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'Charlatans and rogues' or just another dysfunctional family? — Part 2

Elizabeth Spencer
Bond University, liziwizio@gmail.com

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'Charlatans and rogues' or just another dysfunctional family? — Part 2

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A process of dispute resolution for franchising under the mandatory industry code, the Franchising Code of Conduct (the Code), has been in effect since October 1998. A mediation procedure outlined in Pt 4 of the Code constitutes the centrepiece of this process. This mediation procedure is a step forward from the days when there was no formally recognised mechanism for resolving disputes in franchising. There are ways, however, in which the processes and procedures can serve the parties more comprehensively. This article identifies some aspects of franchising that may be significant in the design of a dispute system for this unique business arrangement.

Part 1 of this article offered a brief description of the nature of the franchise relationship. Part 1 also introduced two government organisations that may become involved in franchising disputes, the Australian Competition and Consumer Commission (ACCC) and the Office of the Mediation Adviser (OMA). Here in Part 2, conflict management and dispute system design theory form the basis for an analysis of dispute procedure under Pt 4 of the Franchising Code of Conduct. The analysis indicates some ways in which the current dispute resolution process outlined in Pt 4 of the Code might better serve the participants in the process.

Reported incidence of disputes

While it is beyond the scope of this article to catalogue the nature of disputes that arise in the course of franchise relationships, there is some empirical data available from OMA and the ACCC. Because the Franchising Code of Conduct is the first mandatory industry code under the *Trade Practices Act 1974* (TPA), the ACCC has a special interest in the success of the Code as a regulatory mechanism. The ACCC is charged with education and information about the Code as well as its enforcement. The OMA was set up pursuant to the Code to appoint mediators for franchising disputes. There is also a third source of information about the nature of conflict in franchising, the Franchising Council of Australia (FCA). As the FCA is a franchise industry group, its membership consists predominantly of franchisors.[1]

The data from the three other sources mentioned is not entirely consistent. When the ACCC receives enquiries regarding franchising disputes, it may choose to refer these enquiries to OMA and/or it may conduct its own investigation. Sources at the ACCC report an increase in disputes in franchising involving misleading and deceptive conduct, especially about anticipated earnings and territorial issues.[2] Uncertainty over the extent and application of unconscionable behaviour under s 51AC of the TPA continues to be of concern to franchisors. Finally, the process of dispute resolution has itself been a source of dispute; in two recent cases brought by franchisees against franchisors, refusal by the franchisor to negotiate was one of the items complained of by the franchisee.[3]

As about 85 per cent of inquiries to OMA are franchisee initiated,[4] OMA is perhaps the better resource for understanding the causes of conflict from the point of view of the franchisee. According to OMA, the leading cause of conflict between franchisors and franchisees in Australia is product purchase requirements.[5] Other significant causes of problems include lack of franchisor support, training and/or assistance, and lack of financial viability of the franchise.[6] These disputes are more likely to be franchisee-initiated. Franchisees are often at a disadvantage in the relationship because of the greater dominance of the franchisor in structuring the contract. Contractual terms that favour the franchisor can lead to abuse of the franchisor's roles as business partner and as supplier.[7] Such terms can lead to bullying and unconscionable behaviour on the part of the franchisor.

Slightly fewer than 19 per cent of franchisors reported having been involved in a 'substantial dispute' (defined as a dispute referred to an external advisor for action) with a franchisee in the past year.

The Franchising Council of Australia 2002 Survey reports somewhat different findings to those of the OMA. Slightly fewer than 19 per cent of franchisors reported having been involved in a 'substantial dispute' (defined as a dispute referred to an external advisor for action) with a franchisee in the past year.[8] The main causes of dispute given in the survey were lack of compliance with the system (27%), payment of fees (15%) and misrepresentation (15%). Territorial issues and encroachment, site suitability, profitability and

communication problems were also reported causes of disputes.[9] The first two items, lack of compliance with the system and payment of fees which together represent 42 per cent, would be franchisor-initiated issues.

