

28th June 2002

The Secretary
Trade Practices Act Review
C/- Department of the Treasury
Langton Crescent
PARKES ACT 2600

Re: Review Submission

Dear Sir, Madam,

We apologise for the delay of our submission, however we did request the details from the ACCC itself in plenty of time, but their reply was rather late for us to conform to your dead line.

The concern of our membership in regard to this review is mainly in the manner that the Trade Practices Act controls the Franchising Code of Conduct and in the way the ACCC acts on behalf of the weaker parties.

We are only concerned with matters that affect Australia Post and it's Licensee network (Licensed Post Offices). Nearly to 80 % of all Post Offices are licensed (privatised). In this regard we have three major problems:

- a) Franchisors, in this case Australia Post, are permitted to compete in the same market against their own Franchisees.
- b) The inability or unwillingness of the ACCC to take on matters that affect all Licensees, but only a few have lodged a complaint.
- c) The internal Dispute Resolution Process is stifling and preventing individuals to pursue a matter to its conclusion.

The Office of Small Business conducted the last Review of the Franchising Code of Conduct in May 2000. We made a verbal submission, which we were later asked to provide in writing. We have attached a copy for your perusal.

Below we address our concerns in detail.

a) Franchisor is competes in the same market against own Franchisee.

Australia Post still owns 20 % of Post Offices. They are called Corporate Post Offices. Customers are unlikely to be able to tell the difference, apart from the excellent service they receive from Licensed Post Offices.

Australia Post also operates other services direct from head office, bypassing it's own and Licensed outlets, to name a few:

- 1) **Postage meters.** Customers do no longer have to go to a post office to charge up their franking machines. This can now be done “on-line” direct from head office.
- 2) **Annual Stamp Album.** Australia Post keeps a database of previous orders and targets those customers in a mail-out campaign when the next issue is due.
- 3) **Telephone and Internet bill-pay.** Customers are encouraged to use these services by television commercials and by advertising material distributed by direct mail or postal outlets, including Licensed Post Offices.
- 4) **Poaching of customers.** Australia Post when becoming aware of a large account customer from a Licensed Post Office will try to lure this customer away from the Licensee with offers of cheaper than regular postage costs and free pick-up.

These kinds of practises should not be allowed to continue, especially by a Government owned business enterprise.

As someone once said “You can’t be half pregnant”

We think it is time to either convert the remainder of the Corporate Post Offices or to stop Australia Post from continuing the above practises.

If Licensed Post Offices were allocated a territory instead of just a site and if the revenue raised by the above practises by head office would be distributed on a pro rata basis that would be a fair and proper way for Australia Post to remain a Franchisor.

b) Unwillingness or inability of the ACCC to act.

The ACCC has received numerous complaints over the years about the way Australia Post conducts its franchising business with Licensees.

So far there has not been one instance where it has seen fit to act on one single complaint. From the attached correspondence you can see that they recommend that individual Licensees follow the internal Dispute Resolution Process. This organisation has taken matters to the Office of Mediation in the past and Australia Post at the hearing has suggested to the mediator the same path of action for Licensees to follow. However Sir Justice Street the Mediator did reject Australia Post’s demand, suggesting it was ridiculous for a large number of LPO’s to take individual action when in fact the contentious matter was affecting over 3000 Licensed Post Offices. We therefore suggest that the ACC be given what veer power necessary to be able to act for such matters in the future.

c) Internal Dispute Resolution stifling and preventing matters from conclusion.

The Internal Dispute Resolution Process as prescribed in the Franchising Code of Conduct is preventing micro business from achieving justice in its fight to survive against large and powerful corporations. It is used by the Franchisor to delay and circumvent the intend of the Act. Licensees do not have the financial power, the time and the legal knowledge to pursue an injustice done to them all the way to its conclusion. The Act allows the bypassing of the Internal Dispute Resolution Process and to proceed direct to the office of Mediation, however as we mentioned above, individual small business owners are unable to follow that path. It is our opinion that organisation like ours must be given the right and we would say, must be encouraged, to be able to bring a class action to the ACCC against a large and powerful Franchisor like Australia Post and at the same time be confident that such an action will be supported.

We thank you for your indulgence and are prepared to provide additional input into the Review should you so desire.

Yours faithfully

Marcel Schondelmaier JP

National Chairman & Licensee BARGO Post Office

Attachments:

I hard copy only, by mail ACCC responses to complaints lodged.

