

Mr Scott Cooper

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Please accept this as a formal submission to the 2013 Review of the Franchising Code of Conduct.

Despite amendments to *the Code*, dispute resolution remains an area that leaves franchisees particularly vulnerable. To suggest that the minor changes to *the Code* will alter the attitude or even deter franchisors inclined to push the boundaries of *the Code*, demonstrates a total lack of understanding of the imbalance of power that exists in franchising.

The fact remains that in the vast majority of disputes between franchisor and franchisee(s), franchisees are rendered little more than cannon fodder for a determined and financially stronger franchisor. To demonstrate the knowledge of the strong position that franchisors currently hold, allow me to quote Jim Penman, the name and face of *Jim's Group*.

***'The law is pathetically weak...I'm in an incredibly strong position, where the legal process is so cumbersome and expensive that franchisees, especially in service industries like ours, can't afford to fight as they get buried under the costs.'***

As a franchisee in one of Australia's largest franchise systems, I was exposed to the inadequacies of the *Franchising Code of Conduct* and introduced to the financial brutality of the legal system. In summary:

- The *Franchising Code of Conduct* was breached by the franchisor in failing to provide mandatory information in the Disclosure Document. '*The Code*' states:

***'A franchisor must, before entering into a franchise agreement, and within 4 months after the end of each financial year after entering into a franchise agreement, create a document (a disclosure document) for the franchise in accordance with this Division.'***

- The franchisor admitted to the breach of the *Franchising Code of Conduct*, and accordingly admitted that the breach should be remedied.

***'I've checked and it appears you were not given a list of current Franchisees in your Disclosure....I've asked [REDACTED] from my office to get in touch and try to work out a solution.'***

- Following denials of liability for the breach and a corresponding failure to enter any settlement negotiations, the franchisor orchestrated a disingenuous settlement offer that was extended at mediation.
- The franchisor aggressively invited litigation 'if I wanted more', and simply refused to answer any questions surrounding the breach unless it was in a court room.
- With the clarity of hindsight, it was proven the disingenuous settlement offer would never have been achieved given the subsequent terminations of franchisors and admissions of profitability concerns — not to mention the offer was withdrawn within days of mediation.
- The costs of litigation and the franchisor's 'deep pockets' were less than subtly re-enforced by the franchisor with financial intimidation that included threats of bankruptcy.

***'If you go to court you'll spend tens of thousands in legal fees. You may well get more....I strongly advise you to see sense and accept the offer.'***

- Ultimately, the costs of litigation could never be justified in consideration of the cost of the business, so to mitigate further financial damage I walked away from the franchise with nothing. I walked away with nothing, despite the franchisor admitting they had breached the *Franchising Code of Conduct*.

As clearly demonstrated in my case, *the Code* is totally ineffective at protecting franchisees, unless they have access to vast sums of money to litigate. The costs of accessing the legal system are undeniably extremely prohibitive for the vast majority of franchisees, and as a direct result, dispute resolution by default becomes an area of grave concern.

The adversarial nature of the legal system also works against franchisees, with franchisors staunchly defending their name by wielding a legal sledgehammer and demonstrating 'strong leadership' to set an example to other franchisees. The franchisee is left with a 'take it or leave it offer' that may be extended at mediation, or litigate.

The gaping chasm that exists between mediation and litigation is insurmountable for many, and needs bridging, contrary to the predictable claims of franchisors and their representatives, the *Franchising Council of Australia* (FCA). Litigation, if commenced, is invariably deliberately steered into a protracted financial war of attrition to claim a 'win' by default.

To further extend the 'strong' position the franchisor currently holds, I refer you to a quote from the Chairman of the ACCC, Mr Graeme Samuel, before the last Federal inquiry.

***'It can also avoid one of the real problems that we often find in making our risk assessment on litigation, which is to say, 'If we litigate against this particular franchisor, 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.'***

Unless mistaken, it appears the image of franchising is paramount — not the law. Enforcement of the law is the first step to making the laws effective. If a franchisor is in breach of the law, meaningful action should be taken regardless of the 'brand'. Unless the laws are effective and accessible, I fail to see their purpose.

The reluctance at a Federal level to introduce meaningful reform is somewhat confusing in light of the overall recommendations of the Federal Committee following the last Federal inquiry. The resistance to reform appears to be based on favourable data and reports relating to the franchising industry presented by the FCA, yet both the Committee and ACCC acknowledged that there are no accurate statistics available for the franchising sector. To quote from the committee's final report:

***'Due to a lack of sound data, the true extent of disputation in the franchising sector is difficult to determine'.***

***'The limited available data on the franchising sector is primarily derived from willing respondents to industry surveys...'***

***'The majority of the information has been extracted from a biennial survey undertaken by the Asia-Pacific Centre for Franchising Excellence within Griffith University. The survey is sponsored by the Franchise Council of Australia.'***

***"The Australian Competition & Consumer Commission (ACCC) commented that the shortage of statistical data on franchising 'contrasts with the level of information available about general business demography in Australia'..."***

Despite acknowledgments such as these, Federal Ministers seem willing to blindly accept the biased and prejudiced advice of the FCA.

One of the many reasons for the lack of reliable data from the franchising industry is the reluctance, and at times inability of franchisees to come forward. Franchisors are effectively able to silence franchisees with confidentiality agreements and clauses prohibiting franchisees from speaking out against the franchisor — the fear of reprisal is a powerful deterrent. Indeed, in the Committee's report following the last inquiry, the Committee saw fit to report an incident of a franchisee being threatened that involved two senior representatives of the FCA. To quote the Committee from Appendix 3 of the report:

***1.4 The correspondence received by the committee provided clear evidence that the person who had made the submission was being threatened with a 'penalty or injury' as a direct result of making that submission.***

***1.5 When this letter was brought to the committee's attention, the committee directed the committee secretary to write, as a matter of urgency, to the person who wrote the letter that threatened the submitter, and warn them that the letter may constitute a contempt of Parliament and a criminal offence.***

***1.7 The committee considers this to have been a serious incident.***

Though mandatory in name, *the Code* is primarily voluntary in nature. The falsehood of protection is little more than a convenient marketing tool to entice new franchisees. If the laws are to remain ineffective, then education of prospective franchisees has to be steered towards emphasising the reality of franchising and not the falsehood that is portrayed. I fully understand why franchisors and the FCA are vigorously opposed to meaningful reform — they do not want their *carte blanche* disturbed, but I fail to understand the lack of reform if the laws are indeed implemented to protect franchisees.

Yours sincerely

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