Parliamentary Joint Committee on Corporations and Financial Services

INQUIRY INTO FRANCHISING CODE OF CONDUCT & OTHER RELATED MATTERS

Submission by

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[redacted]

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Executive Summary

As a former franchisee of [redacted] I welcome the opportunity to provide a submission to this Inquiry.

Industry statistics provided by franchisors and their lobby groups will suggest there are no widespread problems in franchising. This is not my view, nor is it the view of the recent WA and SA State Inquiries into Franchising who both included in their final reports a list of recommendations detailing significant changes to the laws regulating franchising in Australia.

My position in relation as to how the current Code and the Trade Practices Act disadvantages franchisees are summarised as follows:

1) The failure of the disclosure provisions as detailed by the Code to ensure franchisors provide franchisees with access to real data. The recent strengthening of the disclosure provisions have assisted the process, but did not go far enough;

2) The lack of any penalties if a franchisor breaches the Code encourages franchisor opportunism;

3) The lack of Good Faith and Goodwill provisions within the Code enable franchisors to act unethically, protected by the franchise contract;

4) The mediation mechanism detailed in the Code if flawed and does not deal effectively with dispute resolution;

5) The prohibitive cost of accessing legal remedy through the legal system under s52 of the Trade Practices Act, and supplemented by 51A, for misleading or deceptive conduct;

6) The lack of understanding of unconscionable conduct in s51AC of the TPA, which has resulted in few cases proceeding to litigation due to the uncertainty of the result. This in itself has resulted in a lack of legal precedent;

7) The lack of independent data regarding franchising, including number of franchise systems in Australia, failure rates of both franchisors and franchisees;

8) No requirement for a franchisor to 'prove' his system before selling it;

9) Lack of franchisee protection in the case of franchisor insolvency;

10) The failure of the current regulator, the ACCC, to investigate all franchisee complaints, and the failure to forensically investigate any franchisee complaints. The failure to proceed to prosecute all franchisors who breach the Code or the TPA;

There is growing evidence within the franchising sector that all is not well. There has been media coverage detailing how some rogue franchisors repeatedly sell unviable 'systems', rip off their franchisees, and knowingly breach both the Trade Practices Act and the Franchising Code of Conduct (the Code). Real horror stories exist of franchisees that lose more than just their investment in the business. When these stories are read, the question must be asked; how can this be allowed to happen?

Franchisors and their lobby groups will say that any failure of a franchise system is the sole responsibility of the franchisee, usually because they didn't manage their financial affairs or follow the 'system'. This is a cop out. The FCA and guilty franchisors will hide behind platitudes such as "bad operators" and "all business is risky", and play down their own role in promoting a sector that promises the world, but often delivers little. The real issues that need to be considered are simple. Currently no accessible protections exist for a franchisee against a franchisor behaving badly without access to significant sums of money. No penalties are enforceable against a franchisor that repeatedly ignores the Code and operates unconscionably in order to profit off their franchisees.

Franchising is business, and yes, all business is risky. Franchising however, is promoted as being less of a risk, as you are buying a 'proven' system. The franchisor owns the risk, whilst the franchisee pays for the expertise of others. What is not commonly known is that franchising is often just as risky as any small business, perhaps more so in some systems that encourages their franchisees to fail so they can reclaim, and then resell their stores.

The current Code offers franchisees a false sense of security through 'mandatory' disclosure and dispute resolution provisions. I would suggest however that any attempt to conduct due diligence in the current franchising environment is a waste of time due to the lack of real information a franchisor is required to disclose. As long as franchisors are allowed to continue to mislead potential franchisees and hide behind weak disclosure requirements, waivers and disclaimers, franchisees will continue to lose their investments. And as long as there is no independent body regulating the Code, franchisors will continue to ignore it and franchisees will have nowhere to go for assistance.

Whilst it is unreasonable to expect that a government will ever be able to devise a law which forces people to invest their money wisely, or that courts can protect those people that make poor investment decisions, I am hopeful that your inquiry will expose the issues currently facing franchisees within Australia and enable a national legislative response to be determined and enacted in order to ensure the protection of Australian franchisees and the whole of the franchising sector.

1. The nature of the franchising industry, including the rights of both franchisors and franchisee.

There is no duty resting upon a citizen to suspect the honesty of those with whom he transacts business. Laws are made to protect the trusting as well as the suspicious... The rule of caveat emptor should not be relied upon to reward fraud and deception.

FTC v. Standard Education Society, 302 U.S. 112 (1937)

1.1. Nature of franchising

Franchising is characterised by the imbalance of power within the relationship between the franchisor and franchisee. This power imbalance, along with the self-regulatory nature of the Code, not only contributes to the ineffectiveness of current regulations to protect the weaker party, it is what characterises the franchising industry.

