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## Review of the Franchising Code of Conduct

Dispute Resolvers was formerly appointed as the Franchising Mediation Adviser under Commonwealth Government contract.

As the former Office of the Franchising Mediation, I have an in-depth knowledge both of Code functions as well as the legislated dispute resolution processes.

I provided detailed submissions on changes to the Franchising industry Code of Conduct particularly in respect to dispute resolution processes, including both Mediation and Arbitration, to the Senate Inquiry that were adopted and published in its report, *'Fairness in Franchising'*.

Dispute Resolvers provides these submissions to assist with the Review of the Franchising Code, August 2023.

**We have limited our comments to solely focus on our area of expertise, the dispute resolution processes provided to achieve the Code objectives.**

Your faithfully,

**Derek Minus**

Accredited Mediator | Barrister-at-law | Chartered Arbitrator





## DISPUTE RESOLUTION UNDER THE FRANCHISING CODE

### Overview

1. What the Franchising Code needs to best assist franchisees, is a flexible and final dispute resolution system.
2. The Franchising Code is a developing attempt, over some 25 years, to ameliorate the effects of the massive economic power imbalance between the franchisor and the franchisees bound into the franchise in a legal embrace, by the terms of the franchise system agreement.
3. What franchisees need is what they have never had, a simple flexible and binding process for resolving their disputes with franchisors, inexpensively, fully and finally.
4. The solution is a **Mediation** process (as now) that provides a relaxed, creative and harmonious approach to the resolution of issues that occur between one or many franchisees within the same system.
5. Where (some) franchisors use the non-binding nature of the mediation process to force a franchisee to accept a less than fair outcome, because of the enormous cost and procedural delays inherent in the court system, the process of private **Arbitration** can provide a legally binding outcome fairly and quickly.

### The Senate Committee Review 2018

6. The **Franchising Code of Conduct** was the subject of a year-long review by the Commonwealth Parliamentary Joint Committee on Corporations and Financial Services (**Senate Committee**) which resulted in the publication of its report, *Fairness in Franchising* in March 2019. Amongst numerous deficiencies that the Committee of Inquiry found, were those in relation to the dispute resolution processes.
7. To assist the Senate Committee in its investigation, as OFMA, I provided extensive evidence and recommendations. They are worth repeating, so I have extracted those submissions below.
8. From SUBMISSIONS TO THE SENATE INQUIRY, May 2018:



### 3.7 Improving the Franchising Code

*The best way for government to increase both the settlement rate and satisfaction with the Franchising Code dispute resolution service is to update the Code to introduce other complementary dispute resolution processes.*

*The best model for doing this is the existing schema employed in the Food and Grocery Code. Here the three dispute resolution processes available ensure that all disputes that are brought into the scheme are resolved.*

*Negotiation provides the cheapest and most flexible process. Mediation is next and allows the parties to engage in negotiation with a trained and experienced facilitator. Arbitration is available where mediation does not completely resolve all of the issues and a party wants an investigation of the facts and a determination on the evidence. It is the most expensive because of the time and expertise required but delivers finality to parties who “want their day in court”.*

*Most importantly, franchisees are not left with the only mechanism to achieve resolution being the expense and uncertainty of litigation in the Federal Court.*

### 3.9 Arbitration universally employed

*It should be realised that arbitration is used as the mechanism of choice in the resolution of franchising disputes in most of the rest of the common law world as well as in civil law countries.*

*Arbitration is also universally used in international commercial dispute resolution (more frequently coupled with mediation).*

*Since the time of the last Parliamentary Joint Committee report, the state based Commercial Arbitration Act, has been completely revised and updated (in line with an amended International Arbitration Act) based on the UNCITRAL Model Law and has been adopted nationally as a “uniform act” in all States.*

*A strategy that used binding arbitration and existing arbitrators would provide an alternative, lower cost methodology for obtaining resolution of disputes that do not completely resolve at mediation.*

*It would also avoid the need for small businesses to entertain litigation in Court where the expense can be prohibitive and where the decision maker may have no expertise in the commercial nature of the transaction.*

*There are hundreds of trained and experienced private arbitrators (most of them with legal qualifications as it is the state law societies and bar associations that have kept the process alive) in Australia and professional associations that train and maintain their standards.*

*Arbitrators are empowered under many legislative schemes to act as experts and conduct the resolution of the dispute first by attempting conciliation and then if that fails, determining the matter as an “expert”. That is, the arbitrator is empowered to conduct an “inquisitorial process” to use their business and technical expertise and call for evidence in order to determine a matter.*

