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1. Introduction

Thank you for the invitation to talk about the ACCC’s enforcement processes and, in particular, the new powers relating to the Franchising Code of Conduct.

The powers to obtain documents are relatively new provisions, having been introduced on 1 January this year as part of the Australian Competition and Consumer Act.

It appears there is still confusion as to how those powers are being implemented by the ACCC. So during this presentation I will go through our general compliance processes. I’ll also set out for you an example as to how we are using the new investigation powers – which are often referred to colloquially as an ‘audit’ power - to obtain documents under section 51ADD of the Act. To date, we have applied section 51ADD 15 times.

1.1 Some General ACCC Observations

To begin with, I'd like to note that the ACCC is committed to playing its part in ensuring the franchising sector in Australia remains healthy.

Franchising is very successful in Australia. It accounts for about 14 per cent of Australia's GDP and it is a popular option for people wanting to start their own business without many of the risks often associated with setting up a small business.

From the perspective of the ACCC, we want to ensure that the regulatory system we enforce continues to encourage the growth of the franchising sector, so that new operators feel confident in using franchising as a business-growth tool and franchisees feel confident in being a part of these systems.

1.2 Key Elements of the Code

The ACCC regulates franchise relationships through the Franchising Code of Conduct, which is a mandatory code in the Competition and Consumer Act.

Both the code and the Act provide a range of protections for current and prospective franchisees in their dealings with franchisors. It also regulates the conduct of franchisors and franchisees.

It aims to ensure that:

- prospective franchisees receive key information about a franchise before making a financial commitment and entering into a franchise system
- franchisees have certain rights in their ongoing franchise relationship.

It also provides a dispute resolution scheme if conflict does arise.

As part of its role in administering the Act and the code, the ACCC employs a range of measures to secure compliance. They involve:

- liaising with and educating industry participants
- considering franchisee complaints
- undertaking detailed investigation, enforcement action or litigation.

Of course, while the ACCC promotes fair business practices through rigorous enforcement of the law, it can't guarantee that all franchised businesses will thrive.

Franchised businesses can and do fail for reasons other than franchisor wrongdoing. It's part of the ACCC's task when assessing complaints to determine whether the cause of concern flowed from conduct contravening the law or was the result of other factors.

The good news is that both the number and nature of complaints to the ACCC suggest the majority of franchisors meet their obligations under the code and the Act.

For the past five years the ACCC has received between 400 and 600 complaints annually in relation to franchising.

In addition, only a small number of franchise systems are the subject of complaints from more than one or two of their franchisees.

2. ACCC's General Approach to Investigations

Before we get into specifics on audit powers I'll give you a broad outline of how we approach investigations generally.

The ACCC Infocentre receives more 200,000 individual contacts each year. Obviously we can't pursue every complaint we receive, so we have to apply discretion in determining which matters to progress to investigation. How do we do this?

It is based on a number of factors, which are detailed in our compliance and enforcement policy, which is available on our website. These include:

- public interest
- consumer detriment
- blatancy of conduct
- national or international issues
- disadvantaged or vulnerable consumers
- where there is a need to create a message of deterrence.

Generally, we do not identify publicly particular industries where we will focus our efforts. Occasionally we have done so – and telcos are an example - where there is a need for regulatory intervention. But we will not do so without some evidence of systemic and widespread consumer detriment.

From time to time the ACCC receives directions from government about issues that we then prioritise - carbon pricing is a recent example. And we may tailor our compliance efforts to particular industries or conduct; for example, green claims.

We do not take a one-size-fits-all approach to compliance. Education and outreach activities are essential to allow businesses to comply with the law – and most do seek to meet these obligations.

Voluntary compliance is always better for a business than having compliance forced on your business by regulators and the courts.

The ACCC's approach to a particular compliance problem depends on the relevant circumstances. These include the nature and size of the contravention, what action the relevant party has taken to remedy the breach, whether the conduct is continuing, whether the trader has a history of contravening the law, and the impact of the conduct on consumers and business.

There are always going to be instances where businesses seek to break the law. In some circumstances the ACCC will seek to resolve its concerns through non-court-based outcomes, such as undertakings, infringement notices and administrative resolution.

Court action is generally reserved for cases where the ACCC considers that litigation is the most appropriate way to achieve its enforcement and compliance objectives.

This includes circumstances where it is necessary to ensure there is a strong message of deterrence, which is particularly relevant to an issue such as anti-competitive conduct.

2.1 Investigations – Some General Comments

We have a number of guiding principles that are relevant to all investigations. For example, it is important that the ACCC maintains its integrity by operating in an open and transparent manner.