It is not always clear to the parties involved in a dispute which of these organisations, the ACCC, the OMA or the FCA, can help them, and how. This problem is most significant for franchisees because franchisees do not have an association or industry group to represent their interests, as the franchisors have in the FCA.[10] This is one reason why a convening clause is strongly recommended as part of the dispute resolution process for all franchise agreements.

Franchising Code of Conduct Pt 4: dispute resolution

Process design

The dispute resolution process prescribed under Pt 4 of the Franchising Code of Conduct[11] is an important feature of the Code. 'The FCC has two main arms; one is disclosure, the other is mandatory mediation.'[12] The dispute resolution process in Pt 4 was informed through a collaborative process that involved nine members, three representing franchisors, three representing franchisees, two representing service providers and an independent chair.

A key principle of dispute system design is to tailor the system as much as possible to the requirements of the users. Consultation with all user interest groups allows for proper consideration of relevant organisational structure, culture, objectives and resources, as well as external conditions. Although there has been some evaluation of the process which has included input from participants, it would be desirable to engage participants in ongoing evaluation of the process design. This evaluation should include comprehensive needs assessment of the kinds of disputes that arise, how they arise, how they are presently handled, and why particular procedures are used.

The process procedures

Part 4 of the Franchising Code of Conduct requires that all franchise agreements entered into after 1 October 1998 contain a dispute resolution clause. Both parties must comply with the dispute resolution procedure in the franchise agreement or use the procedure in Pt 4, unless they mutually agree otherwise.[13]

Clause 29 outlines the Code procedure. The steps are as follows:

1. Notice. Notice of the dispute, in a complaint format, is given to the other party.[14]

2. Negotiation. After notice has been given, the Code provides that the parties should try to agree on how to resolve the dispute. There are no further guidelines offered in the Code, by the ACCC or by the OMA for this procedure.

3. Mediation. For mediation *under the franchise agreement* subs 3 provides that if the parties cannot agree within three weeks, either party can refer the matter to a mediator (subs 3a), or ask the OMA to appoint one (subs 3b). For mediation *under the Code procedure* subs 4 provides that either party can ask the OMA to appoint a mediator.

4. Litigation. Litigation can be pursued at any time, including following termination of the mediation, at the option of either party. The procedure in Pt 4 does not foreclose parties' rights to take legal action (eg injunctive relief to safeguard legal rights).[15]

There is evidence that conflict management in franchising in Australia has improved since the introduction of the Code. The 2002 FCA Survey found that 40 per cent of the FCA member respondents surveyed felt that the Code had assisted in the way they resolved disputes.[16] When asked which dispute resolution processes they would use, 39 per cent surveyed agreed with the statement that they were more likely to resolve disputes using mediation since the introduction of the Code.[17] Negotiation was not addressed in the survey; no figures are available to provide information about the number and types of disputes handled through unassisted negotiation.[18] Although arbitration is not a part of the Code procedure, the survey nevertheless did include a question about arbitration; 17 per cent of the respondents reported that they were more likely to resolve disputes using arbitration since the introduction of the Code.[19] None of the respondents surveyed agreed that they were more likely to resolve disputes using litigation.[20] It is important to note, however, that despite a heavy response that they were not more likely to use litigation under the Code, and despite the Code's emphasis on mediation, more disputes are reportedly still being resolved through litigation (23%) than mediation (17%), results similar to 1999 findings.[21]

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Under the current process the choice of dispute resolution procedures involves a sequence of procedures, first negotiation, then mediation, with litigation available at any time. This process design could be improved in three fundamental areas: education, access, and choice and sequence of procedures. In theory, a dispute resolution system should be as wide in scope as is practicable with somewhat more extensive multiple and parallel

options, and multiple entry points into the system. Guidance should be provided to participants throughout the process. In order that access to procedures is not prematurely foreclosed, the current system should also provide loop-backs to negotiation from mediation and litigation, and, again, guidance as to when these options might be used. Loop-forwards should be available if they are agreed to by the parties. Finally, there should be rights and/or power-based backup procedures. All of these measures help to ensure that the most appropriate procedure is available at the time when it is most useful.