*A quick decision by an experienced industry “expert”, using a flexible dispute resolution process can deliver a binding decision at much less cost than attempting to conduct litigation in a Federal Court.*



9. From SUBMISSIONS TO THE SENATE INQUIRY, November 2018:

### Is a Determinative process required?

*In our previous submission we set out the reasons why a determinative process is needed as part of the Franchising Code.*

*As identified at 1.3, the ASBFEO has also recognised that a binding determinative process (arbitration, which is specifically excluded by their Act) is needed.*

*The ACCC was asked about the use of a binding arbitration process:*

**ACTING CHAIR:** *What are your views about binding arbitration? We heard from ASBFEO that they do triage and they use all of the resources that are available to them and try to be very efficient about what they do. But 15 per cent are just stuck. The power differential, which we've discussed with every witness throughout the course of the day, including yourselves, means that the next step, taking it to court, just isn't happening. So we've got an impasse here. Is binding arbitration required, and who would do it?*

*Mr Grimwade: I would just refer to an earlier answer I gave, which is: we would support more effective dispute resolution. I don't think we have a strong view in relation to: should it be constitutionally achieved for binding arbitration to be available? I think we'd be looking at anything which would deliver more effective resolution, particularly for that 15 per cent of disputes, as you talked about, that are unresolved.*

*The ACCC response recognises the particular reason a determinative process needs to be introduced into the Code, "more effective resolution" for disputes that are not resolved through a meditative intervention process.*

*The Franchise Council of Australia in its primary submission (No. 29 dated 4 May 2018) echoed the concerns that have been expressed regarding the difficulty for franchisees and small businesses of obtaining just outcomes under the Code which does not provide a determinative resolution methodology:*

*"An aggrieved franchisee or franchisor with a strong legal case has access to justice, albeit at a cost. This is often with the prospect of harm to the franchise relationship and considerable delay that may see a matter only determined well after the expiry of the*



*franchise agreement. This serves to further consolidate th (sic) economic harm that gave rise to the initial dispute that remained unresolved leading to the legal action.*

*We are aware, however, of select accounts of parties arriving at a resolution through mediation that they are not happy with but felt pressured into accepting due to the cost, delays and combativeness of escalating the matter further to the Federal Court.*

*Anecdotal information suggests some parties have tactically used the barriers to taking a matter to the Federal Court and the comparatively advantaged position of the franchisor in terms of accommodating time delays, legal capability and financial resources, to assert its position and hold out for a mediated outcome that is to their liking, knowing the smaller counter-party has few realistic options to accepting a mediated 'solution'.*

*This is not simply a matter for the franchise community but small businesses involved in commercial disputes more generally.*

*The challenges around small businesses being able to access justice through available mechanisms have been the subject of a number of high-level inquiries in recent years, including via the Productivity Commission (2014) and Harper Review on competition policy (2014), and is currently the focus of an inquiry by the Australian Small Business & Family Enterprise Ombudsman.*

*The Constitution impedes the formation of legislated tribunal-type mechanisms that seek to extend a determinative mandate beyond administrative matters, into matters seeking a commercial judgment. For the Commownealth (sic) jurisdiction, these matters need to be resolved through the Courts or via agreed commercial arrangements between the parties."*

## **Objections to Arbitration - Overcome**

*In Australia, despite the ASBFEO, OFMA and ACCC, the three main entities involved in regulating and resolving disputes in the franchise industry, recognising that there is a need within the Code for a determinative process for the resolution of disputes, there exists significant misunderstanding about the nature of arbitration procedures.*

*For example, The Coffee Club which has a "franchise family of more than 200 who own and operate over 450 cafes across Australia and six other countries" stated in its submission (No. 77, 4 May 2018):*

*The Coffee Club does not believe that a more formal dispute resolution*



*process would be of benefit as that would require a large amount of work to be undertaken and at significant cost. Any dispute resolution process which can result in a binding decision is similar to a court trial, albeit in a different forum, and would encourage parties to focus on procedural technicalities rather than on reaching a mutually acceptable solution. Parties to a franchise agreement already have the option to use court processes if they wish.*

*Yet, the very nature of arbitration processes, especially where provided under legislation, require that the arbitrator avoid procedural technicalities to focus on the substantial equities of the case:*