Submission to the Review of Franchising Code of Conduct May 2000

**Julia Freeman
Secretariat
Franchising Policy Council
C/o Office of Small Business**

REVIEW OF THE FRANCHISING CODE OF CONDUCT

DISCUSSION PAPER

REPLIES TO THE TERMS of REFERENCE

Verbal submission by the Licensed Post Officers of Australia Ltd.

Marcel Schondelmaier National Chairman

SYDNEY

Friday 5th May 2000

Transcribed from hand written notes and key sentences.

PREFACE

Australia Post operates a “Licensed Post Office” franchise.

It is also introducing a new concept of a “Franchised Post Office”.

At the same time it competes against the licensees with corporate post offices and with certain products or services direct from head office. It does not divulge these actions in the Licensing Agreement.

AUSTRALIA POST and LICENSEES

TOR 1: Identify the level of awareness of the Code within the franchising industry.

1) Are franchisors, franchisees and potential franchisees aware of the Code?

Australia Post is aware of the code, however in some correspondence to us Australia Post maintains the right to challenge its capture by the code.

2) Are franchisors sufficiently aware of what procedures they need to implement in order to comply with the Code?

We think Australia Post is fully aware of the procedures required under the code. They just choose not to implement them at the lower level of management.

3) Are franchisees aware of the dispute resolution procedures established by the Code?

NO.

Only franchisees, who have taken on a business (in our case a post office) since the inception of the code, seem to be aware of the code.

Most medium to large post offices have knowledge of the existence of the code, but not of its details or ramifications. A large number of small post offices and especially those with in-conjunction post offices are not aware of the code.

(An in-conjunction post office is a post office, which also operates another business such as a newsagency or general store from the same premises).

Therefore the dispute resolution procedures of the code are not widely known and most of our members who contact us when a dispute arises know of the code, but not about how to resolve the dispute.

4) Are franchisors and franchisees aware of the Office of the Mediation Adviser?

Most licensees would not be aware of this.

5) Are there any further steps that the Government could take to increase awareness of the Code?

YES. We recommend the Council adopt the introduction of a reference to the dispute resolution process in the "Notice of Default" issued by Australia Post. (Example).

TOR 2: Evaluate the range of business arrangements covered by the Code, and the appropriateness of this coverage.

1) Is it appropriate for the Code to cover business arrangements which are not structured like traditional business format franchising?

We think so, but have not come to a definite conclusion.

2) Is the Code's definition of a franchise agreement too broad, or too easily avoided?

No. We are quite happy with it.

3) Do any of the exclusions under the Code need to be fine-tuned?

4) Should there be specific codes for businesses in particular industries, such as has been suggested for the petroleum retail industry?

No.

5) Should there be a requirement, as proposed by the Franchise Council of Australia, for all franchise agreements to be in writing?

Yes. We believe a written agreement is better, oral agreements can be misunderstood. A high percentage of business people are not born with English as the mother language and therefore may interpret an oral agreement in a different way to the other party.

TOR 3: Evaluate the effectiveness of the Code in raising the level and standard of industry disclosure.

1) Has the Code led to an increase in the number of franchisors offering disclosure?

We believe so. It certainly applies to Australia Post, where only since October 1998, has this been introduced.

2) Are franchisors disclosing the full range of items required under the Code?

We don't know, and we have not received any complaints in this regard.

3) Are franchisors' disclosure documents compliant with the Code?

Not always. There have been several complaints about omissions and additions to disclosure documents to new licensees, which were not disclosed to existing licensees.

4) Are franchisees offering disclosure documents when they transfer a franchise? Are these documents compliant with the Code?

We believe so, especially as Australia Post advises prospective licensees about the requirements under the code.

5) Is the range of items that the Code states must be disclosed appropriate? Should the list be extended/reduced?

Because Australia Post operates a separate retail system in competition to licensees, we feel the need to have detailed financial disclosures included. Only in this way can we judge if a fair and equal comparison can be made between our part of the franchise system and the Australia Post corporate retail outlets.

6) Are there any areas in which franchisees would benefit from additional disclosure?

The details of the area network and its management. This is important, especially in a mixed (corporate and licensed) network.

The percentage of income by range of items (i.e. income from postage, and related products etc.). Demographics of the catchment area.

TOR 4: Evaluate the effectiveness of the Code's dispute resolution procedures.

1) Has the Code's dispute resolution process led to an increase in parties adopting mediation over litigation?

We have no information.

2) Is the Code's dispute resolution process providing a generally lower cost and speedier outcome than litigation?

We assume so, but have no figures to prove it.

3) Are there any aspects of Part 4 of the Code that require clarification? Could the wording of this section be improved?

