



POAAL

Post Office Agents Association Limited

ACN 006 382 314

Submission to the

Review of the Franchising Code of Conduct

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Background

1. The Post Office Agents Association Limited (POAAL) represents the nearly 3,000 small business owners of the Licensed Post Office and Franchised Post Office network that comprise over 75% of the Australia Post retail network. Our members are also drawn from the operators of the approximately 5,000 mail contracts, delivering mail and parcels to Australia Post customers across the country, together with around 630 Community Postal/Mail Agents. (Further information on the background of our organisation may be found on our website www.poaal.com.au.)
2. Our members are all small business owner/operators who have invested heavily financially – and personally – in the Australia Post network either through purchasing a Licensed Post Office or successfully tendering for a mail contract. Post office licences are purchased on the open market, and prospective Licensees undergo extensive training. They are the front line for the services provided to Australian communities, especially in regional, rural and remote areas of Australia.
3. Licensed Post Offices are operated under licence from Australia Post. Each LPO forms part of Australia Post's retail and delivery network. Licensees are small business people, and their businesses provide the framework for delivery of postal services in their area. The Licensee is responsible for all business expenses, including providing premises, operating overheads such as utilities, and staff costs.
4. Most LPOs are operated in conjunction with another small business such as a general store, convenience store, newsagency, pharmacy, or stationery and gift sales.
5. Australia Post also operates a network of 29 Franchised Post Offices. These businesses differ from LPOs in that a Franchise has a fixed term, where a Licence is for an indefinite term. Like LPOs, Franchised Post Offices can be purchased on the open market.
6. For the purposes of this submission, the term Licensee shall be taken to also refer to a Post Office Franchisee unless specifically noted otherwise. Similarly, any reference to a Licensed Post Office shall also refer to a Franchised Post Office unless specifically noted otherwise.
7. POAAL contributed extensively to the formation of the Franchising Code of Conduct (FCC) and in particular its dispute resolution code. The LPO Agreement was a ground-breaking agreement, and POAAL drew upon the lessons learned from the Agreement's negotiation and implementation for contributions to the FCC.
8. LPOs are considered franchisees under the FCC.

Disclosure Document

9. The wording of Clause 19 of the FCC regarding how often a Franchisee may request a Disclosure Document needs clarification. If a Licensee lists their business for sale towards the end of a Disclosure Document period, then by the time a sale is agreed a new Disclosure Document may be in place. Can the Licensee request a fresh Disclosure Document, even though it may be less than 12 months since the last request?
10. Franchisors should be required to send Disclosure Documents annually, as soon as they are completed and no later than 14 days after the period specified in Clause 6(1) of the FCC.

Disclosure of rebates and financial benefits to the franchisor

11. What controls are in place to check that franchisors or their representatives are disclosing details of any rebates or financial benefits they receive?
12. What powers do franchisees or their representatives have to challenge a franchisor for non-disclosure of rebates or financial benefits received by the franchisor?

Unilateral variation, transfer and novation

13. Franchisees are most sensitive to changes to franchise agreements and operating conditions when their business is on the market – all the more so when a buyer has been found and the transfer of the business to the new franchisee is imminent. Franchisor-initiated changes to franchise agreements during this period pose a significant problem to Post Office Licensees, especially in relation to matters such as mail delivery and collection times, the changing or removal of mail services, franchisor-mandated upgrades to security arrangements, and any business payments. These are all matters that must be revealed or discussed earlier with the Licensee, in order to give the Licensee time to negotiate or discuss the proposed changes.
14. Changes to the FCC that came into effect in 2010 require a franchisor to disclose whether it will amend or require the amendment of the franchise agreement on or before the transfer or novation of the franchise. The franchisor must be compelled to provide this information to the franchisee **as soon as the franchisor is made aware of the proposed assignment of the franchise**. POAAL is aware of instances where Australia Post has presented an amended Agreement to the LPO purchaser at the time of transfer or in the days leading up to the transfer. Changes to an LPO's operating conditions can change the value of the business and jeopardise the sale of the business.
15. At the time of purchase, franchisees often have complete trust in the franchisor. This is the time when the new franchisee is most vulnerable. Experience can bring scepticism of the infallibility of the franchisor.

Disclosure regarding franchisor conduct

16. Clause 18 of the FCC lists “materially relevant facts”, which the franchisor is obliged to disclose to franchisees within 14 days of becoming aware of this fact. If Australia Post chooses to move a corporate post office closer to existing LPOs, or indeed open a new post office close to existing LPOs, then this must be considered a “materially relevant fact”. Changes to the network that can affect business levels must be declared to affected franchisees, rather than franchisees hearing about future changes via media or word of mouth.
17. Australia Post was aware of delays due to AUSTRAC processing, but failed to notify Licensees of the reason for the delay. Australia Post should be compelled to report these sorts of delays to Licensees.
18. Australia Post expects prospective Licensees to undergo background checks, suitability tests and training prior to taking over an LPO. It is not unreasonable for Licensees, who are about to make a significant financial investment in Australia Post’s business, to expect some level of reciprocal disclosure and transparency from Australia Post.
19. Australia Post has the resources to be able to comply with the disclosure requirements of the FCC.