*For example, section 49 of the New South Wales Civil Procedure Act 2005 defines the nature of Arbitration Procedure as (emphasised):*

***Procedure*** (cf Act No 43 1983, section 10)

*(1) Subject to this Act and any directions given by the referring court, the procedure at arbitration is to be determined by the arbitrator.*

*(2) Subject to the rules of evidence, an arbitrator must act according to equity, good conscience and the substantial merits of the case without regard for technicalities or legal forms.*

*The New South Wales Civil and Administrative Tribunal (NCAT) consolidates the work of 22 former tribunals into a single point of access for specialist tribunal services in NSW. NCAT deals with a broad and diverse range of matters, from tenancy issues and building works, to decisions on guardianship and administrative review of government decisions and provides services that are prompt, accessible, economical and effective. It has over 250 Tribunal Members who hear and decide cases in accordance with the law and the evidence presented.*

*Section 38(4) of the Civil and Administrative Tribunal Act 2013 No 2 [NSW] provides the Procedure of the tribunal (emphasised):*

*The Tribunal is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case **without regard to technicalities or legal forms.***

*Similarly, the Franchise Council of Australia in its Supplementary Submission (No. 29.1, September 2018) to the Senate Inquiry made the following (Part B)*



*Observations and Recommendations regarding Issue 10, Dispute resolution mechanisms:*

### **The Franchise Council of Australia**

*The FCA does not support suggestions to supplement mediation with any form of arbitration or any new Tribunal, for the following reasons:-*

- 1. This would immediately create an adversarial environment, which runs entirely contrary to the principles of mediation. Fewer disputes would proceed to mediation, the parties would be less open to negotiated settlements and access to justice would be significantly reduced;*
- 2. Mediation is well suited to franchising, where both parties are typically small businesses and their assets are essentially intangible. Neither party can typically afford for a dispute to continue. As a consequence both parties have a genuine vested interest in achieving a negotiated outcome, as they know an early compromise solution will usually yield the best net outcome;*
- 3. Arbitration would almost certainly lead to higher costs of dispute resolution and delayed resolution of disputes;*
- 4. There are few if any arbitrators in Australia who would have the requisite experience to act in a franchise arbitration. The appointment of franchise mediators is more flexible, and the franchise sector suits the facilitative nature of a mediator's role;*
- 5. The courts have been effective in enforcing franchisee rights, with most franchising cases yielding favourable results to franchisees;*
- 6. Unlike the US, where arbitration is often used to avoid the risk of excessive punitive damages, there is no need for arbitration in place of litigation, noting that the costs of arbitration are also very significant*

*We consider these concerns unfounded and offer this commentary:*

- 1. "creation of an adversarial environment"*

*Mediation processes are born out of the adversarial litigation environment and were originally described as forms of "alternative" dispute resolution. Therefore, mediation does not need collaborative, cooperating parties to be successful. A skilful and experienced mediator does make a difference in achieving an agreed outcome.*



*However, a necessary condition is that the parties be willing to negotiate in good faith and try to achieve an outcome. Where this condition is missing the mediation process will fail by design. A determinative procedure is then required.*

2. *"Arbitration would almost certainly lead to higher costs of dispute resolution and delayed resolution of disputes."*

*Because of the necessity to make a determination according to law, arbitration would be more expensive than a mediation process. But that does not mean that every matter needs to be arbitrated. As illustrated above, 80% of the matters were settled at mediation. Parties will still choose the cheaper and effective option.*

*Arbitration would, therefore only be required for those 20% of matters that do not result in a satisfactory resolution at mediation. The correct comparison is therefore the price of "justice" under the litigation system versus a fixed price arbitration process. If the franchisor was required to pay for the entire cost of the arbitration (where there had been a failed mediation in which it participated) it would also put pressure on franchisor to achieve a reasonable settlement with the franchisee at mediation.*

3. *"Mediation is well suited to franchising ... neither party can typically afford for a dispute to continue."*

*Mediation is well suited to the resolution of franchising disputes if the parties are acting in good faith to resolve the conflict. But where a party is using the process to avoid an outcome (e.g. repayment of the franchise fee as they have failed to complete the agreement) then there is no impetus to resolution.*

*In fact the party with the superior economic power can just refuse to agree, safe in the knowledge that the franchisee is unable to afford to take the matter to litigation.*

4. *"There are few if any arbitrators in Australia who would have the requisite experience to act in a franchise arbitration."*