1. Notice

The first step in the process is giving notice. The initial notice of dispute is not required by Part 4 to be filed with the OMA, but it requests parties to do so. Compliance with this request is important for monitoring the dispute resolution process. Monitoring of disputes by the OMA has great potential as a source of information, both about the nature of franchising disputes and about the methods used to resolve them.

Descriptive materials and instructions regarding notice tend to emphasise what the other party must do to resolve the dispute.[22] Ideally, the format might elicit a more balanced response by framing the questions in a way that suggests that responsibility for the dispute is shared by both sides.

2. Negotiation

The second step in the Code process is negotiation. Unassisted negotiation works best when the parties have some trust, both in the process and in each other; when the parties have influence on each other; where the interests of the parties are not entirely incompatible; and when both sides' interests are served by early settlement.[23] Franchisor-franchisee relationships have many attributes conducive to successful negotiation. They may also exhibit characteristic barriers to successful negotiation. Research has shown that negotiation is least effective where communication is poor; where there are misconceptions that block exchange; where there are incompatible differences, including value differences; or where parties cannot get started in negotiations, have reached an impasse or cannot agree on how to approach multiple issues.[24]

As a recent report by the National Alternative Dispute Resolution Advisory Council (NADRAC) noted, the Code procedure offers no guidance for parties in negotiation.[25] Such guidance is particularly important when the conditions disadvantageous to negotiation exist, as these can be greatly ameliorated by assistance to the parties with process. Parties often turn to mediation when it is already too late, when one party, often the one with less power, has already decided to exit the relationship.[26] This situation would indicate a strong need for greater assistance to the parties prior to the mediation stage.

One further point about the early stages of dispute resolution and the concept of prevention is that while it is axiomatic that prevention is often the cheapest and most effective way to handle conflict, conflict does offer benefits. It is not always best avoided. Any prevention scheme should acknowledge that some conflict needs to be developed and aired. Prevention may be addressed both at the pre-dispute level by training and education as well as post-dispute through data-gathering, evaluation, and adjustment. The Code makes no provision for early recognition and early intervention. This is yet another reason for an expanded education, advice and referral process available to parties in the early stages of conflict.

3. Mediation

The third step in the Code dispute resolution process is mediation.[27] Upon notification of the dispute the OMA has 14 days to appoint a mediator. The mediator then has 28 days to notify the OMA that the mediation has started. Termination of mediation can be granted upon request by either party if, after 30 days, there has been no resolution. Parties share the costs of the mediation, and pay their own costs associated with attending.[28] The mediator may determine the time and place of mediation, which must be in Australia.[29]

Representatives from each side must appear in good faith and with decision-making authority.[30] Though the term 'good faith' does not appear in Pt 4 of the Code, the TPA s 51AC does require parties to act in good faith; this requirement extends to the dispute resolution process.[31] Some franchisee organisations, however, such as the Motor Trades Association of Australia, advocate an express good faith clause in Pt 4 as a greater incentive for franchisors to enter negotiations. For their part, some franchisors claim more is needed to get franchisees to mediation, but say they recognise the difficulty in legislating concepts such as good faith.[32]

There are many reasons why mediation can be suitable for franchising disputes. Because the parties are in a continuing relationship, mediation may do less damage to the relationship and improve the parties' capacity to resolve future disputes. Mediation can accommodate parties' needs for privacy and confidentiality. It is often the process of choice in the case of complex, protracted subject

