

Franchising Taskforce
By email: franchising@employment.gov.au

6 December 2019

RESPONSE TO FRANCHISING SECTOR REFORMS - REGULATION IMPACT STATEMENT

Dear Taskforce Secretary,

Dispute Resolution Associates (**DRA**) is responding to the Taskforce Regulation Impact Statement.

We are providing our response only in relation to **Principle 5**: *Where disagreements turn into disputes, there is a resolution process that is fair, timely and cost effective for both parties.*

The Taskforce numbering system has been utilised in our response for ease of comparison.

We note that the background to there being an effective dispute resolution process is that, according to the RIS, as at mid-October [2019], the ACCC has litigated only 34 franchising-related matters since the Franchising Code was first introduced in 1998.¹

This is approximately 1.5 disputes that the ACCC has taken action a year over the past 20 years, against the background of there being:

- 1,344 franchise systems operating in Australia
- 80,000 franchisees
- OFMA handling approximately 250 mediations per year of which 80% are successfully resolved
- leaving 20% of 250 or 50 matters each year that are left unresolved.

Your faithfully



Derek Minus
Director
[Redacted]

¹ Sourced from the Australian Competition and Consumer Commission.

REVIEW—Taskforce Regulation Impact Statement

Policy Problem 5.1

1. We agree with the Taskforce assessment of the problem that: ***“Some disputes are not being resolved in a fair, timely and cost effective manner.”***
2. In particular: *“A wide range of stakeholders have raised concerns around access to justice in cases where mediation fails. Stakeholders have submitted that determinative dispute resolution through the courts is in most cases prohibitively expensive.”*
3. Therefore, there needs to be introduced into the Code a timely, effective and less expensive solution than litigation for the final determination of a franchising dispute that has not been resolved by mediation, which is also based on legal principles, like Arbitration.

Option 5.1.1 Status Quo

4. We do not agree that it can be seriously proposed by the Taskforce to do nothing to redress the very real hardship and inequalities identified and recorded in the Committee hearings and reported in the press.

Option 5.1.2 Expand options for dispute resolution, and streamline mediation procedures and services

Option 5.1.2(a) Merge OFMA and ASBFEO

5. The Committee considered but did not recommend this. They wrote: *“While the committee notes the evidence it received that proposed OFMA be merged into ASBFEO, the committee does not have a firm view on what the best outcome would be.”*
6. An independent expert report commissioned by Treasury (in June 2017) recommended against the amalgamation on the basis that combining the dispute resolution referral services of the ASBFEO and the OFMA would require both legislative change and a fundamental change in the ASBFEO’s role as:
 - a. The ASBFEO Act limits the ASBFEO to assisting small businesses, whereas the OFMA can assist all businesses, small or large, as well as consumers. Combining the two organisations would require a fundamental change in the ASBFEO’s role.
 - b. Section 73 of the ASBFEO Act prevents the ASBFEO from itself conducting any form of ADR process and it has no power to even refer disputes to arbitration.
 - c. As for the levy, not only is there no justification advanced of the need for it, the recommendation was never discussed by the Committee.

Option 5.1.2(b) Strengthen third party involvement in dispute resolution, including pathways for binding dispute resolution

7. The is explained by the Taskforce as: *“Under this option, dispute resolution options could be expanded by explicitly providing for arbitration in the Franchising Code.”*
8. We strongly support this option as it is what the OFMA and ASBFEO argued was needed and with which the Committee agreed and recommended:

“15.67 In terms of how the dispute resolution scheme for franchising could be enhanced, the overwhelming bulk of the evidence from a range of stakeholders strongly argued the Franchising Code be amended to include provision for binding arbitration. In this regard, the committee notes that more modern dispute resolution schemes under the Food and Grocery Code of Conduct and the AFCA both provide for binding arbitration.”

“15.73 The committee recommends that the dispute resolution scheme under the Franchising Code of Conduct remain mandatory and be enhanced to include: the option of binding arbitration with the capacity to award remedies, compensation, interest and costs, if mediation is unsuccessful (does not exclude court action);”

9. The Taskforce notes that this recommendation involves: *“complex legal considerations, which may limit, or even prevent, the ability of the Commonwealth to compel parties to participate in arbitration.”* There is no analysis as to what these complex problems are, no report by the Attorney-General to explain the nature of the problem nor how it can be practically dealt with. The Taskforce has failed to undertake its mandate to: *“examine the feasibility and implementation”* of the committee's recommendation.

Option 5.1.2(c) Clarify the availability of multi-party mediation.

10. The Taskforce appears confused as to the nature of this recommendation of the Committee contained in paragraph 15.73:

“the capacity for a mediator or arbitrator to undertake multi-franchisee resolutions when disputes relating to similar issues arise (as determined by the mediator or arbitrator)”
11. The comment that: *“Many stakeholders indicated that they were unaware of their ability to engage in multi-party mediation ”* is because under the current Code they **cannot** do this.
12. This change to the Code to allow for multi-party mediation and arbitration was proposed by the ACCC and strongly supported by the ASBFEO and OFMA and adopted by the Senate Committee as a recommendation.
13. We agree that it should be introduced.

Option 5.1.2(d) Require that mediation and then arbitration commence within a specified time period once a mediator or arbitrator has been appointed

14. Currently there is no requirement that parties are to engage in a dispute resolution without delay and it is a frustration to the complainant to see the dispute resolution process constantly thwarted by time delays.
15. We agree that it should be introduced.

Option 5.1.3 Clarify the complaint handling procedure requirements in the Franchising Code, to require dispute resolution processes be included in franchise agreements. Provide best practice guides for these processes (including options and timeframes).

16. Whilst it can never be said that clarifying the “complaint procedures” is anything but beneficial, this option entirely misses the crux of the problem, regarding: *“voluntary binding arbitration, a potentially lower cost dispute resolution option than the courts or drive its uptake where it already exists. This could also ensure that disputes are handled in a timely manner, by specifying timeframes.”*
17. Voluntary arbitration, will be adopted by the franchisors who are interested in resolving disputes with their franchisees in the best, cheapest, fairest and fastest available way. But will be ignored by franchisors that are currently using the lack of a mandatory process that requires them to engage with their franchisees in a binding resolution process, to avoid finalising the dispute.

Question 12

18. Arbitration is a generic term encompassing: international commercial arbitration, domestic court annexed arbitration, arbitration under the Commercial Arbitration Act, tribunal arbitration. The cost of the arbitration is dependent on the nature of the process.
19. We intend to introduce a fixed cost arbitration under \$20,000, substantially less than the alternative of conducting litigation in the Federal Courts.

Question 13

20. As identified in paragraph (20) above, a voluntary arbitration option will not lead to a final binding outcome.
21. If it is intended to introduce an option for voluntary binding arbitration, then the Code should allow franchisors (either individually or as a group) to negotiate the terms of their franchise agreement. Any dispute as to terms can resolved in the same manner as utilised in the **Port Terminal Access (Bulk Wheat) Code**. If a dispute arises over the future terms to govern the relationship, either party can refer the terms of the agreement to be determined by an independent arbitrator.