

By email: smallbusiness@innovation.gov.au

The General Manager
Small Business & Deregulation Branch
Department of Innovation, Industry, Science and Research
GPO Box 9839
CANBERRA ACT 2601

Dear Sir/Madam

**Submission: The Franchisee's Association of Australia Incorporated
Resolution of small business disputes**

Thank you for the opportunity to make a submission to the Inquiry.

We have had regard to the Options Paper made 2011 and in particular the four options under contemplation for the resolution of small business disputes.

1. The Franchisee's Association of Australia Incorporated (ARBN 119 802 489) (FAAI).

- 1.1 The FAAI is a not for profit body representing the interest of franchisees principally in the area of policy development and law reform.
- 1.2 The FAAI has approximately 1000 members and associates. Its business is conducted by an honorary board chaired by the Honourable David P Beddall.
- 1.3 A very substantial number of franchisees might be considered *small business*. Whilst that concept is not defined these franchisees certainly have their own capital at risk and run businesses typically with a turnover of around \$1 million annually. Consequently franchising, and franchisees operating in that domain is an interest we would respectfully invite the Department to consider in determining the Options.

2. The need for reform

- 2.1 The need for reform is manifest as is evidenced by the Options Paper to which FAAI responds, as such there is limited need to articulate those reasons.
- 2.2 Franchising, as a small business, even with the advantage of its own dispute resolution systems still encounters the issues to which the Options Paper refers; namely, finally and satisfactorily resolving disputes.
- 2.3 Mediation is facilitated under the Franchising Code of Conduct but ultimately disputes if not resolved by mediation or conciliation or any other forms of alternative

dispute resolution must be litigated and typically in superior courts of record and at great risk and cost. As such FAAI welcomes the consideration of the Parliament pursuant to this Options Paper and is pleased to make a submission.

3. Submission

- 3.1 FAAI does not seek to be heard in derogation of the four options presented in the option paper. Any self conscious attempt to put in place systems that facilitate the resolution of disputes for small business is welcome.
- 3.2 As FAAI reads the Options Paper the four options appear to encompass a form of escalation as one moves from Option one through to Option three. Option three countenances the creation of a national Small Business Tribunal. Option four seems to countenance an Office described as that of the "Small Business Advocate" which may, or may not, result in the Advocate having powers and functions similar to those of the ombudsman one sees in superannuation and banking.
- 3.3 FAAI favours either option three or option four or an amalgam of those two options provided that the Tribunal (Option three) or the Advocate (Option four) is capable of exercising arbitral power or in the alternative the judicial power of the Commonwealth. In the alternative, if judicial, there is ease of access paved to the Courts.
- 3.4 The principal concern of FAAI (based on its long experience in franchising as a small business) is that disputes are ultimately resolved by reference to the threat of, or the actuality of, litigation which results in the certainty of a hearing date and the certainty of an outcome being judicially determined.
- 3.5 That is, whilst the desirability of alternative dispute mechanism other than arbitration or judicial proceedings is favoured, the want of compulsion as flows from the orders imposed (by an independent tribunal) means that unless good faith from each party is truly operating, the disputes are either not resolved or alternatively resolved on the basis that one party to the dispute (in franchising, typically the franchisee) is so commercially over borne or under resourced and undercapitalised, that the dispute is resolved unfavourably including in circumstances where the ongoing relationship is often impugned.
- 3.6 Coining a colloquialism often heard from wise and experienced judges:

"Nothing will settle a case quicker than the certainty of a hearing date."
- 3.7 FAAI appreciates the limitations in the Commonwealth Constitution should the decision be to empower a tribunal or the office of a Advocate with the judicial powers of the Commonwealth under chapter III of the Commonwealth Constitution.
- 3.8 It would be possible for the Commonwealth to invest, for example, the Federal Magistrate's Court of Australia with judicial power in a division which might be described as "small business division" or "small claims division".

- 3.9 Definitional questions aside, such an arrangement is constitutionally available and practicable because it is very unusual indeed in modern commerce for one counterparty to a commercial dispute or another, not being a "constitutional corporation" as that concept is understood to the corporations power of the Constitution; namely section 51(xx).
- 3.10 However FAAI would also support arrangements such as may be contemplated under Option three provide these disputes could be escalated to and finally resolved in consequence of binding arbitration. The commonwealth has a long history of legislative experience creating tribunals with arbitral functions and methodologies by which those arbitrated outcomes are binding. Such has been the case in the exercise of the commonwealth's industrial power since federation and there can be no legal objection, as FAAI understands it, to legislation which would empower a small business tribunal (or the office of an Advocate) to have an arbitral function and legislative arrangements for the enforcement of arbitral outcomes being put in place.
- 3.11 It is FAAI's primary submission that resort to arbitration or judicial process operates as the ultimate sanction to ensure parties negotiate in good faith through the mediation or conciliation phases in the knowledge that if the matter is not so resolved amicably there will be easy access to arbitral or judicial process, at low cost.
- 3.12 FAAI strongly submits that there can be no reason in principle (subject to definitional arrangements) why franchising would not fall within these arrangements. In other words the definition of *small business*, if such be in contemplation should operate to include rather than exclude franchising. This is for the very fundamental reasons that franchising can be and is in the main:
- (a) small business; and
 - (b) not advantaged by arrangements such as contemplated in these submissions namely easy access to an arbitral or judicial tribunal (Court) at low cost.

FAAI would be pleased to expand upon these submissions if required, and FAAI thanks the Department for the opportunity to make these submissions.

Yours faithfully

The Honourable David P Beddall
Chairman

22 Redgum Place Calamvale Qld
Phone 07 32737455 Fax 07 32737761
Email: beddald@bigpond.com