It is also in the public interest – and in ours – to finalise investigations in a timely manner and, in doing so, we seek to act in a predictable and consistent manner.

Depending on the nature of the matter being investigated, we may send a letter requesting information from a business. The purpose of this is to simply allow us to ascertain any important facts and, where appropriate, contextualise the conduct being investigated.

It is in the interests of a business to be forthcoming and truthful with the ACCC and not to obstruct our enquiries.

The ACCC is also empowered with a number of information-gathering tools such as Section 155 notices to obtain information, documents and evidence. This includes the power to require that a person appear before the ACCC to respond to questions.

We are also able to apply for a search warrant to enter premises or to access stored communications. These powers often involve significant impact on an individual's rights and for this reason we give serious consideration as to whether or not to use them.

2.2 Investigation Process for Franchising Matters

As I mentioned earlier, the ACCC addresses misconduct in the franchising sector by enforcing the provisions of the Franchising Code of Conduct as well as broader provisions under the Competition and Consumer Act, such as the prohibitions on misleading or deceptive conduct and unconscionable conduct.

It's important to note that the investigation (audit) powers relating to the code of conduct are different from our formal information-gathering powers under Section 155. Section 155 powers are limited in that we must have a "reason to believe". The power to obtain documents – under section 51ADD - is not subject to such a limitation.

Let me set out the means by which we generally assess franchising complaints. The underlying principle is that in order to enforce the law we require allegations to be supported by credible evidence.

The first step is a preliminary assessment of the complaint, which may include an initial interview with the complainant to verify general information.

If the complaint is assessed as substantive, it progresses to the initial investigation stage. However, if it is considered the matter would be best addressed by mediation within the code's dispute resolution processes, the complainant is advised of that fact.

At the initial investigation stage, the matter is escalated to an ACCC enforcement officer, who seeks further information and substantiation of the allegations from both parties.

Once additional evidence is collected and it is believed the allegations can be substantiated by reliable evidence, the matter will generally be referred to our Enforcement Committee for consideration.

At the completion of an in-depth investigation, we may seek compliance through:

- warning letters – putting traders on notice
- administrative and court-enforceable undertakings
- seeking court declarations that there has been a breach of the code or the Act.

We also take into account a variety of factors when deciding whether to litigate matters. These include:

- the seriousness of the breach
- whether such action will secure timely outcomes
- the ability to stop unlawful conduct and deter others from that conduct
- the level of detriment suffered.

Note that the ACCC can't take action for breaches of the franchising agreement – as distinct from the code - because that is a contractual issue between the franchisee and franchisor.

However, as the national regulator we have and will continue to investigate complaints about breaches of the code and Act and, where necessary, take enforcement action.

We have recently had a number of enforcement actions for breaches of the code.

In 2010, we secured court-enforceable undertakings against real estate agent Ray White for terminating a franchise without giving reasons to the franchisee or providing them an opportunity to remedy any breaches.

That year we also took action against mobile refrigeration business Seal-A-Fridge for unconscionable conduct against its franchisees and breaching the code. The franchisor withheld access to its national telephone number to franchisees that did not agree to vary their franchise agreements and pay a 50 per cent fee increase for the telephone service. The court granted injunctions against Seal-A-Fridge and its director.

ACCC action resulted in franchisees of telephone retailer Allphones collectively receiving \$3 million in damages in 2010.

Allphones was found to have engaged in unconscionable conduct for bullying franchisees that did not come into line with their demands. The bullying tactics included withholding stock and income and threatening franchisees with breach notices.

The court also declared that Allphones had engaged in misleading and deceptive conduct towards franchisees in masking commissions and bonuses it received from suppliers.

2.3 New Powers under s51ADD

And so to today's key topic – the new powers. Under section 51ADD of Act, the ACCC is now able to compel a franchisor to provide information or produce documents or records that it is required to keep, generate or publish under the code. This information must be provided to us within 21 days.

A guidance note on the ACCC's new audit powers under the Act is available on our website at www.accc.gov.au/franchising.

This power assists us in situations where there are significant imbalances in bargaining power between industry participants.

Often in these circumstances, less powerful participants are hesitant to report contraventions by more powerful participants for fear of retaliatory action or possible flow on consequences.

Importantly, we can investigate alleged breaches anonymously. Thus the audit power helps strengthen franchisor compliance with the code, while relieving franchisees of the fear of retaliation against them for complaining to the ACCC about franchisor behaviour.

It also allows us to monitor compliance in the franchising sector without having to rely on complaints by other industry participants.

