

SUBMISSION ON PROPOSAL FOR FEDERAL OMBUDSMAN

Outline of Experience

Since 1990 I have had the experience of managing dispute resolution under these Codes:

Voluntary Oilcode 1990-6
Voluntary Franchising Code 1993-5
Statutory NSW Electricity Code 1996-8
Statutory National Electricity Code 1998-2003
Statutory Victorian Gas Rules 1998-2007
Statutory Franchising Code 1998-present
Voluntary Film and Cinema Code 1998-present
Voluntary Produce and Grocery Industry Code 2000-1 and 2006-present
Statutory Horticulture Code 2007-present
Statutory Oilcode 2007-present
Voluntary Wine Code 2011-present

I have also given advice in respect of other codes and proposed codes such as the contemplated national supermarket code.

Effectiveness of Industry Codes

In general, industry codes are very effective to develop fair and reasonable behaviour by industry participants.

Reasons for this are:

1. % The codes provide specific custom tailored guidance for what is required by participants in a particular industry – that clarity and specificity is something which cannot be achieved by an overall ombudsman or small business commissioner
2. % The code provisions especially in the case of voluntary codes are drafted by industry participants in a consensual way with specialist knowledge as to what would be workable
3. % Codes eventually change industry behaviour as the participants adapt and develop to the requirements
4. % Codes play a vital role in bringing different sectors together to co-operate on industry-wide issues. The voluntary film code is an excellent example of where at first there was substantial suspicion and lack of co-operation between the different industry sectors but gradually over time those sectors have been able to meet and discuss technology changes and thereby prevent conflict.

Codes are not always effective. An example is the Horticulture Code which so far has limited effectiveness. Possible reasons for that are:

1. % It was not drafted by industry participants and had insufficient industry buy-in.
2. % Its requirement for written agreements has been impractical

3. % It only covers agreements entered into after a certain date
4. % The food supply industry does not have a history of written agreements like the franchising sector does
5. % In terms of dispute resolution, it repeated the successful processes under the Franchising Code but those processes were too formal for the food supply industry
6. % Food supply disputes are usually in the context of continuing relationships while franchising disputes are often in the context of relationships that will no longer have a future where taking action cannot do any more harm.

On the other hand, the Franchising Code has been a significant success.

Some mandatory codes are introduced for political purposes without sufficient industry buy-in or commitment.

In some cases, voluntary codes have collapsed for legal liability reasons (Franchising Code 1995) or for political reasons (Oilcode 1996) and have led to mandatory statutory codes.

There is an element of fear by some that if they pursue their opportunities under codes or via the ACCC they will be victimized in future. This often limits operation of codes. This would not be any different if recourse were taken to an ombudsman or small business commissioner. The fear may actually be greater as those bodies may have regulatory or enforcement functions.

Appropriate Dispute Resolution Process

Consideration needs to be given to which is the appropriate dispute resolution process or processes for any industry. Facilitative mediation has been successful for the franchising sector but not as appropriate for the food supply sector. Early facilitation processes have been successful for the cinema, food supply and petrol station sectors but not as appropriate for the franchising sector because of the complexity of franchise disputes. Conciliation (or evaluative mediation) has also been successful in the cinema industry although early facilitation has been more effective.

The fact that mediation is appropriate for the franchising sector does not mean that it will be appropriate for any other sector.

Dispute resolution under codes allows for appropriate and custom designed process for the particular type of disputes as distinct from providing for one process provided by an ombudsman or small business commissioner.

Cost and Quality of Dispute Resolution Process

Different types and complexity of dispute exist in different industries. Food supply disputes are mostly debt collection issues where cost of the process

should be minimal. Franchise disputes are complex involving relationship issues where a higher cost is appropriate.

The process (other than early intervention) should be provided by people who have expertise and acceptance by the industry, for example, franchising consultants or lawyers for franchising and food quality assessors for food supply issues. The cost of the process can be set by what such persons normally charge otherwise there is a risk that process will not be provided by people with actual or perceived talent. Disputants will not have confidence in using the specified process if the cost is too low as they will think the providers are not sufficiently experienced – this is especially the case where lawyers are representing the disputants. The requirement for mediators to be nationally accredited is already restricting the availability of experienced people to mediate franchise disputes and could endanger the quality of service.

Under the Franchising Code there would be many privately arranged mediations such as those arranged by law firms outside of OFMA where the hourly rates are determined by the market and would be much higher than OFMA mediator rates, probably twice the OFMA rate. Rates set by service providers such as OFMA have to be high enough to have respect from users but still be below market rates to meet the concerns of providing inexpensive dispute resolution.