*Of the 100 mediators appointed to the Franchising Mediator List there are already 12 people who are qualified, experienced and available as arbitrators.*

5. *"The courts have been effective in enforcing franchisee rights, with most franchising cases yielding favourable results to franchisees".*





*This is most certainly not the case with matters that go to trial usually resulting in a loss for the franchisees (see Pizza Hut case; Virk Pty Ltd (In Liquidation) ACN 132 822 514 v. Yum! Restaurants Australia Pty Ltd ACN 000 674 993).*

*Whilst, it is generally accepted that beneficial legislation does exist to assist franchisees, most cannot avail themselves of it because of the crippling cost of the litigation system and the economic imbalance between the parties in respect of, and ability to absorb the litigation costs and delays.*

6. *"There is no need for arbitration in place of litigation, noting that the costs of arbitration are also very significant."*

*As discussed above, there are many different types of arbitration processes, in tribunals, referred by courts or consumer orientated. It is not a one-size fits all scheme but can be tailored to the particular nature and type of disputes.*

*One of the most recent and well-known examples of a simple, straightforward, accessible and inexpensive worldwide system of arbitration, is that provided for the resolution of Domain Name disputes by the World Intellectual Property Organisation (WIPO).*

*This is a fixed-price scheme costing between US \$1,500 and US \$4,000 depending on the number of arbitrators selected, which has resolved 41,000 disputes since it was introduced in 1999. The arbitration is conducted "on the papers" submitted by the parties to the arbitration panel which then delivers an award within three weeks.*

*In consultation with stakeholders, it is possible to design a similar process that can be available for the resolution of non-complex matters that parties want to refer to arbitration. Such a system would provide access to justice for small business franchise owners and franchisees, which have failed to reach agreement at a mediation.*

*In this way, a quick decision by an experienced industry "expert", using a flexible determination process, can deliver a binding decision at much less cost than attempting to conduct litigation in a Federal Court.*

10. In its final report *Fairness in Franchising* the Senate Committee commented on the importance and availability of a binding resolution process to complement negotiation and mediation in good faith, available in the Franchising Code:



15.62 However, the committee agrees with the view put forward by OFMA, namely that a necessary condition of mediation is that the parties be willing to negotiate in good faith and try to achieve an outcome. Where this condition is missing, the mediation process will fail by design. Indeed, the evidence to this inquiry included a litany of instances where one party alleged the other party failed to engage in good faith in the mediation process, knowing that the only alternative was court action which was prohibitively expensive for one of the parties. In effect, the party in the stronger position had no incentive to reach a negotiated settlement and could effectively say to the weaker party, 'take it or leave it', or 'take it to court'. To be clear, most of the allegations put to the committee alleged that the franchisor refused to negotiate in good faith with the franchisee. In other words, the franchisor had a vested interest in impeding mediation because they knew the franchisee could not afford to take them to court.

15.63 It is in these circumstances, where all the issues are unable to be resolved satisfactorily through mediation, that a determinative procedure such as arbitration is required. Arbitration works in those situations where a party wants an investigation of the facts and a determination on the evidence.

15.64 The committee accepts that arbitration is more expensive than mediation because of the time and expertise required. But, it can deliver finality to parties who want to resolve a matter and move on. And arbitration is far cheaper and more flexible than pursuing court action, and this is the critical cost comparison in any attempt to deliver justice in a timely fashion at a reasonable price. Indeed, many of the concerns raised in the committee's 2008 report have now been addressed by a number of developments in arbitration during the ensuing decade.

15.65 Furthermore, the addition of arbitration within the overall dispute resolution framework for franchising would, in all likelihood, increase the number of satisfactory outcomes achieved through mediation. In addition, referral to arbitration would help level the current uneven playing field where many franchisees cannot afford to take franchisors to court, or defend themselves, when franchisors take them court. To prevent this scenario, the committee considers that the Franchising Code should include a requirement that franchisors should have to demonstrate to the court's satisfaction that the matter could not be resolved through mediation or arbitration. If the franchisor is not able to do that, the court should direct the parties to mediation or arbitration. In this regard, the committee suggests that similar to mediation, arbitration must be conducted in Australia and should only be conducted in the state or territory in which the franchisee's business is based to be consistent with existing Franchising Code provisions on the jurisdiction for settling disputes.