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matter, or if the subject matter is related to large numbers of other disputes that can benefit from integrative solutions. When issues other than legal issues need to be resolved, mediation can address them. Finally, because of the nature of the process, including the involvement of the parties themselves throughout mediation, there is greater flexibility in crafting solutions.[33]

Mediation is not, however, the most suitable procedure for every franchising dispute. The good faith requirement is important because mediation is not likely to be successful when parties fail to participate in good faith.[34] It may also founder if one or both parties feels strongly on a matter of principle, or one or both perceives a need to set precedent.[35] Mediation may be ineffective if one or both parties have lost interest in settlement, as for example in the case of a franchisee which has made a firm decision to exit or a franchisor to terminate. Even in these latter instances, however, mediation can help the parties to reach workable solutions and allow them to avoid more expensive and time-consuming adversarial procedures.

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Finally, attitudes toward risk affect parties' choice of procedure. Mediation may not be the best procedure where there is a significant power imbalance between the parties, not only because of the risk that the stronger participant will dominate the process. A 1992 study that examined franchisors' choice of dispute resolution strategies showed that when the stakes, franchisee dependence, and complexity of disputes are high, or where there is a high precedent-setting aspect to the dispute, dominant parties choose what they perceive to be low-risk (not necessarily lower cost) strategies such as politics or bargaining.[36] These choices are motivated by perceived immediate gain as well as greater latitude for tactical manoeuvres and exercise of influence. Conversely, when the stakes, franchisee dependence, and complexity of the disputes are perceived to be low, and when the precedent-setting value is low, dominant parties are more likely to choose 'higher-risk' processes such as problem-solving and integrative procedures.

These results are consistent with two commonly held views about choice of procedure: one, that integrative problem-solving is appropriate when the relative power of the parties is balanced and, two, that rights-based processes are used when there is a need to set precedent. On the other hand, the results of the study challenge the view that integrative problem-solving is more appropriate when levels of complexity are high. They found that the dominant party opted for lower-risk strategies such as politics and bargaining in complex situations. Further research into the organisational culture of franchising may indicate ways to address this aspect of the relational imbalance.

There are four further observations to be made about possible improvement to mediation under the Code.

- First, mediation is mandatory. While there are no pecuniary penalties for failure to comply with Part 4, there are penalties for breach of the duty of good faith required by the TPA s 51AC. One of the main challenges the OMA faces is 'ensuring the genuine support of the parties to the process given the quasi-mandatory nature of the process under the Code.'[37]
- Second, there is insufficient emphasis on preparation for mediation. A recent change reflects the OMA's awareness of this problem. Mediators are now permitted to charge three hours of preparation time, but this change does not go far enough to ensure that parties themselves are adequately prepared for mediation.[38]
- Third, while the option of litigation is left open, procedures are not specifically outlined for cases where mediation fails.
- Fourth, the mechanisms for monitoring and enforcing agreements made through negotiation or mediation are not clear. Both monitoring and enforcement are important functions that should be conducted according to clearly defined procedures.

Arbitration (not included in the Code process)

Arbitration is not provided for in the prescribed process under Pt 4 of the Code. Arbitration is generally faster than mediation, but it can also be expensive. In Australia arbitration may involve a risk of removal to the home jurisdiction of the franchisor.[39] Other disadvantages are its relative inflexibility and inability to develop integrative solutions. Arbitrators may not be able to probe for information, and there may be problems with the overlapping roles of the third party intervener if he/she acts as mediator and also as arbitrator.

A rights-based approach, although not necessarily arbitration, should be part of the Code process. Such an approach is often the best method to ensure a binding result.[40] Rights-based approaches are useful where there is a need to shift responsibility for the decision to a third party, where there is a need to 'quantify' the dispute, where technical and practical questions are involved, and where a greater degree of formality may be warranted. Such an approach can also inject an objective

point of view as a catalyst to stalled negotiations.

