
Small business

ACCC Small Business Program

The Commission has appointed Mr Philip Eliason to manage its National Small Business Program. It will also appoint small business liaison staff in its State and Territory capital city offices.

The appointments reflect the Commission's commitment to assisting the small business sector to reduce commercial problems occurring with large businesses and between franchisees and franchisors. The Commission developed the Small Business Program in 1995-96 with the primary objectives of coordinating:

- the enforcement of the Trade Practices Act in relation to small business issues;
- education of small business about rights and obligations under the Act; and
- promotion of small business aspects of Commission activities.

The expansion of the Commission's Small Business Unit will significantly enhance its capacity to listen to, and communicate with, small businesses.

Mr Eliason brings a strong knowledge of small business needs to the Commission. He has been CEO of the Real Estate Institute of Australia and Deputy Director of the National Farmers' Federation where he argued the case for small business to Government. He was a member of the Small Business Coalition and has represented business and industry views at national and international levels since 1988.

From July 1998 the Commission will run an information program and industry outreach on the new Franchising Code of Conduct and small business amendments to the Trade

Practices Act which facilitate the resolution of disputes over unconscionable conduct. Both issues have been highlighted by business and the Government as priorities (*see below*).

The Commission has also recently published a revised guide called *Small business and the Trade Practices Act* which is available free from Commission offices and its website. The Commission's website also has a small business section which contains other information relevant to small business and a direct email address for the Small Business Unit.

The Commission is also looking closely at how its activities in other sectors affect small businesses particularly in the provision of telephony and energy services. Small business is an important consumer of both goods and services and the Commission will note benefits delivered to small business from its wider enforcement of the Trade Practices Act.

Franchising Code of Conduct

As part of the Commonwealth Government's small business initiative the Minister for Workplace Relations and Small Business, the Hon. Peter Reith MP, launched a mandatory Franchising Code of Conduct on 19 June 1998. Some elements of the code are effective from 1 July 1998 with the remainder effective from 1 October 1998.

The code is mandatory for all franchise businesses — including franchisors and franchisees — and is prescribed under the Trade Practices Act. It will apply to all new, renewed or extended agreements and, where applicable, to existing agreements. The Commission will monitor and enforce the code. Non-compliance may invite official action by the Commission or private action by franchisees.

The code was developed by the Franchising Policy Council set up in February 1998 by the Commonwealth Government. The Council comprises representatives of the sector. Chaired by the Hon. Michael MacKellar, it consulted widely with the franchising community about the form and content of the code. It will review the code within three years.

The main elements of the code are:

- improved franchisor disclosure to franchisees and prospective franchisees;
- minimum standards for franchise agreements, such as cooling off periods and auditing requirements on marketing funds; and
- the introduction of mandatory mediation processes where disputes cannot be resolved within the franchise system.

The introduction of the code was foreshadowed in the Commonwealth Government's small business initiative *New Deal: Fair Deal* announced on 30 September 1997. In April 1998 legislation which allowed for the prescription of voluntary and mandatory codes of conduct under the Trade Practices Act was passed.

The aims of the code are to:

- raise the standards of conduct in the franchising sector without endangering the vitality and growth of franchising;
- reduce the cost of resolving disputes in the sector;
- reduce risk and generate growth in the sector by increasing the level of certainty for all participants; and
- address the imbalance of power between franchisors and franchisees.

Under the disclosure requirements, franchisors must disclose to franchisees and prospective franchisees information relevant to the operation of the franchise business. They will also be required to provide relevant information to franchisees during the course of the

agreement, such as details of a change of ownership or changes to certain financial circumstances. A franchisee selling a franchised business must provide a disclosure statement to the purchaser.

Franchisors are also obliged to provide a cooling off period, a copy of a lease to a franchisee, and income and expenditure statements on marketing and promotional funds. They may not prevent franchisees from associating with each other for a lawful purpose and may not seek a general release from liability on entering the franchise agreement. The code also deals with termination of a franchise agreement and sets guidelines for mandatory mediation where a dispute arises that cannot be resolved within the franchise system.

The elements of the code which come into effect on 1 July 1998 include the requirement for a franchisor to provide a copy of any lease to franchisees, the requirement to prepare financial statements for marketing and promotional funds, and the provision ensuring that franchisees have the right to associate. The majority of the code, including the disclosure and dispute resolution provisions, will come into effect on 1 October 1998. This transitional period provides franchisors with three months in which to establish compliance systems.

Copies of the code are available free by contacting the Office of Small Business on 1300 366 114 and from its website at <http://www.dir.gov.au>, and from Commission offices. The Commission's website also has a link to the code on the Office of Small Business website.

A compliance manual to help franchisors comply with the code will be available shortly from the Commission.

Unconscionable conduct provisions

In addition to the Franchising Code the Government introduced legislation expanding the current provisions in the Trade Practices Act dealing with unconscionability in commercial transactions.

The new unconscionable conduct provision (s. 51AC) prohibits a stronger party dealing with a disadvantaged party in a harsh or oppressive manner. It gives small business the same strong legal protection that is available to consumers under the Act.

It provides that the court may take into account a range of circumstances in determining whether a business has been subject to unconscionable conduct. The court may consider the parties' relative commercial strengths, whether undue influence was exerted, whether parties adhere to a better business type code, whether the contract exceeded what was reasonably necessary for the legitimate interest of the supplier, and whether there was evidence of disclosure, good faith and willingness to negotiate.

The new provision applies to conduct occurring from 1 July 1998. It does not apply to publicly listed companies and there is a cap of \$1 million per transaction to which the new law can apply.

Code of conduct for distribution and exhibition of films

In March 1997 the Commission requested a consultant's report on developments in the cinema distribution and exhibition industry which may be having an impact on competition in the industry.

The request followed a substantial increase in the number of complaints received by the Commission from cinema exhibition interests. These complaints related largely to access to first release films and conditions of film hire imposed by film distributors on small exhibitors.

The consultant's report recommended that the Commission seek cooperation from the exhibition and distribution sectors of the industry to establish an industry code of conduct and dispute settling mechanism.

In adopting this recommendation the Commission convened a meeting of all relevant interests in Melbourne in April 1998 to work towards developing an industry code. A drafting committee of all relevant interests was

formed at that meeting which prepared a working draft. Subsequent meetings of the drafting committee finalised the code in June 1998 after consultation with all relevant interests.

The code will be administered by a code administration committee made up of representatives of relevant interests. The inaugural meeting of the code administration committee will be held in August 1998.

The code includes guidelines for the supply of prints, trading terms, supply of trailers and advertising material, supply of information, review of sessions policy, and exhibitors' and distributors' obligations. It also sets out some dispute resolution procedures, which include the right of the parties to take their dispute to an independent conciliator. The procedures have been designed to allow a quick, relatively inexpensive and accessible means of resolving disputes. The dispute resolution system should also be a more market sensitive means of resolving disputes than previously was the case.