The cost of mediation without lawyer involvement could be as low as 1% of the cost of litigation, perhaps 25% with lawyer involvement.

Role of State Small Business Commissioners, ACCC and Possible Ombudsman

The state Small Business Commissioners play a helpful role encouraging fair small business behavior in the context of federal and state legislation with whatever powers are given to them such as “name and shame”.

The ACCC also has a helpful “please explain” role which can lead to investigation and audit with serious cost and business disruption consequences to the investigated party leaving aside any prosecution outcomes.

The neutral administrative role of code dispute resolution advisers is more likely to lead to adoption of process by the “stronger” party to disputes as it will not fear any enforcement action, for example, 35% of requests for mediation under the Franchising Code come from franchisors.

Industries may prefer to choose their provider of dispute resolution services through voluntary codes rather than rely on a central ombudsman which does not give them flexibility to choose the type of service or appropriate process.

Allowing codes to have their own separate providers of dispute resolution services avoids confusion between enforcement or regulatory functions of an ombudsman and its dispute resolution service. Parties may feel more restrained about accessing an overall dispute resolution service where enforcement type

powers such as investigation, reporting or “name and shame” apply. Would an ombudsman be seen as just another ACCC in a different guise?

Codes deal with issues specific to the relevant industries. Allowing codes to have separate providers also allows for specialization of industry relevant services as distinct from an overall generic service, for example, how can a centralized service provide industry relevant and specific dispute resolution services to fields as vast as franchising, cinema, petrol stations, farmers, motor repairers and grape growers all at the same time? One process such as mediation may not be suitable for all sectors and allowing for industry specific processes provides an overall better quality and more frequently used dispute resolution service. If the dispute resolution service is not appropriate then parties would need to fall back on litigation which is out of reach for most small businesses.

Tying dispute resolution to an ombudsman or office with enforcement or regulatory type powers may lead to less mediation and more expensive dispute resolution or no resolution at all. Up to 17% of enquirers to the Office of Franchising Mediation Adviser are previous users of the service. Will they be so willing to proceed through an ombudsman?

Separate industry code dispute resolution allows for specialist services and educational activities which develop users’ confidence to use an industry specific service rather than just another government body which can take action against them. Franchisors are particularly sensitive to a bad report on their reputation as that affects further sales of franchise licences or continued harmony between existing franchisees. Specialist industry services develop contacts and networks which encourage greater use of dispute resolution services.

With voluntary industry specific codes, the dispute resolution provider will be accountable and report to an industry committee. It would be entirely inappropriate for an ombudsman to perform that role. There would be a conflict between the regulatory role and the dispute resolution role.

There may be a case for parties to be able to access an ombudsman as a point of last resort if they wish. However, regard needs to be had as to why small businesses already are fearful of taking action through the ACCC or even existing industry friendly and applicable codes through a perceived prospect of victimization.

The title “ombudsman” creates enforcement or policing expectations. The voluntary Produce and Grocery Industry Code has been disappointing for some in that it provides for an Ombudsman whereas the actual powers are those of a mediator. Some have expected the Produce and Grocery Industry Ombudsman to correct industry behaviour. Title should accurately reflect role.

As regards any regulatory or enforcement powers of an ombudsman, one asks why this question arises at further cost to the Commonwealth when 4 States have already answered this question through their Small Business Commissioners. The Victorian Small Business Commissioner has a successful

track record of encouraging and obtaining compliance with fair business practice.

Should there be an ombudsman I submit that dispute resolution as distinct from compliance action should still be left in the hands of separate providers. This will only encourage the use of cost effective dispute resolution. There can be a happy co-existence between an ombudsman making dispute resolution happen where it otherwise might not and the neutral and confidential providers of the dispute resolution process.

Future Codes

Industry specific codes have a continuing effective role to provide tailor made provisions for what is appropriate behaviour in any industry sector and what is appropriate dispute resolution process. Future voluntary industry codes should not be discouraged as they play a vital role in assisting an industry to work out its own problems even if in the end mandatory codes eventuate. Those mandatory codes when properly created have a history of successful effectiveness.

There is a good case for a system to be developed for analyzing the suitability, viability and nature of any future proposed code. In the past this has been left to the ACCC but this issue requires more expertise and systemization. A charter for future code analysis could be developed. Part of that would be to access the expertise of an expert in various dispute resolution processes such as a Federal Dispute Resolution Adviser so that appropriate process can be considered and implemented.

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