We can use this power to obtain a range of documents from franchisors including disclosure documents, franchise agreements, professional advice statements and marketing fund accounts.

We will also be able to use it in conjunction with other powers; for example, where a substantiation notice has been issued and a franchisor does not comply with the notice.

As you would expect, if you receive an audit request, or a Section 155 notice, you must not provide false or misleading information or documents. Our existing civil remedies apply in these circumstances.

2.4 How We Will Use s51ADD – In Practice

Let me map out how our section 51ADD powers might be applied. Let's say we have received a series of complaints about a franchisor and that franchisor's conduct in a particular area – say in supplying disclosure documents to its franchisees. That would trigger our interest.

It's a three stage process from there.

Stage 1: we send the franchisor a notice to produce documents under section 51ADD.

The notice clearly sets out what documents the franchisor will need to provide.

We'll definitely ask for a copy of all disclosure documents issued by the franchisor in a certain period. That might be two years, or less.

We'll probably also ask for copies of franchise agreements, certain lease documents and marketing fund statements.

We might also want to see any termination notices issued by the franchisor.

The franchisor has 21 days to respond. If the records are in order, their shouldn't be any problems. So far, franchisors have downloaded documents to CDs and provided them to us.

The notice will be accompanied by a letter with the contact details of an ACCC officer – that's the person to contact if you think you won't be able to comply in 21 days. You can seek an extension to the 21-day period if you have good cause to do so.

Ok – so that's pretty straightforward. Here's stage 2.

Once we receive the response, we'll do an initial scan of the documents to see that everything we asked for has been provided. If it looks like everything's there, we write to the franchisor thanking them for the documents and saying that we'll be in touch if we have any queries. If there are things missing, we'll contact the franchisor and find out why.

We'll also compare what's in the documents with what we already have on our complaint files. If there are discrepancies, we'll contact the franchisor to discuss.

The documents will also be kept on file and may be referred to if we receive future complaints against the franchisor.

Here's stage 3. Say we find non-compliance. Then we contact the franchisor, and if they're co-operative and undertake to comply going forward, we won't take court action. At most we'll seek a court-enforceable undertaking.

If, however, our review of the documents reveals severe, deliberate breaches of the Franchising Code - or the Act - by a franchisor, court action is a possibility, especially if there is no co-operation forthcoming.

If our review reveals very minor breaches of the code - or the Act - we'll seek to resolve the matter using our administrative powers.

All matters will be handled in accordance with the ACCC's Compliance and Enforcement policy.

2.5 What Might Trigger a Section 51ADD Investigation?

What sort of triggers might lead us to consider issuing a section 51ADD?

Initially our attention will go to franchisors who:

- have a significant number of code-related complaints made against them
- have a history of non-compliance, including prior dealings with the ACCC

Also, we will be paying attention to franchisors who are:

- randomly selected from industry sectors that appear to generate a disproportionate volume of complaints
- identified as potentially not complying with a prescribed code or the Act through intelligence received from industry associations, other government agencies or members of one of our consultative committees.

We will also likely to pay attention to franchisors who have given undertakings in the past to improve their behaviour, where they have been taken to task for wrong conduct, to ensure they have maintained the high standard they committed to.

Receiving a section 51ADD notice doesn't mean a franchisor will be exempt or relieved from ACCC interest for any time afterwards. For example, they could be investigated for unrelated conduct. Or, if complaints continue against the trader, we may choose to use our powers a second or third time to call for certain documents.

We will provide further information on our industry code audit program in our quarterly *ACCCount* publication and in our annual report. Also, from time to time we make media statements about our use of these powers.

The fact that you have been issued with a notice doesn't mean we have already assessed you as having breached a provision of the code. It may just mean a complaint has been made against you or it may mean that a high number of complaints have been made about your industry.

The purpose of the notice is to call for your documents so we can assess if all is in order.

And finally, we can't possibly know the scope of every business and how many documents that business might hold within each category. So, if the notice captures a large volume of documents, we will invite you to contact us to explain your situation. Depending on the circumstances, we may decide to narrow our request for documents or give you more time to compile and produce the documents.

3. Conclusion

So I trust that gives you a good background on powers and how we intend to use them. It's worth noting that we are still in a learning process with this as well. As I said, we've issued only 15 notices so far and we are still fine-tuning the process.

But it's an important policy because, ultimately, the long-term beneficiary is the franchise sector.

The amendments to the code, combined with our new powers to enforce the changes, provide for better communication and information flow between franchisors and franchisees, which can only help reduce issues in the sector and help more franchisees be successful.

Thank you.

I'd now like to open the floor to some questions.