15.66 The committee also acknowledges that there may be certain types of dispute that can only, or should only, be determined or enforced through the courts. However, acknowledging this proposition does not detract from the overall argument that the inclusion of binding arbitration would be a valuable addition to the current dispute resolution system for franchising.

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.

11. For these reasons the Committee recommended that:



***the dispute resolution scheme under the Franchising Code of be enhanced to include the option of binding arbitration with the capacity to award remedies, compensation, interest and costs, if mediation is unsuccessful***

12. However, despite the Committee's extensive consultations, public enquiries and expert submissions, the Commonwealth failed to act on this recommendation and provide for binding arbitration as exists in the Sugar Code and (non mandatory) Food and Grocery Code.
13. It is our recommendation that the reform be finally introduced with a mandatory binding arbitration process to be included as a right, in every Franchise Agreement.

## **ROLE OF THE AUSTRALIAN SMALL BUSINESS AND FAMILY ENTERPRISE OMBUDSMAN (ASBFEO)**

14. Despite the commitment and competence of its staff, the ASBFEO is limited in its ability to assist franchisees with the resolution of their disputes. This is evidenced by the significant fall-off in the *actively managed cases relating to franchising* for the period from 2019 to 2023 identified for this review, compared to the growth experienced in the period 2016 to 2018 when DRA was responsible for the management of the dispute resolution processes under the Franchising Code.
15. There are a number of structural reasons for this declining support for franchisees.

### **Issue 1. The ASBFEO is not an Ombudsman**

16. The Australian Small Business and Family Enterprise Ombudsman (ASBFEO) is not an "ombudsman" at it does not have the power to resolve disputes of its own volition. The ASBFEO is unable to intervene in the dispute resolution process as an 'independent arbiter to investigate and redress complaints', only to refer disputes to others to resolve.
17. As the Commonwealth Ombudsman noted (April 2017):

*The Australian and New Zealand Ombudsman Association, the peak body for Ombudsmen in Australia and New Zealand has outlined the essential criteria for describing a body as an Ombudsman in light of the globally accepted Ombudsman model and its 200 year history. The SBFE Ombudsman does not meet these criteria and therefore should not be described as an Ombudsman.*

18. This issue was echoed in the Independent Review of the ASBFEO dated June 2021, by the Independent Reviewer, Carmel McGregor PSM. In Recommendation 4, she suggested that:

*ASBFEO should be renamed to the Australian Small Business Commissioner or the Australian Small Business Advocate to:*

- a. *Reduce confusion over the nature of ASBFEO's assistance role, and*
- b. *Support the value of ASBFEO's advocacy work.*



19. The problem here is that SME's believe that the ASBFEO has the power to resolve their disputes for them, when it does not, it can only refer them to independent dispute resolvers. The continuation of this system represents a 'fraud' on the businesses that seek and need real assistance with the resolution of their disputes, which the ASBFEO is unable to provide.

## Issue 2. The ASBFEO is only empowered to assist small business and family enterprises.

20. By its Act the ASBFEO is only enabled to provide assistance to **small businesses and family enterprises**. The terms small business and family enterprises are defined by its Act:

### Section 5 Meaning of small business:

- (1) A business is a small business at a particular time in a financial year (the current year) if:
- (a) it has fewer than 100 employees at that time; or
  - (b) either:
    - (i) its revenue for the previous financial year is \$5,000,000 or less; or
    - (ii) if there was no time in the previous financial year when the business was carried on—its revenue for the current year is \$5,000,000 or less.

### Section 6 Meaning of family enterprise

"A small business operated as a family enterprise is a family enterprise for the purposes of this Act."

Where section 4 additionally provides that: "enterprise includes a business, activity, project, undertaking or arrangement."

21. In the independent report<sup>1</sup> prepared for the Minister for Small Business, it identifies that:

*the types of parties to which the ASBFEO and the mediation adviser provide dispute resolution services – **The Act limits the ASBFEO to assisting small businesses, whereas the mediation adviser can assist all businesses, small or large, as well as consumers.***

*This highlights that combining the disputes resolution services of the ASBFEO and the mediation adviser would require both legislative change and a fundamental change in the ASBFEO's role.*

*If the ASBFEO's assistance function was strengthened in future to include in house mediation or adjudication for example, many stakeholders would no longer consider the current arrangements to separate it from the advocacy function to be adequate. Given this risk, the ASBFEO's assistance function should only expand in response to a clearly identified gap."*

## Issue 3. Power to Appoint an ADR practitioner

22. The ASBFEO can only provide assistance by recommending a dispute resolution process. The ASBFEO has no power to appoint a dispute resolver under its enabling Act.

