



Australian
Competition &
Consumer
Commission

Resolving franchising disputes

In any business, disputes are a fact of life—this can also be true for those involved in a franchise. When there is a dispute under a franchise agreement, where can you look for help?

Fortunately, several avenues are available to ensure that both sides receive fair treatment.

The Franchising Code of Conduct is a mandatory code and has the force of law under the *Trade Practices Act 1974* (the Act). It regulates the conduct of franchisees and franchisors, with the aim of ensuring prospective franchisees are sufficiently informed about a franchise before entering into it. The code also provides a cost-effective dispute resolution scheme for franchisees and franchisors to resolve any disputes.

The Australian Competition and Consumer Commission (ACCC) ensures compliance with the code and the Act by informing franchisors and franchisees of their rights and obligations under the code and enforcing it where necessary.

This fact sheet aims to provide guidance on the dispute resolution scheme under the code.

The role of mediation in franchising disputes

The code provides a dispute resolution scheme for parties to a franchise agreement. It states that they should first try to resolve a dispute directly with each other, and provides directions on how best to resolve problems. It also requires that franchise agreements provide for a complaints handling system.

If this mechanism does not achieve a satisfactory outcome within three weeks, the code provides for mediation between the parties facilitated by an impartial third party, the mediator.

Mediation is a process that allows for the resolution of conflicts without resorting to costly legal action. It is a proven cost-effective way to resolve franchising disputes, with a majority of disputes resulting in an outcome acceptable to both parties. Both parties can agree to appoint a mediator or seek mediation from the Office of the Mediation Adviser (OMA).

Office of the Mediation Adviser

While the ACCC requires compliance with the code, it does not provide mediation services. The OMA has this role and will assess the complaint and appoint a mediator.

Trained mediators with commercial experience are located across Australia. Participants in mediation should be aware that mediators do not give legal advice or make decisions like a judge—they help parties to negotiate and resolve their dispute.

Preparing for mediation and what to expect

Mediation is essentially a well managed negotiation. It is wise to prepare for mediation, so that you are sure of your options. It is important during mediation to clearly state your requirements and concerns so that everyone understands what you need and why.

It may be helpful to consider:

- your rights and obligations in relation to the dispute
- the main issues you would like to discuss and why they have not been resolved to date
- what you would like to see happen
- what you are prepared to do to achieve an outcome
- how the dispute might be resolved if mediation is not successful
- what costs are involved in each option.

At the end of mediation, the terms of any agreement reached may be recorded in a binding contract.

Who pays for the cost of mediation?

Mediation is less expensive than court action. The cost of mediation is shared between the parties, unless agreed otherwise. Parties pay their own expenses for any preparation, such as legal or financial advice. If one party would like the mediation in their city, it is common that they pay for half the travel costs of the other party to travel there. If the parties cannot agree on a location, the appointed mediator will decide on a location that is central to both parties. The parties then pay their own travel costs.

Alternatives to mediation

Mediation may not be appropriate if you require urgent relief. In these cases an injunction (a court order to stop someone from doing something or requiring them to abide by an agreement) may be appropriate. If you are unsure about the suitability of mediation, consult your legal adviser.

When a dispute cannot be resolved through mediation, it is sometimes necessary to resort to legal action. If you decide to bring proceedings against another party, it is important to remember that you may be liable for some or all of the other party's costs if you lose, as well as your own.

This should only be considered after obtaining independent legal advice. You should also seek an opinion on your prospects of success in any legal action.

Resolving franchising disputes

Who to contact

If you are involved in a franchising dispute, there are people you can contact for help. Initially, you should speak with your legal adviser, accountant, business adviser or your industry association on what action you can take.

The ACCC will consider enforcement action when it believes that there has been a breach of the Act and when there is a public interest in doing so. If the ACCC believes that your dispute is of a private contractual nature, it will recommend that you try mediation or seek independent legal advice.

Contact details for both the ACCC and the OMA are listed at the end of this fact sheet.

