

# Submission to Review of Franchising Regulation

## Introduction

We are franchisees who are involved in the Retail Fuel industry and as such our opinions, experiences and problems are specific to that industry. We are unable to comment on other franchises in any form other than anecdotally.

As we have never before made a submission to a legislative review, this may be in a style and format that is not usual, however, we believe that we have compelling evidence to offer. We write this with first hand experience of the issues and offer our experience as a symptom of the problems, and finally we will suggest what would have been helpful to us.

## Submission

We wish to start by answering the specific questions from the discussion document.

*Q1 Are there any particular features about franchise contracts that mean that potential and existing franchisees require further protection?*

Franchises are a system of marketing that offers huge benefits to both parties. Consistency is the key to franchising, and as such it must be from all parties. Delivery of systems and practices need to be in place from the outset and not left open to ad hoc changes from the franchisor.

*Q2 Have the problems been defined correctly? Are there other problems?*

There are other problems which are industry specific and we will address them in Q3 and the summary

*Q3 What is the magnitude of these problems? Do they apply to the franchising sector as a whole, or are they specific to particular types of franchising or particular industries?*

Fuel Retailing in Australia has for many years had separate regulation in an attempt to control imbalance of power and unconscionable behaviour.

This was originally in the form of The Petroleum Retail Marketing Sites Act 1980 and The Petroleum Retail Marketing Franchise Act 1980.

These were repealed and replaced with the Oil Code 2006.

Australia recognized that a potential for dominance by Oil companies and imbalance of power in agreements existed. In New Zealand we follow, and sometimes lead, Australia in legislation. That we didn't follow in this regard is regrettable.

*Q4 Which of the options outlined do you favour? Why?*

We favour option 3.

The fact that this discussion document exists is evidence of a level of disquiet concerning

Option 1. Our own experience indicates that is well founded.

Option 2 on its own will not remedy any of the concerns.

Option 3 is already in place in many other jurisdictions, particularly Australia, and as such would not require re-inventing the wheel.

Para. 62 concerns the disclosure of information, and would remove the potential for changes to the structure of the franchise arrangement.

Para. 64 Correctly identifies that franchisors may have an unfair cost burden imposed upon them by this disclosure, however, that would only apply if the franchise was poorly or loosely structured from the outset.

Para. 65 This indicates the level of compliance costs involved and seems to be self defeating

Para. 67 The potential for cross border franchises being deterred from operating in New Zealand appears to be unfounded. The Ubiquitous Golden Arches are able to adapt to most legislative environments, and as they are often held up as the epitome of success in franchising, they show that no barrier is insurmountable.

Para. 69,70,71,72. All relate to disclosure and are desirable. Voluntary waivers are acceptable, however the franchise documents should have a "plain English" version available. The Road Code being an example of a Plain English version of the "Traffic Regulations 1976" and various amendments.

Para. 78 Highlights the issue of technicalities getting in the way of Plain English  
Option 3.3 Cooling Off periods are already in existence and are a desirable requirement.

Para. 85 Mediation is only useful if it is mandatory and enforceable. We will discuss this in our specific case details later.

Para. 88 If the dispute has reached this level it is our experience that the relationship is permanently damaged.

Para. 93 Existing options are available but are not experienced in franchising. Our preferred option is an enhanced FANZ endorsed mediation service, which is perhaps attached to the Disputes Tribunal.

Para. 97 We agree that one size does not fit all, however the option of mandatory and binding mediation would remove any imbalance of power issues.

Option 3.6 Good Faith.

Most franchisees are also employers and are thus well used to the concept of Good Faith in employment agreements. There is no reason whatsoever that good Faith should not be in Franchise agreements. These agreements are after all a type of Employment Agreement. The franchisor agrees to sell the franchisor's products under the system specified by the franchisor.

While Good Faith is intangible and hard to specify, the inclusion would align Franchise Law with Employment Law.

Option 3.7 & 3.8 We see this as an ideal starting point and in particular Para.110

*Q5 Have all of the options (and sub-options) been identified? Are there other options (and/or sub-options) that should be considered?*

We believe that the options presented are an excellent starting point for the discussion process.

*Q6 If information disclosure is to be introduced, which classes of information should be required to be disclosed?*

We strongly believe a Plain English summary is desirable. We also recognize the legal minefield that this could create, at which point it we be self defeating. That potential issue is way outside our field of experience.

*Q7 What are the benefits of each of the options (including any further options)?*

Option 1. There would be no need for this discussion paper if this option was working satisfactorily and we do not see any benefits from continuing this pathway

Option 2. Unless membership is made mandatory this option is similar to Option 1 above. Compulsory membership with much of Option 3 added would add certainty to the industry.