YES. The code does not specify that the internal dispute resolution process has to have an independent mediator, i.e. Australia Post has an "exclusive" consultative agreement with one organisation, and also specifies in the licensing agreement, that this particular organisation will be the dispute mediator.

4) Should there be a requirement to mediate in good faith?

Yes. We believe the inclusion of mediation in good faith is essential and the dispute resolution system would then be used in its intended manner, i.e. reduce litigation and produce an acceptable solution to the dispute.

5) Is the current requirement for mediation adequate, or should the Code allow for other forms of alternative dispute resolution?

We have little information in this regard; most of our members give in at the initial Notice of Default.

6) Can the Commonwealth restrict the rights of parties to a franchise agreement to take legal proceedings while the parties are engaged in an alternative dispute resolution process?

We tend to lean in favour of the adoption to prevent legal action until mediation is exhausted.

It is usually the franchisor with its greater financial assets who institute legal action. The franchisee in the majority of cases would not have the financial resources to commence and sustain legal proceedings.

TOR 5: Estimate the indicative range of costs for the franchising industry in complying with the Code, evaluate the extent to which compliance has changed the operating procedures of franchise systems and identify options for minimising the compliance burden wherever possible.

1) What are the costs of compliance for franchisors?

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2) Does the code impose a compliance burden on franchisees?

The compliance cost for licensees is minimal, and depending on the amount of information and accounting data supplied by the licensee himself, the cost would not be more than \$200.00 - \$300.00.

3) Has the Code led to a change in franchisors' operating procedures?

No, we have not noticed any difference.

4) Would franchisors have offered disclosure documents in the absence of the Code?

No.

5) Are the costs of compliance distorting the market, or are they an acceptable compromise in the interests of ensuring fair trading?

Because Australia Post is operating in a monopoly market, we cannot compare it against similar competitors. Certainly in the interest of fair-trading, the compliance costs are regarded by us as a fair compromise.

6) Are the costs of disclosure outweighed by the benefits of disclosure?

No. It is human nature to maximise the financial gain in any business dealings. The disclosure provision guards against bending the rules, or 'gilding the lily', therefore assisting the newcomer or trusting person from being duped.

7) What are the options for minimising the compliance burden?

Minimising the compliance burden adds to the overall costs of the franchising environment. This is due to consequences arising from a greater number of disputes and dispute resolution attempts.

TOR 6: Evaluate whether the current statutory protections contained in the Code are appropriate.

1) Should the Code contain added prescriptions against unfair practices?

The provision in a franchising agreement for the unilateral variation to clauses of the franchise agreement is giving the franchisor too much power over the franchisee.

One has to consider that in many instances, the franchisee has his or her entire life's savings invested in the business. Sometimes as in the case of Australia Post, the licensee had no choice but to take up the offer of a licence, otherwise he or she would lose his or her job, would have to sell up and move out of town etc.

In many instances the franchisor may vary an agreement in order to cut costs and it is this variation that may affect the viability of the licensee's business.

2) Is the current level of statutory rights set by the Code appropriate?

3) Should the Code deal with standards of conduct?

YES.

4) Are the termination provisions appropriate in their current form?

We believe not. Australia Post does not offer market value when buying back a licence.

5) Have franchise systems developed appropriate Trade Practices compliance strategies?

????????? Are they not covered under the Trade Practices Act?

TOR 7: Evaluate any other relevant issues pertaining to the operation of the Code.

1) Are there any issues not covered by the Code that could be covered?

(This part of the submission was shortened due to time constraints).

We find continual problems exist between Australia Post and Licensees because Australia Post, apart from being the franchisor, also competes in the same market with its own corporate offices.

These offices receive higher margins, they do not have to pay for certain stock, and in some instances offer cheaper rates contrary to Australia Post's own regulations.

Also, Australia Post's head office competes against us in direct marketing services, which are directly supplied or provided by centrally located sites.

In essence Australia Post is openly competing against its own franchisees and breaches its own regulations, to which we as licensees have to adhere to, otherwise we may lose our licence.

We have problems with these particular Australia Post issues:

- I. Postage meters
- II. Poaching of customers (parcel contracts, no cubing)
- III. Data base for annual stamp collection
- IV. Telephone bill pay
- V. Internet bill pay
- VI. Free pick-up

We would be prepared to give detailed information about these and other issues if so required.

We feel that the annual disclosure document ought to be provided as a compulsory requirement and at a set date. (1st October seems a good date)

We also feel that the Trade Practises Act ought to be amended to prevent Franchisors to also be or act as a franchisee or a direct competitor in the same market.

In reply to a question from the panel in regard to franchising by site or territory, we expressed our wish to have a franchise by territory instead by site.