Steps to try to resolve a dispute under the code

1. The complainant¹ must write to the respondent² with details of the complaint (**Notice of Dispute**) including:
 - the nature of dispute
 - the outcome the complainant wants
 - what action the complainant believes will settle the dispute.A sample **Notice of Dispute** is available on the OMA website.
2. Direct negotiation: the complainant and respondent should attempt to resolve the dispute between themselves.
3. If the dispute cannot be resolved within 21 days, either party can refer the matter to a mediator. When mediation is requested by either party, it becomes mandatory for both to attend the mediation and to try to resolve the dispute. Failure to attend the mediation and/or make a genuine attempt to resolve the dispute will constitute a breach of the code and thereby a breach of the Act. Contact the ACCC if this occurs.
4. Parties can agree to their own mediator or they can ask the OMA to appoint a mediator (the latter may also be the case if either party cannot agree on a mediator).

¹ A complainant is the person/party that initiates the procedure (clause 29 of code).

² A respondent is the person/party with whom the complainant has a dispute.

5. If the parties to the dispute make a request to the OMA, a mediator must be appointed within 14 days of the request. After mediation has started, the mediator must advise the OMA of this within 28 days.
 6. The mediator may request private meetings with the parties to the dispute.
 7. A joint mediation session will be held at a time and place decided by the mediator. At the mediation, all relevant documents will be tabled and potential solutions explored.
 8. If the dispute cannot be resolved during the joint session, the mediator may hold private sessions with each party in confidence.
 9. If a common objective can be found during the confidential sessions, the mediator will be able to assist the parties in further negotiations.
 10. When an outcome is agreed to between the parties, the mediator will assist them in writing it down. The written record will normally be a binding contract.
 11. The mediator may terminate the mediation at any time if the mediator is satisfied that a resolution is not likely to occur.
 12. The mediator must also terminate the mediation if:
 - at least 30 days have elapsed since the start of the mediation
 - the dispute has not been resolved
 - either party asks the mediator to do so.The mediator must issue a certificate of termination and give copies to the Mediation Adviser and each party.
- Where mediation is not successful in resolving a dispute, legal action may be required.

Sometimes the ACCC may intervene, particularly when franchisors refuse to negotiate with franchisees, unreasonably terminate franchise agreements or otherwise disregard the provisions of the code.

Contacts

The Australian Competition and Consumer Commission

ACCC Infocentre
1300 302 502

Small business helpline
1300 302 021

ACCC website
www.accc.gov.au

ACCC franchising website
www.accc.gov.au/franchisingcode

For all other business information go to www.business.gov.au.

Callers who are deaf or have a hearing or speech impairment can contact the ACCC through the National Relay Service, www.relayservice.com.au.

TTY or modem users phone 133 677 and ask for 1300 302 502.

Voice-only (speak and listen) users phone 1300 555 727 and ask for 1300 302 502.

The Office of the Mediation Adviser
OMA website
www.mediationadviser.com.au

OMA inquiry lines 1800 150 667 (free-call within Australia) or (02) 9267 0167

ACCC publications

The ACCC has several other franchising fact sheets available. These publications can be ordered through the ACCC Infocentre or you can download copies from the website at no cost.

Important notice

On 1 March 2008 the Australian Government implemented a number of amendments to the Franchising Code of Conduct. The amendments aim to increase the transparency, quality and timeliness of disclosure to existing and prospective franchisees. This fact sheet reflects the law and legislation as it stands at the date of publication including these amendments. Where there is any inconsistency between the code and this fact sheet, you should always refer to the code.

The information in this fact sheet is for general guidance only. It reflects the ACCC's views on what is required to comply with certain provisions of the *Trade Practices Act 1974*. It does not constitute legal advice and should not be relied upon as a statement of the law relating to the Act. You should obtain legal advice if there is doubt about whether any conduct may breach the Act.

Other federal or state-based laws may impose additional requirements or responsibilities on your business when dealing with other businesses or consumers, beyond the Trade Practices Act.