Option 3. This is our preferred option, however we would like to see several of the suggestions in Option 2 added. This option would give certainty to all parties involved and would allow the industry to grow with confidence.

*Q8 What are the costs and risks of each of the options?*

On personal experience Option 1 is costly and gives little result as it is an adversarial system. The very nature of Franchising means that a system of mediation would help to preserve the symbiotic nature of the relationship. This would also mean that, like in the disputes Tribunal System, the protagonists would have to meet face to face and resolve the issue. The potential for protracted and expensive legal battles would be removed, and most importantly the reputation of the franchise would be preserved. This would protect other franchisees who will have invested large sums of money in their business.

*Q9 Can you give any estimates of the compliance costs associated with the options?*

The indications we were given, were prohibitive and depended on the willingness of the franchisor to expedite proceedings or otherwise.

We are not able to cost the Tribunal model and thus rely on your costings based on existing Tribunals

*Q10 With any of the regulatory options discussed are there potential conflicts with any existing law, such as securities law or company law?*

This is outside our experience and, in our opinion would be best determined by your departmental legal advice.

## **Conclusions**

We have attached a summary of our specific case and would like to make the following points from it.

Compulsory mediation would have prevented this from festering for so long. In discussion with various people from the legal, accounting and other professions, the common thread has been that we would need very deep pockets. This perception is also common amongst the general public. We were often told at sales conferences that "Perception is Reality". Presumably this applies no matter which side of the fence you sit on.

Our situation is not that unique. Certain aspects are, but there are also threads of common interest with others in the industry.

In summary, we believe that Franchising offers benefits to all parties. The franchisor can concentrate on the brand advertising and development, leaving the franchisee to the hands on running of the business. Franchising is by its very nature, symbiotic, and relies on Good Faith from all parties. It also relies on all parties having certainty and consistency in order to grow the business.

Having had the franchise fees and terms, constantly changed over a period of nine years did not provide that certainty. We also accept that nothing is fixed, and that change can be forced upon us all by circumstances outside our control

### **Case Specifics**

We entered into a franchise arrangement in 1998 with a term of seven years. The associated lease documents were also for seven years and specified what would or could occur at the end of that seven year term. This was that the lease would continue on a month by month basis.

The franchise agreement, however had nothing whatsoever to explain what would or could occur. Later versions of the franchise agreement however did set out the terms for continuation. This suggests that the issue had been identified and remedied.

At the end of the seven year lease the Oil CO performed a rental review and increased the rent.

After two years of this increased rent (our lawyer believes this is in effect a new lease) and having continued to pay franchise fees, the Oil Co. called for a selection board for the franchise. At this point we involved a lawyer as we believed (and still do) that in the absence of any clauses in our franchise agreement, our franchise was, and still is, valid. The Oil Co disputed this and claimed that the lease took care of this matter. If so why did they feel the need to include clauses to cover this in later contracts?

The figures for the selection process were initially not given to us and when we eventually received them we proceeded on those figures. We were advised that the selection board had decided to award the franchise to others and that we were to be terminated. Our lawyer queried how this could occur as we have to this day never received any formal notification of the termination of our franchise, and more importantly, under which clause it was being terminated.

We were later sent a copy of the rental figure that the illegal franchisees were being charged. The rental is 40% lower than what we used when we entered the selection process. ( a copy is available along with the original terms of selection and our rental figures.)

Our lease was cancelled by sending advice to our lawyer. The terms of the lease specified that ALL notices were to be sent either to the registered office, or the actual site. This in effect was an illegal termination.

On the fourth of December 2007 the business manager rang and asked what time the handover would occur on Sunday the 9<sup>th</sup> 2007.

I informed him that the issue was not resolved and that we would not be leaving. His comments to me were that they would “run me dry on fuel, and lock my pumps” *Audio of the phonecall is available.*

On Sunday 9<sup>th</sup> December 2007 I rang the Vice President of the Oil Co in Singapore and appraised her of the situation. Amongst many things we discussed, was the issue of mediation, and how in her opinion, it should have occurred and should occur in the future. Other issues discussed may be of interest to other Government Departments.

On the 10<sup>th</sup> December 2007 we were evicted and the hired goons served a trespass notice on me. Despite this eviction being based on an illegal act, our lawyer advised us that we would not succeed in an injunction as the notice would be reserved and we would only get one extra month.

We are still waiting for any mediation to occur but having been illegally evicted, we do not see this as being likely.

We have sought a review by the new Retail Manager of the Oil CO, and after a delay of a week, his response was that all had been done correctly and he “was comfortable with what had been done and how it had been done”

We will leave the judgment on that to any future mediation or judicial review.

We thank you for your time in reading this, and for the opportunity to present our case, as an example of the need for regulation to control franchising in the retail fuel industry.

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