

The ACCC is most likely to act on complaints about conduct that:

- shows a blatant disregard of the law
- will cause significant public detriment
- when pursued will provide an outcome that will have an educative and deterrent effect
- is unconscionable against small business
- when pursued will clarify the reach and meaning of the act.

This means that, although the ACCC will assess every complaint, not all will be pursued. Individuals can take a private action under the Act.

Major parts of the Trade Practices Act

Access regime

Part IIIA

The access regime provides a national system to facilitate third party access to facilities of national significance such as electricity grids or natural gas pipelines. How the regime works is for a service to be declared and then, if there is a dispute over conditions of access to it, the ACCC may be called upon to arbitrate on the conditions.

Anti-competitive practices

Part IV

The more serious types of anti-competitive behaviour by businesses include:

- competitors agreeing to charge the same or similar prices, or to restrict the territories within which they trade
- competitors agreeing to prevent another from acquiring or receiving goods and services
- misusing substantial market power to eliminate or damage a competitor or potential competitor
- refusing to supply—this may infringe the Act under some circumstances such as if the purpose of the refusal is considered to be to damage another business
- stipulating minimum resale prices for goods supplied to a retailer.

Sometimes conduct that may appear to be anti-competitive is permitted if it is of sufficient public benefit. Under the Act the ACCC can authorise such conduct.

Penalties

Anti-competitive conduct may result in penalties of up to \$10 million for companies and \$500,000 for individuals.