The NADRAC Review of the Franchising Code of Conduct suggests that Pt 4 should include a procedure such as expert evaluation or decision.[41] 'Case presentation' is such a procedure. It is 'a process in which the parties to the dispute present their evidence and arguments to a third party who provides advice as to the facts of the dispute, and, in some cases, advice regarding possible, probable, and desirable outcomes and the means whereby these may be achieved.'[42] This may be a better rights-based option for franchising than arbitration because it offers many of the benefits of arbitration without the high cost, inflexibility, risk of removal, and other disadvantages.

4. Litigation

Litigation is the fourth step in the Code process. Litigation is appropriate when the outcome needs to be public in order to establish precedent. It may also be suitable when the outcome may affect third parties. But litigation offers less choice and flexibility to the participants. More formal than mediation, litigation offers limited privacy, and may involve delay. A court may not consider all the issues that are relevant to the parties in favour of a focus on issues that are legally relevant – and these may not be the issues that matter most to the parties. Finally, court remedies are standardised, limited, and beyond the control of the parties. All of these factors may mean litigation erodes goodwill, instead of reinforcing it.

The director of the OMA estimates that few of the disputes that fail to settle through mediation go on to litigation. Nevertheless, more franchise disputes are still resolved through litigation than through mediation.[43] More information is needed to determine why more disputes are litigated and to understand how litigation addresses the interests of franchisees, franchisors and/or their solicitors. Litigation may in fact be the most appropriate response in some circumstances, but probably not for the majority of disputes, as the currently reported rates of litigation might suggest.

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The Dant and Shul[44] study showed that franchisors prefer low-risk procedures such as litigation when the stakes, franchisee dependence, and complexity of the disputes are high. Franchisors are, however, publicity-averse as well as risk-averse. The threat of litigation can be a powerful incentive to franchisors to reach resolution. In addition, Code disclosure requirements provide that franchisors must disclose to potential franchisees all litigation, including litigation with other franchisees. Such disclosure would not enhance the franchisors' sales prospects.

Education, information, implementation and evaluation

These fundamental aspects of implementation are not addressed in the Code. Education and dissemination of information about the Code are important for at least two fundamental reasons. First, because breach of the Franchising Code of Conduct constitutes a breach of the TPA, it is important that both franchisors and franchisees understand their obligations under the Code. Second, the Code is designed to serve the needs of the parties. They can only make use of the process if they understand it. An education program should aim to make both franchisors and franchisees aware of the constraints as well as the potential for flexibility in using the process.

The Code process should offer clearer and more comprehensive education and information to prospective users about the system and the process, including the procedures available and how to access them. Information should be provided to participants concerning the different types of ADR (eg preventative, facilitated, negotiated, advisory, fact-finding, imposed)[45] and approaches to mediation (eg interest-based, evaluative, transformative). Related to this, a more comprehensive definitions section would help with information and education about the process.[46]

There is a variety of ways that these informational functions can be handled. The OMA is a possible candidate to take on some or all of them. Clause 25 provides for the OMA to be appointed by the Minister for Small Business. As it operates currently, the OMA is primarily a mediator referral service, with a limited ancillary role to promote mediation for small business. The OMA's narrow scope forfeits a valuable opportunity. Often the first port of call for parties experiencing difficulty in resolving disputes, the OMA is uniquely positioned to diagnose, to educate, and to guide parties in achieving the best outcomes in handling conflict.

Conclusion

The dispute resolution process prescribed in Pt 4 of the Code provides little support for any procedure outside of mediation. Mediation may be a suitable centrepiece for the process, but

it should not be expected to meet every need. Other procedures should be introduced or expanded and greater assistance provided to parties in the effective employment of procedures.

At the notice stage, the procedure could be reoriented with a more constructive, interest-based information-gathering procedure. Parties in the preliminary stages would also benefit from some guidelines and/or training in unassisted negotiation. Mediation often fails if it comes too late, when one of the parties has already given up and decided to exit the relationship. The need for more guidance suggests a possible convening function for OMA in the preliminary stages. A convening clause would help ensure that parties select the most suitable procedure at the appropriate time, and could stem the flow of disputes to litigation.

