

C 2nd **AMA** Sheraton Imperial Hotel
Kuala Lumpur
24-25 February 2011
CONFERENCE
Rediscovering Mediation
in the 21st century

**TRANSFORMING THE LANDSCAPE OF
RESOLVING FRANCHISE DISPUTES BY
MEDIATION**

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Date:	25 February 2011 (Day 2)
Time:	10:50 am to 11:50 am
Venue:	Penang Room (L3)

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TRANSFORMING THE LANDSCAPE OF RESOLVING FRANCHISE DISPUTES BY MEDIATION

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Office of the Franchising Mediation Adviser (OFMA)

The Office of the Franchising Mediation Adviser is a national, federally funded office which was established by the Australian Government in 1998 under the Franchising Code of Conduct. The Code is a Regulation under the federal Trade Practices Act.

OFMA has a panel of approximately 120 mediators across Australia and its role is to appoint mediators from that panel when requested to do so by any party to a franchise dispute. OFMA has no regulatory or enforcement role.

OFMA has been administered by The Accord Group under contract to the Government since 1998.

Mediation

Mediation is like a structured negotiation where an independent third party, called the mediator, helps the parties work together to reach an agreement. The mediator facilitates the negotiation and creates a safe environment for the parties to address the issues and concerns.

The mediator does not act as a judge or arbitrator. The mediator will not decide who is right or wrong. OFMA uses a facilitative model of mediation where the mediator does not evaluate the issues and recommend a solution but may make suggestions for resolving the dispute.

Mediation is a very effective way to resolve franchise disputes:

- It may be able to repair or even save a business relationship and improve the communication between the parties for the future
- It provides an opportunity for the parties to better understand each other's side of the dispute
- It also deals with all the issues at hand and helps the parties reach an agreement that best suits their needs.
- The mediation process is a quick one. It reduces the stress resulting from the dispute and enables the parties to move forward sooner than might otherwise be possible.

Another advantage of mediation is that it is considerably cheaper than most other dispute resolution processes such as litigation, arbitration or conciliation. Parties to a franchise dispute are often unable to afford litigation. Though mediation is not a legal process, an agreement signed by the parties at the conclusion of the mediation is legally binding like any contract.

Part 4 of the Franchising Code of Conduct

The dispute resolution procedures set out in Part 4 of the Franchising Code of Conduct cover disputes between parties to a franchise agreement. In other words, they will cover a dispute between a franchisee and a franchisor, but they will not apply to a dispute between a franchisee and a supplier, for example.

To initiate mediation under the Franchising Code of Conduct a party must first send a letter or Notice of Dispute to the other party. OFMA has prepared a suggested format for this document to help people who want to start the mediation process. Once the Notice of Dispute has been sent to the other party, the Code provides a 21-day period to enable the parties to resolve the dispute themselves prior to mediation. At the end of this time either party is free to contact OFMA in writing to request that a mediator be appointed.

In addition to providing OFMA with the contact names and numbers of the parties involved, we also request that a copy of the Notice of Dispute be forwarded to our office.

OFMA will appoint a mediator from its national panel of mediators within 14 days of receiving the request to appoint. Before confirming the appointment we check the general availability of the mediator and verify that there is no conflict of interest as the mediator must be neutral and impartial during the mediation process.

OFMA then sends confirmation of the mediator's appointment to the parties along with the mediator's contact details and a copy of the mediator's resumé.

Following appointment, the mediator will contact the parties involved in preparation for the mediation meeting. The mediator will either meet with the parties individually or discuss the dispute with them by telephone in order to gain an understanding of the issues and positions at hand.

The mediator will discuss:

- Any exchange of information before the mediation,
- The time and place for the mediation meeting and
- Signing of an agreement to mediate: the mediator may request that the signed mediator appointment agreement and cheque for the estimated fees and costs be received prior to the mediation meeting.

Mediations are normally held within 4 weeks of the mediator's appointment.

Mediation through the OFMA costs \$A275 (incl GST) per hour with up to a maximum of 3 hours of preparation time. These costs are shared equally between the two parties and are generally in the region of \$A1250 each plus any legal representation costs or room hire costs. This is a small fraction of the cost of court proceedings.

OFMA Statistics

OFMA has actively sought to raise awareness within the franchising industry of the assistance available to franchisee and franchisors in dispute. The latest figures indicate an overall increase of 50% in dispute enquiries received by the OFMA compared with the previous 12 months. We have also seen an increase in referrals from past use of the OFMA and through word of mouth which is very encouraging.

The OFMA has now received almost 4000 new dispute enquiries and made in excess of 1260 mediator appointments.

About one-third of mediations conducted through the OFMA are initiated by the franchisor.

The dispute settlement rate is approximately 75% which includes cases where the mediator has assisted the parties to reach settlement prior to the mediation.

OFMA also manages disputes between 1 franchisor and many franchisees where the franchisor consents to the matters being joined into the one mediation process.

There is no dominant type of dispute – the issues are widespread.

Frequently Asked Questions:

- **What if the other party does not want to attend mediation?**
 - the Code provides that the parties must attend the mediation and try to resolve the dispute
- **Can I go to mediation independently of OFMA?**
 - yes, but both parties must agree as to who should be the mediator
- **What are the advantages of going to mediation through OFMA?**
 - panel of experienced mediators who have had to meet certain criteria (mediation and relevant franchise experience) to be accepted onto the panel
 - cost of mediation generally lower as the mediators have accepted to mediate at a rate that is generally lower than their usual rate
 - OFMA asks the mediator and the parties to a mediation to return a completed feedback form to help with quality control
 - there is no delay in choosing and agreeing on a mediator which can also help avoid further disagreement between the parties
- **What happens if the parties are located in different states?**
 - usually one party agrees to cover half the travel costs of the other party as this is often the most cost effective solution for both parties
 - otherwise, if the parties prefer, OFMA can appoint a mediator in another state and both parties will cover their own travel costs to attend the mediation (eg. one party in Brisbane and the other in Melbourne, we might appoint a mediator in Sydney)
- **Can I bring a legal adviser to the mediation?**
 - yes, as long as the other party has no objection
 - it is also possible to request that an accountant or business adviser be present
 - There would be a lawyer representing at least one party in 60% of the mediations. In a number of other matters one or both parties have legal representation, although their lawyers might not attend mediation (instead being available via telephone for consultation).
 - The OFMA have found lawyers to be very helpful in the mediation process. OFMA staff keep a register of specialist franchise lawyers to assist enquirers who are seeking legal advice.
- **Will mediation prevent or affect future legal action that I might want to initiate?**
 - no, unless a settlement agreement is signed
 - mediation is confidential to the extent that the law allows
- **What options are open to me if no agreement is reached at the mediation?**
 - OFMA estimates that about a quarter of mediations that do not reach settlement during the mediation meeting do actually settle within the following month
 - however, if the dispute remains unresolved then the parties might choose to contact the government regulator or pursue independent legal action

Early Intervention Services

From January 2011 OFMA staff will be providing assistance to dispute enquirers giving them the chance to resolve the problem prior to the appointment of a mediator. This will take the form of informing the respondent by telephone that an enquiry has been received and providing the respondent with an opportunity to resolve

the matter directly. Experience in other dispute schemes has shown that this early intervention has removed the necessity for mediation in anything from 34% to 100% of cases depending on the nature of the disputes.

Further Information

www.franchisingmediationadviser.com.au