# REGULATION IMPACT STATEMENT

Franchising has deteriorated since its inception. In the early days both franchisors and franchisees were riding the crest of a wave. What’s changed? There are successful franchise

systems. There are franchises that are profitable for franchisees and franchisors alike - run by honourable franchisors with honourable franchisees. These are the systems that we must

examine to be the basis of what is good about franchising for the future. There has been so many tries to get it right we need to get it right once and for all and significant change is needed for this to happen.

I took the view that franchisors and franchisor groups tended to focus on the fact that a lot of the blame for trouble in the industry was due to franchisees doing the wrong thing and not doing their due diligence. They tended to focus on this aspect as a major factor. Yes it is a problem and franchisees can be their own worst enemy sometimes when they are keen to get into the business but the problems arise when down the track franchisees are faced;

1. with a franchisee agreement that can arbitrarily change during the course of the agreement.
2. with an agreement that isn’t fair to both parties
3. with a franchising code that offers no real opportunity to resolve a dispute apart from mediation and there is limited enforcement of breaches.
4. and a franchise that you are stuck in and that is difficult to move on from.

As far as the business phases of the Impact statement are concerned I have focused mainly on **Operating a franchise. Principle 5**. I consider it to be one of the most important opportunities to make things better.

I am a firm believer in expanding the options for dispute resolution and streamlining mediation procedures and services. Option 5.1.2.

I am a long standing franchisee of just under 20 years. I have been involved in disputes with my franchisor from time to time over the years. The one thing that I can attest to is how difficult it can be to resolve a dispute when one party does not want to. Both parties need to be committed to the process and only then is mediation an option otherwise it is a waste of time. I am going to say that anecdotally mediation only works in 50 present of the cases because if it doesn’t work then sadly there is no real alternative for franchisees and as a franchisee you take the easy option because the alternative just simply costs too much money. I most definitely agree with the proposition that the high success and satisfaction rates exist as far as the ASBFEO are concerned because there are no real options for a franchisee when mediation fails. Lawyers are expensive and going to court to resolve a dispute is expensive and is really not a viable option for a franchisee. So as it currently stands mediation is really the only option.

My recommendation encompasses most of the aspects of 5.1.2:

1. There needs to be expanded options for dispute resolution
   1. There needs to be one single body responsible for the dispute resolution process.
      1. That body should manage the process from mediation and beyond.
      2. To provide advice and information both initially and throughout the process as to options available, without offering legal advice be able to offer information on the code itself penalties, clauses, definitions etc.
      3. That body needs to be Commonwealth based but with State representation perhaps having a relationship with the existing State Small Business Commissions. In a recent dispute that I have had with my franchisor the ASBFEO was a more expensive option namely $2,000 in mediator costs as opposed to $120 each party at the Victorian Small Business Commission. There is no existing relationship between these two offices and it is, I believe, largely a duplicated service.
      4. To maintain a register of accredited, experienced and competent mediators conciliators and arbitrators.
      5. to maintain data and be receptive to research and feedback as to the effectiveness of the system and how it is working. And to report to government to suggest change where appropriate.
   2. The best and most cost effective option would be to merge the AFMA and ASBFEO
   3. There needs to be a mediation, conciliation and arbitration option as part of the dispute resolution process. With conciliation as a second step in the resolution process I believe that parties could be encouraged to move towards a settlement. For those inexperienced in the dispute resolution process mediation alone can fall short of what is sometimes required to reach a settlement. Franchisors employ in house counsel more often than not have them in attendance and that can be a daunting experience for a franchisee. Conciliation would assist in this situation.
   4. There needs to be an ability to finally determine a matter and for that to be a binding result. Arbitration is more expensive but it is still a more cost effective and efficient option than going to court.
   5. The state based civil and administrative tribunals work extremely well and they have a proven record of success. They are a legislative body.
2. Multi party mediation is a necessity. It would save costs and resources and be a timely option for other parties that have a similar dispute. This is where a proper single administrative body could monitor disputes and explore the option to link similar matters. In some franchise systems one franchisee may not be aware of what another is involved in.
3. I certainly support a system where this combined administrative body could be funded by an industry levy based on the number of complaints. Disclosure documents should reflect the number of complaints or at the very least a rating as to the standard of the levy imposed on particular franchisors who find their way into the dispute resolution arena on a regular basis.
4. The current difficulty is that where a dispute involves a serious matter or breach of the Franchising Code and is an individual matter the ACCC is not equipped or charted or sufficiently resourced to deal with it. Their purpose is to administer the code on a more global basis and how the code affects the market as a whole. They are not equipped to act as an individual complaint handling body, so you have got nowhere to go when the ACCC decides that they can’t take your complaint on and whilst I have no statistics as to how many matters are reported to the ACCC relating to breaches of the code and are unable to be pursued I feel that it may happen quite a lot.
5. The dispute resolution procedures should be a legislated option and spelt out in each Franchise agreement.

