

Media Release
Minister for Small Business – Hon. Dr Craig Emerson, MP
27 November 2009

EXPERT PANEL ON FRANCHISING

Minister for Small Business Dr Craig Emerson announced today the establishment of an expert panel on franchising and unconscionable conduct.

Dr Emerson said Professor Bryan Horrigan, Mr David Lieberman and Mr Ray Steinwall have been appointed to the expert panel.

The panel will provide advice to the Government on some outstanding issues raised in recent parliamentary inquiries into the Franchising Code of Conduct and the provisions of the *Trade Practices Act 1974* (TPA) that prohibit unconscionable conduct.

The Government's response to these inquiries was announced on 5 November 2009.

"The panel members have a well-acknowledged expertise in various aspects of trade practices law," Dr Emerson said.

"Their backgrounds and experiences make them ideally placed to consider the issues before them."

The panel will consider the merits of a number of proposals for enhancing the provisions of the law that protect small businesses from anti-competitive behaviour by powerful and unscrupulous businesses. The panel's terms of reference are reproduced below.

To assist the panel's work on the unconscionable conduct provisions of the TPA, Dr Emerson released an Issues Paper, prepared by Treasury, to canvass the views of consumer, business and other stakeholders. In particular, the paper seeks submissions on unconscionable conduct from the retail tenancy and franchising industries and other small business organisations.

The Issues Paper is available on the Treasury website, www.treasury.gov.au. Submissions are sought by 18 December 2009.

"I encourage all interested stakeholders to make submissions to this process, to assist the panel in its deliberations concerning the merits or efficacy of statutory unconscionable conduct. I look forward to seeing the outcome of this process," Dr Emerson said.

The Panel will consider the submissions made to the Senate Standing Committee on Economics Unconscionable Conduct Inquiry and its recommendations.

In the specific context of franchising, the panel will be considering the merits and the feasibility of introducing into the Franchising Code a list of examples of behaviours that are inappropriate in franchising relationships.

This proposal arises out of the Government's response to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Franchising. The panel will draw on the work conducted by this Committee in considering the issues.

The panel is to report to the Government by the end of January 2010.

Attachment

Minister for Competition Policy and Consumer Affairs' Expert Panel to Advise on strengthening the Franchising Code of Conduct and the Unconscionable conduct Provisions of the Trade Practices Act 1974

Terms of reference

In responding to the Parliamentary Joint Committee on Corporations and Financial Services inquiry into Franchising and the Senate Standing Committee on Economics Unconscionable Conduct Inquiry, the Government asks the Panel to consider the matters raised in Recommendation 2 of the Unconscionable Conduct Inquiry, and Recommendation 8 of the Franchising Inquiry, in accordance with the terms of reference below.

The Panel will:

- inquire into and report to the Minister for Competition Policy and Consumer Affairs on the need to introduce a list of examples that constitute 'unconscionable conduct', or a statement of principles, into the TPA;
- consider the efficacy of a statutory list of examples or statement of principles concerning unconscionable conduct, and their legal effect;
- provide advice on whether the measures suggested by Recommendation 2 of the Unconscionable Conduct Inquiry would serve to: improve the clarity of Part IVA of the TPA; increase the effectiveness of those provisions; and improve community confidence in the effectiveness of those provisions; and
- if the Panel is satisfied that a list of examples or a statement of principles would improve the effectiveness of Part IVA, compile a list of examples that are generally accepted to constitute 'unconscionable conduct', or a statement of principles, having regard to the matters set out in these terms of reference.

The Panel will also:

- inquire into and report on the need to introduce into the Franchising Code of Conduct a list of examples of specific behaviours that are inappropriate in a franchising arrangement, with particular reference to:
 - unforeseen capital expenditure;
 - unilateral contract variation;
 - attribution of legal costs;
 - confidentiality agreements;

- franchisor-initiated changes to franchise agreements when a franchisee is trying to sell the business; and
- consider the potential impact any proposed measures could have on the franchising sector.

As part of this process, take account of the views of the ACCC, the retail tenancy and franchising industries, small business organisations, and such other parties as the panel considers would have an interest in the outcome of this process.