Second, mediation as it is currently structured may not always serve optimally if there is insufficient preparation or where there is a significant power imbalance between the parties. Parties must participate in good faith, a requirement that can be difficult to ensure. There are currently no fines for failing to attend mediation. Finally, even when mediation is success-fully completed, better mechanisms for enforcing and monitoring agreements contribute to the ongoing success of the process, both for the parties involved and future users of the system.

Third, in addition to negotiation and mediation, a well-designed dispute system should offer rights-based procedures other than litigation. Mini-trials, a sector-specific tribunal, or the case presentation concept might be considered if, for a variety of reasons, it is decided that arbitration is not appropriate. Despite obvious disadvantages such as expense, delay and lack of control, more franchising disputes continue to be settled through the process of litigation than any other procedure. More research is needed to explore the conditions under which litigation is the most appropriate method of handling disputes in franchising.

Comprehensive information-gathering and record-keeping is important throughout the process. Feedback can be gathered through interviews and surveys, and analysed to adjust and refine the system. This feedback can be collected, observing standards of confidentiality, at every stage, not only when the dispute process is complete. Efforts should also be made to survey franchisors and franchisees which do not use the process.[47]

The dispute resolution process under the Code, although it has been the focus of this paper, is only one technique in the management of conflict. A thought-fully designed dispute system weaves conflict management systems into the fabric of franchising organisations for the benefit of the sector as a whole. ●

Elizabeth Spencer is Assistant Professor in the School of Law, Bond University. She can be contacted at <liz_spencer@bond.edu.au>.

Endnotes

1. For an expanded discussion of the interrelated functions of these organisations, see Part 1 of this article.
2. Martin J, Commissioner of Small Business, *The Health of Franchising from the Viewpoint of its Regulator*, Address to the Franchising Council of Australia, 23 October 2001.
3. See *ACCC v Cheap as Chips Franchising Pty Ltd and Peter Hudousek* (2001) (unreported, Federal Court, No 354 of 1999; and also *ACCC v Simply No-Knead (Franchising) Pty Ltd* (2000) FCA 1365.
4. Telephone conversation with Director of OMA, David Newton, 22 April 2003.
5. E-mail from David Newton, 10 February 2003. The particular concerns here tend to involve quality, price or delivery time of goods.
6. Id.
7. For a list of ways the parameters of the franchising relationship can be recalibrated in favour of the franchisee, see the Review of the Franchising Code of Practice, 1994, BRW Research.
8. Frazer L, and Weaven S, *Franchising Australia 2002 Survey*, Griffith University and the Franchising Council of Australia Ltd (2002).
9. Id at 50.
10. The Australian Franchisee Association was established in late 2003, but no data is yet available from this organisation. For more information go to <www.franchisees.org.au>.
11. This new code, the Franchising Code of Conduct, is the first mandatory industry code under s 51AE of the TPA. It is binding on all industry participants; compliance is mandatory and failure to comply is a breach of s 51AD. The Code can be accessed at <http://scaleplus.law.gov.au/ html/pastereg/2/1466/pdf/TradePracIndCodeFran98.pdf>.
12. Telephone interview with Brendan Bailey, ACCC, 9 February 2003.
13. Clause 26 requires any franchise agreement after 1 October 1998 to have a procedure that 'complies' with cll 29 and 30. Clause 27 provides that a party may initiate a dispute procedure under cl 29, the Code dispute resolution procedure. The choice of procedure provision in cl 28 provides that parties can follow cl 26 (the procedure in the franchise agreement) or cl 27 (the Code procedure), apparently irrespective of the date of the franchise agreement. If both parties agree to other methods of handling their dispute, there is no requirement to mediate.
14. See OMA Complaint Form, available from the OMA website at <www.mediationadviser.com.au/#notice>.
15. Franchising Code of Conduct Pt 4, cl 31.
16. See note 8, above, at 45-50. 14 per cent disagreed, 41 per cent were uncertain.
17. Id. 20 per cent disagreed, 36 per

cent were uncertain.

