Franchise Mediation: Confidentiality or Disclosure: A Consumer Protection Conundrum.

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Presented at the 25th Annual  
International Society of Franchising Conference  
Boston University  
Boston, Massachusetts, U.S.A.  
June 16-18, 2011

25th Anniversary
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Abstract

The benefits of the confidentiality of mediation are well recognized. What is less often discussed are the disadvantages of the level of confidentiality that exists in franchise mediation. Our motivation in conducting our research was to identify the benefits of confidentiality and to weigh them against the competing consumer protection benefits of disclosure.

The current level of pre-contract disclosure provided to franchisees in Australia excludes information about mediations within the franchise system. This results in incoming franchisees being denied access to accurate information about the level of dispute within a franchise system, the franchisor’s attitude to resolving disputes, and, ultimately devalues the pre-contract disclosure process by omitting key information that is impossible to obtain on any terms and for any price as part of an intending franchisee’s due diligence.

In Part I we briefly trace the path that led to mediation, as opposed to conciliation or arbitration, becoming a mandatory part of the dispute resolution landscape for franchises in Australia. In Part II we discuss the competing arguments for confidentiality and integrity of process, versus consumer protection and information disclosure. We review the writing of mediators currently active in commercial and franchise mediation in Australia. Specifically, we examined what they had to say about the need for confidentiality and integrity of the mediation process, and, about the competing interests of consumer protection and information disclosure. In Part III we identify the information about franchise disputes that is currently available to franchisees in Australia. The four Australian actual and potential sources of generic franchise mediation data are the biannual survey of franchising in Australia conducted by Griffith University, witness testimony to Government reviews conducted into the franchising sector, reported cases and, finally the currently untapped potential for data being captured from data emanating from Clause 30A of the Franchising Code of Conduct.

In Part IV we explore aspects of mediation, confidentiality and data raised in two Australian government inquiries. These are the Economic and Finance Committee, Government of South Australia, inquiry into the existing laws governing franchising’ that culminated in Economics and Finance Committee, Parliament of South Australia, Franchises Final Report, and the ‘Corporations and Financial Services Joint Committee (Australian Commonwealth Government) inquiry into franchising’ that culminated in Joint Committee on Corporations and Financial Services, Australian Senate, Opportunity not opportunism: improving conduct in Australian franchising.

In Part V, drawing on the information privacy regime in New Zealand, we propose a solution that would partially redress the current information asymmetry surrounding mediation conducted within franchise networks.

We conclude that whilst the arguments in favour of confidentiality may outweigh those favoring transparency and disclosure for some parts of the mediation process, mediation is a multi-part process and the interests of confidentiality do not justify complete secrecy of all aspects of mediations conducted within franchise systems in Australia.