The other area that I wanted to address was the exit arrangements that are available to franchisees and making them less onerous.

## Problem 6.2 Excessive Restraint of Trade Clauses

My franchise agreement does not give me a fair way to exit my agreement

My franchise agreement has unfair exit fees that force franchisees to pay a transfer fee to the franchisor based on a percentage of the sale price namely 20% of the sale price less the stock or $20,000 whichever is the greater. Upon sale, stock in my franchise system is graded into numbered grades of stock which relate to how compulsory it is to have it in stock and also according to its seasonality. Upon sale the stock is valued on a sliding scale. The object being that an incoming franchisee is not purchasing stock that is slower moving or obsolete. Whilst this is admirable on some occasions the fact of the matter is that an incoming franchisee may wish to take the stock but is forbidden to do so by the franchisor. What occurs is that taking into consideration the transfer fee and the diminished value of the stock on occasions it better to simply close the business and try to sell the stock yourself. And you can’t do that because of the onerous restraint of trade clauses.

When the agreement ends and the business is sold to a new franchisee then goodwill is an asset that forms part of the purchase price payable by the new franchisee. When a franchisee exists by closing the business or a termination there is no compensation payable for the effort that the franchisee contributed to building the brand and the business. The value of the goodwill remains with the brand and the franchisor. A franchisees contribution should be recognised and this should be a statutory requirement.

My franchise agreement has strong restraint of trade clauses based on time, distance and various multiples of each as well as the type of business or products being the same or similar. I consider the clauses to be onerous. In my case I can’t retire and although I have had my franchise for almost 20 years and have built up a level of expertise I am unable to use because of these clauses. At my age now I am to a large degree unemployable and I can’t use my expertise to run even a smaller style similar business. We are effectively stuck.

We live in a highly competitive environment so the time factor and the ability to use skills acquired and sell similar products should be removed from the restraint of trade clauses in franchise agreements. Whilst restraint of trade clauses protect franchisors and others franchisees the nature of the business shouldn’t be a factor in this determination. I agree that whilst you should not be able to open up figuratively speaking ‘across the road’ restraint of trade clauses shouldn’t prohibit franchisees from continuing on in a similar business and using their expertise to do so.

Where a franchise has altered insofar as the type of goods sold, and the profitability of the business has altered an opportunity should exist to exit the business should circumstances change. Where the franchise has significantly decreased or become less

profitable then the ability to exit should become available on that basis.

The most common reasons for non-compliance with the code is that most franchisees have limited knowledge of the code in the first place. Most franchisors are aware of that and it is easy to confuse or intimidate franchisees. The code is a ‘toothless tiger’ and doesn’t go anywhere near far enough to regulate or police the franchise sector. Until we have proper legislation, and the ability to fairly regulate the industry and

properly enforce suitable penalties then we will continually fall short of what is needed.

[Redacted]