18. The 2002 Survey defines 'substantial dispute' as one referred to an external advisor. A dispute that is resolved through negotiation between the parties might not come within that definition and thus would not have been included in the Survey.

19. See note 8, above, at 45-50. 23 per cent disagreed, 59 per cent were uncertain.

20. Id. 46 per cent disagreed with this statement, 38 per cent were uncertain.

21. Id at 47.

22. See note 12, above.

23. Moore, *The Mediation Process*, 2nd Edition, 1996, Josey-Bass Publications, San Francisco, p 13.

24. Id at 13-14.

25. NADRAC Review of Franchising Code of Conduct, 9 October 2002. See <www.nadrac.gov.au/www/disputeresolutionHome.nsf/Web+Pages/4C00DE78CBE68246CA256B4C0006506D?OpenDocument>.

26. See note 4, above.

27. Franchising Code of Conduct, Pt 4, cl 29.

28. Franchising Code of Conduct, Pt 4, cll 30, 30A and 31.

29. Franchising Code of Conduct, Pt 4, ss 5 and 5A.

30. Franchising Code of Conduct, Pt 4, s 6 provides that 'The parties must attend the mediation and try to resolve the dispute.'

31. ACCC Franchising Consultative Panel: Summary of Discussion (Draft), April 2003 at 7.

32. ACCC Franchising Consultative Panel, 20 March 2003, comments of Julie Owen of McDonald's Corporation.

33. Boulle and Nesic, *Mediation: Principles Process Practice*, 2001, Butterworths, London, pp 92-7.

34. Franchising Code of Conduct, Pt 4, cl 29, s 6.

35. CDR Associates, Boulder, *Divorce and Child Custody Mediation*, 1986, Training Materials, at 63.

36. Dant and Schul, 'Conflict Resolution Processes in Contractual Channels of Distribution' (1992) 56 *Journal of Marketing* 1 at 40.

37. See note 5, above.

38. NADRAC Review of the Franchising Code of Conduct, 9 October 2002. The NADRAC report suggests that more help should be provided to the parties at this stage. The report is available at <www.nadrac.gov.au/www/disputeresolutionHome.nsf/Web+Pages/4C00DE78CBE68246CA256B4C0006506D?OpenDocument>.

39. See Martin J, Commissioner of Small Business, *The Health of Franchising from the Viewpoint of its Regulator*, Address to the Franchising Council of Australia Conference, Adelaide, 23 October 2001, referring to *Timic v Hammock* in the Federal Court of Australia, Victorian Division (2001) where the Court found that an arbitration clause could lead to removal to the US. The Franchising Code of Conduct, Pt 4, cl 29, s 5A stipulates that mediation must be conducted in Australia.

40. Wolski B, 'The Model Dispute Resolution Procedure for Australian Workplace Agreements: A Dispute Systems Design Perspective' (1998), paper presented at the Fourth Annual Mediation Conference, Melbourne at 35.

41. See above note 38.

42. 'Towards Consistency in ADR Terms' (1998) 1(1) *ADR*.

43. 2002 FCA Survey, above note 8 at 47.

44. See note 36 above.

45. Constantino C and Merchant C, *Designing Conflict Management Systems: A Guide to Creating Productive and Healthy Organisations*, 1996, Josey-Bass Publications, San Francisco, p 127.

46. Franchising Code of Conduct, Pt 4, cl 24.

47. Slaikeu and Hasson, *Controlling the Costs of Conflict: How to Design a System for Your Organisation*, 1998, Josey-Bass Publications, San Francisco, p 158.

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