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TERCEIRO LEGAL CONSULTING Pty Ltd

'specialist insight'

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Franchising Code Review Secretariat
Department of industry, Innovation, Science, Research and Tertiary Education
Small Business Division
GPO Box 9839
Canberra ACT 2601

Via email: franchisingcodereview@innovation.gov.au

Dear Mr Wein

Submission to 2013 Review of Franchising Code of Conduct from Terceiro Legal Consulting

Terceiro Legal Consulting (TLC) is a boutique law firm, which specialises in competition and consumer law (trade practices law). TLC has been operating since 2008 and has represented numerous companies and businesses in Australian Competition and Consumer Commission (ACCC) matters.

Michael Terceiro, the principal of TLC, formerly worked at the ACCC for 15 years in a variety of positions, including as a Director of Enforcement. In this role, he was responsible for running investigations and litigation into alleged breaches of the *Trade Practices Act 1974* and the Franchising Code of Conduct.

Enforcement of the Franchising Code

Introduction

In this submission, I will only be focusing on Part Six of your *Discussion Paper: Review of the Franchising Code of Conduct* which discusses enforcement of the Franchising Code.

In this Part, you list four discussion questions as follows:

1. Is the current enforcement framework adequate to deal with the conduct in the franchising industry?
2. How can compliance with the Franchising Code be improved?

3. What additional enforcement options, if any, should be considered in response to breaches of the Franchising Code?
4. What options are available to address breaches of the Franchising Code, or any other adverse conduct in the franchising industry?

Background

Before responding to these questions, it is necessary to consider the ACCC's record in enforcing the Franchising Code. While a number of submissions to your Review have claimed that the ACCC is effective in enforcing the Franchising Code, the ACCC's own statistics concerning court cases and investigations into Franchising Code breaches tell a very different story.

A number of years ago the ACCC decided to create a page on its website entitled "Franchising Code complaints, investigations and outcomes" – located at <http://www.accc.gov.au/content/index.phtml/itemId/816437>. On this page, the ACCC listed the "Matters the ACCC has pursued" in relation to Franchising Code breaches.

The ACCC made it clear that the list was not intended to list every Franchise Code investigation. However, I believe that this list is likely to represent most, if not all, of the noteworthy Franchising Code investigations and litigation undertaken by the ACCC since 2004.

An analysis of the list shows the following level of enforcement activity by the ACCC in the franchise sector since 2004:

Table 1: Noteworthy ACCC Franchising Code cases and investigations 2004 – 2012

Year	No. of cases and investigations
2004	2
2005	4
2006	5
2007	2
2008	1
2009	4
2010	5
2011	1
2012	0
Total	24

In other words, in the last nine years, the ACCC has taken a total of 24 noteworthy cases and investigations in relation to the Franchising Code, which is less than three cases and investigations a year.

Furthermore, there appears to have been a significant decline in the ACCC's enforcement activity in relation to Franchising Code matters over the last two years

with only one noteworthy Franchising Code case being commenced by the ACCC in that period.

Unfortunately, the above figures are somewhat misleading. While the title of the relevant page from the ACCC's website states that it is a list of the ACCC's "Franchising Code complaints, investigations and outcomes", on closer examination it turns out that a number of the so-called Franchising Code investigations and outcomes did not in fact allege or establish any Franchising Code breaches.

Rather, a number of the cases and investigations included on the ACCC list involved a franchisor engaging in other conduct in breach of the *Trade Practices Act 1974* or the *Competition and Consumer Act 2010*, but not, as claimed, in any breaches of the Franchising Code.

For example, the ACCC's Sensaslim case does not appear to allege any contraventions of the Franchising Code. Rather, the focus of that case is on false representations and misleading and deceptive conduct. The Refund Home Loans case also did not allege any breaches of the Franchising Code. The Photo Shop matter (which I ran whilst employed at the ACCC) did not result in any findings of a breach of the Franchising Code.