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<sup>1</sup> *The Independent review of the Australian Small Business and Family Enterprise Ombudsman, 19 June 2017*



23. Section 71 of the ASBFEO Act, provides that the ASBFEO may recommend that parties to a dispute take part in an alternative dispute resolution process.

Section 71(1) provides that:

If a person requests the Ombudsman to give assistance in a dispute in relation to a relevant action, the Ombudsman may make recommendations on how the dispute may be managed.

24. Section 73 of the Act, provides that alternative dispute resolution processes are not to be conducted by the ASBFEO and that the dispute resolver must be chosen and appointed by the parties not the ASBFEO.

Section 73(1) provides that:

An alternative dispute resolution process recommended by the Ombudsman is to be conducted by a person, other than a person mentioned in subsection (2), chosen by the parties to the dispute.

25. Section 71 of the Act, provides that the ASBFEO can only select an alternative dispute resolution practitioner from a list it has published and the ASBFEO does **not** currently publish such a list:

Section 72(1) provides that:

The Ombudsman may publish a list of persons who:

- (a) have the qualifications or experience to conduct alternative dispute resolution processes to resolve disputes in relation to relevant actions; and
- (b) the rates that providers on the list have agreed to charge in conducting alternative dispute resolution processes to resolve disputes in relation to relevant actions.

And section 71(2) provides that:

- (a) the Ombudsman may recommend that the parties to the dispute should take part in an alternative dispute resolution process, or alternative dispute resolution processes, of the kind specified in the recommendation; and
- (b) the Ombudsman may recommend that the alternative dispute resolution process or processes be conducted by one or more of a group of persons specified in the recommendation **who are drawn from the list of alternative dispute resolution providers published by the Ombudsman under section 72.**

26. The Ombudsman has not published a list of alternative dispute resolution providers as contemplated.

#### **Issue 4. Arbitration - no power to appoint**

27. The Ombudsman cannot appoint an arbitrator as part of a dispute resolution process as the Ombudsman has no power to appoint or even refer disputes to arbitration under the ASBFEO Act.

28. Section 71 of the ASBFEO Act, provides that the Ombudsman may recommend that parties to a dispute take part in an alternative dispute resolution (ADR) process.

Section 71(1) provides that:



If a person requests the Ombudsman to give assistance in a dispute in relation to a relevant action, the Ombudsman may make recommendations on how the dispute may be managed.

29. ADR processes are procedures and services for the resolution of disputes, is defined section 4 of the ASBFEO Act and includes:
- (a) conferencing; and
  - (b) mediation; and
  - (c) neutral evaluation; and
  - (d) case appraisal; and
  - (e) conciliation; and
  - (f) prescribed procedures or services;
30. However, the definition of ADR procedures specifically **exclude**:
- (g) arbitration; or
  - (h) court procedures or services.
31. The Ombudsman therefore lacks the power to appoint an arbitrator as its enabling ASBFEO Act specifically provides that it does not have that power. This is notwithstanding the changes to the Franchising Code brought about by the Competition and Consumer (Industry Codes—Franchising) Amendment (Fairness in Franchising) Regulations 2020. This regulation makes changes to the Franchising Code by introducing a new section 4A *“Functions of Australian Small Business and Family Enterprise Ombudsman relating to Franchising Code of Conduct”*.

Subsection 4A(b) states that:

*The Australian Small Business and Family Enterprise Ombudsman has the function of ... appointing persons who can provide services of arbitration ... on request by one or more of the parties;*

32. This section does no more than replace the role of the previously identified Mediation Adviser with a role to be undertaken by the ASBFEO. It does not empower the Ombudsman to so act. The power to appoint arbitrators can only be provided by the ASBFEO enabling Act.
33. The assistance that the Ombudsman may provide in relation to a dispute is contained in s 71 of the ASBFEO Act. The substance of the assistance that the Ombudsman may provide under s 71, is in relation to recommending an alternative dispute resolution process. Also the Ombudsman can *“recommend that the alternative dispute resolution process or processes be conducted by one or more of a group of persons specified in the recommendation”*. But the persons specified in the recommendation can only be drawn from *“the list of alternative dispute resolution providers published by the Ombudsman under section 72.”* Neither the process nor the persons recommended can relate to arbitration because it is specifically excluded.