Good faith

20. POAAL has stated in previous FCC submissions that there is an urgent need to have an explicit obligation to act in good faith incorporated into the FCC. The current provisions do not create an explicit and positive obligation to act in good faith and this emphasis needs to be addressed in the FCC.
21. The relative bargaining power of the two parties – franchisor and franchisee – demands that there be an obligation on the franchisor to act in good faith.
22. At common law, in the absence of a partnership, employment relationship or specific contractual requirement, there is no obligation upon contracting parties to act in good faith in connection with their dealings. However, this principle is only suited to an adversarial situation, where the parties have opposing and competing interests. It is ill-suited to a franchising relationship where the parties are expecting to work together collaboratively in a de-facto partnership.
23. In a partnership there is a legal obligation on the partners to act in good faith towards each other. A franchising relationship operates more like a partnership (at least commercially) than a contract and so the good faith principle should apply. There should be a mutual good faith obligation.
24. In POAAL’s experience, in the absence of an express good faith obligation, Australia Post does sometimes act in bad faith or disregard the interests of the franchisee. When challenged, Australia Post relies on the strict wording of the FCC to protect itself. This black letter or literalist approach is inconsistent with the spirit of a franchise.

25. To ensure that the spirit (of collaboration) is respected it is recommended that the FCC contain a specific requirement that the parties operate in good faith.
26. It is important that any disputes over matters relating to good faith be resolved via a low-cost dispute resolution procedure (such as the dispute resolution procedure that applies for LPOs through the LPO Agreement) or via low-cost mediation through a dispute resolution procedure such as that provided under the FCC, because court action is often prohibitively expensive for franchisees.
27. Good faith on the part of the franchisee is a given, since it is often the franchisee who has the greatest personal investment in the franchise. It is in the franchisee's best interests to gain maximum value for their business, through their day-to-day business income and the capital growth of the value of their business, which usually requires acting in good faith towards the franchisor.
28. Good faith must apply to all aspects of franchisee-franchisor relations.
29. Penalties for breaches of good faith obligations should include a significant, attention-sharpening fine to franchisors and restitution of any costs or damages to the affected franchisees.

End-of-term arrangements for franchise agreements

30. Any franchise agreement with a fixed term must include clear conditions for early termination of the agreement (by either the franchisee or franchisor), which must be discussed by franchisor and prospective franchisee as part of the franchise purchase process.
31. Any payments made to the franchisee by the franchisor arising from the termination of the franchise agreement by the franchisor must take into account the market value of the business.

Dispute resolution in franchising

32. POAAL has made numerous submissions and representations to Government in the past 20 years on the matter of dispute resolution in franchising. The internal dispute resolution procedure for resolving disputes between Post Office Licensees and Australia Post formed the basis for many elements of the FCC dispute resolution procedure when it was first formed in the late 1990s.
33. POAAL has been involved in resolving disputes for Licensees for 20 years, and for 50 years before that for Licensees' predecessors. Based on our experience, there are a number of core points that need to be addressed prior to any dispute resolution hearing (be it mediation or any other dispute resolution method) proceeding:
 - a. The franchisee and franchisor representatives who attend any mediation hearing must have the authority to make binding decisions.

- b. Franchisor representatives must be prepared to negotiate, rather than simply stonewall. To stonewall is a breach of good faith and a misuse of bargaining power.
- c. Timing and location of any mediation hearing must be mutually agreed and take into account a franchisee's limited ability to travel far from their business to take part in mediation.
- d. The franchisor's representative(s) must be obliged to show up for any dispute hearing.

34. Failure to follow the above will mean that mediation fails to resolve the dispute at hand, which in turn means wasted time, money and resources (often scarce commodities for a franchisee) and any ill-will between the parties will be exacerbated.

35. The behaviour of franchisors during mediation has not changed since the introduction of the 2010 amendments of the FCC. The parties to disputes frequently fail to reach a settlement.

36. The failure rates of disputes through the OFMA are unsatisfactory. What reasons have been given for such a high failure rate? Is it because the franchisor representative lacks the authority to make a decision on the day of mediation? Is it because the franchisor has stalled and stonewalled, knowing that they have deeper pockets than the franchisee and can therefore afford to drag out proceedings? The reasons for failure rates must be reported and analysed.

Enforcement of the Franchising Code

37. There are still too many disputes between franchisees and franchisors, so it could be argued that enforcement of the FCC has not been sufficiently robust as to discourage franchisors from breaching the FCC.

38. Better education of franchisees and franchisors could help improve FCC compliance.

39. Where a franchisor has breached the FCC, financial penalties should be paid to affected franchisees to compensate for loss of business or any other damages incurred.

40. Legal avenues are too expensive for most franchisees to seek restitution for breaches of the FCC.

41. Penalties imposed on franchisors for breaches of the FCC must be severe. In line with some OHS laws and company laws, directors and individual franchisor managers and representatives must be held responsible for breaches.