Therefore, if one removes the cases and investigations from the above list which did not allege or establish a breach of the Franchising Code, the table would show the following results:

Table 2: Actual noteworthy ACCC Franchising Code cases and investigations 2004 – 2012

Year	No. of cases and investigations
2004	2
2005	4
2006	3
2007	1
2008	1
2009	2
2010	4
2011	0
2012	0
Total	17

The above table shows that once one removes the matters where a breach of the Franchising Code was not in fact alleged or established by the ACCC, that the ACCC has only pursued 17 noteworthy Franchising Code cases and investigations over the last nine years, which is less than two Franchising Code cases and investigations a year.

Furthermore, the ACCC has not pursued any noteworthy Franchising Code cases or investigations over the last two years.

Responses to questions

1. Is the current enforcement framework adequate to deal with the conduct in the franchising industry?

The ACCC has an adequate range of powers to investigate alleged breaches of the Franchising Code. Unfortunately, the ACCC does not appear to be using these powers effectively in relation to the franchising sector.

The ACCC only has access to a limited range of remedies in relation to breaches of the Franchising Code. I believe that if the ACCC had access to civil-pecuniary penalties for Franchising Code breaches, its ability and willingness to enforce the Franchising Code would be significantly enhanced.

2. How can compliance with the Franchising Code be improved?

Compliance with the Franchising Code can be improved by the ACCC pursuing more cases and investigations in the sector, particularly in relation to rogue franchisors. I believe that successful ACCC cases and investigations and the imposition of civil pecuniary penalties would be very effective in achieving general deterrence in the franchise sector. It is likely that the ACCC will pursue more cases and investigations if it can seek civil pecuniary penalties in relation to breaches of the Franchising Code.

3. What additional enforcement options, if any, should be considered in response to breaches of the Franchising Code?

On 20 February 2013, the ACCC issued its new Compliance and Enforcement Policy for 2013. It is clear from this document that enforcement of the Franchising Code is not a current enforcement priority for the ACCC. Indeed, the Franchising Code is not mentioned once in the entire document.

The ACCC should consider including enforcement of the Franchising Code as a priority enforcement area in future Compliance and Enforcement Policy documents.

4. What options are available to address breaches of the Franchising Code, or any other adverse conduct in the franchising industry?

The ACCC must make enforcement of the Franchising Code a priority, particularly in relation to rogue franchisors. It is clear on the figures quoted above, that the ACCC has all but ignored enforcement of the Franchising Code in terms of cases and investigations over the last two years. The omission of enforcement of the Franchising Code from the ACCC's current Compliance and Enforcement Policy suggests that this trend is likely to continue.

The introduction of civil pecuniary penalties for breaches of the Franchising Code is likely to encourage the ACCC to pursue more enforcement actions in relation to breaches of the Franchising Code in the future.

Finally, the ACCC should give some thought to establishing a dedicated team to investigate alleged breaches of the Franchising Code. I understand from first hand experience that such investigations are both difficult to run and resource intensive. Therefore, a dedicated team would be able, over time, to develop the necessary expertise and focus to pursue a larger number of significant Franchising Code cases and investigations successfully each year. This approach would be preferable to the hit-and-miss approach which the ACCC appears to be taking in relation to enforcement of the Franchising Code at the current time.

Conclusions

The ACCC's record in enforcing the Franchising Code over the last nine years has been poor. Despite its efforts, particularly during the term of previous ACCC Chairman, to argue that was enforcing the Franchising Code effectively, there is simply no objective evidence to back up this claim. The ACCC's own numbers show a very low level of enforcement activity, which unfortunately appears to be on a downward trend.

The simplest way to increase the ACCC's level of enforcement in this sector is to provide the ACCC will access to civil pecuniary penalties for contraventions of the Franchising Code.

However, the introduction of civil pecuniary penalties alone will not reverse the trend of under-enforcement in this area. Rather this important change must also be complemented by two other important changes (1) the ACCC issuing a clear statement that enforcement of the Franchising Code is in fact a priority area and (2) the ACCC making internal structural changes to the way in which the ACCC investigates alleged breaches of the Franchising Code.

Only by implementing these changes will the ACCC be able to adopt a more effective, focused and ultimately successful approach to ensuring compliance with the Franchising Code.

If you have any questions about this submission, please contact me on (02) 8086 2005.

Yours sincerely



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