The imbalance of power exists throughout every aspect and process of the franchise relationship, starting pre-contract. The franchisor has control whilst the franchisee is left to rely on trust and the reputation of the franchisor. These are things that are not contracted obligations and offer the franchisee little protection against abuse and opportunism.

A typical franchisee has no business experience and certainly no experience with the nuances of a franchise contract. In many cases, a franchise purchase will be the first step by a prospective franchisee into the business arena and they will not be aware of how the franchisor-drafted contract will rarely obligate their franchisor to provide any services to the franchisee. Meanwhile all of their obligations will be laid out in great detail. The franchise agreements are constructed in favour of the franchisor and leave the franchisee extremely vulnerable to the whim of the franchisor.

The power imbalance occurs because:

- Franchisors control all information about the sector;
- Franchisors and their lobby groups dominate discussion regarding regulation of the sector;
- Franchisors and their lawyers draft non-negotiable contract terms.

1.2. Problems with lack of information about the nature of franchising

There is a lack of reliable information about franchising. There are a number of reasons for this, including, but not limited to the fact that:

- Information is dominated by franchisors and their lobby groups, particularly the FCA, who have a vested interest in projecting a positive image of franchising;
- Franchisees have been threatened with defamation and breach of contract if they speak out against their franchisor;
- There is no statistical evidence regarding the success or failure of the dispute resolution process;
- There is no authority collecting independent statistics, instead myths regarding the success of franchising are promulgated by self interest groups quoting unsubstantiated data.

It would be of benefit to the franchising sector for some mandatory rules and regulations to be followed before a franchisor is permitted to sell their system and I suggest the following as a guide:

- *Franchisor registration*: Franchisors should be required to register their system on a national database before they are permitted to sell franchises. This would be an important first information collection point on the actual number and types of systems that are being sold in Australia;
- *Franchisor to be licensed*: Sectors such as the stock-market and real estate require their agents to be licensed to sell their products but no such requirement is required in the franchising sector. The model I would put forward is one that has been previously recommended by the FAAI which imposes liability on Directors, Officers and persons concerned with the management of the franchise company;
- *The franchise system on offer must be 'proven'*: In addition to registration and licensing, franchisors should have both their business 'system' and 'offer' examined by a regulatory body like ASIC, in the same way that ASIC assesses the prospectus of companies looking to list on the ASX;
- *Free access to Disclosure Documents and Franchise Agreement:* Many Australian franchises require a prospective franchisee to make a financial outlay before receiving information to commence their research. The lack of freely available information restricts the ability of a potential franchisee to compare franchise systems and their obligations within different franchise systems.

Unfortunately the complexity of the franchising relationship may mean that some lawyers and accountants that are approached for advice may also have difficulties understanding the true nature of the contract. Placing disclosure documents and franchise agreements on the public record would enable franchisee advisors to offer more informed advice.

In the USA there is a website called 'FreeFranchiseDocs' (www.freefranchisedocs.com) that provides access to US franchise documents, including franchisors Disclosure Documents and franchise agreements, to anyone free of charge.

Just this week in California a new database of online franchise documents has been launched. In California franchisors are required to register and lodge their franchise documents and the online site operates by accessing the more than 3,200,000 franchising related documents from the public records of California's Department of Corporation's database system. The site searches franchise agreements, financial statements, franchisee litigation against franchisors and more providing the information to the user at no cost. The site, part of the Franchise Openness Project, can be accessed at www.openfran.org

This is a fantastic resource not just for potential franchisees but for every party involved in franchising, including the lawyers and accountants who are approached for advice. A similar system in Australia could easily be implemented if franchisors are required to register their system every year.

1.3. Disclosure Provisions in the Code

Franchisors and their lobby groups hide behind the idea of 'disclosure' using it to shift the blame to franchisee investors who did not conduct 'due diligence'. The reality is that prospective franchisees cannot conduct research under the current disclosure provisions of the Code as they do not have access to complete and accurate information. Franchisors control the flow of information and provide the disclosed information as they see fit. This allows the franchisor to provide information that is:

- Inaccurate or incomplete;
- Irrelevant or unusable.

You will undoubtedly be told by the FCA and others that the disclosure provisions in the Code are adequate. Repeatedly, the FCA has stated that potential franchisees 'are provided with over 250 items of disclosure', inferring that if the franchisee buys and fails it is totally the franchisees own fault. The point I would make is the majority of those '250 items' are either not complete, protected by wide disclaimers, or not what is needed to allow potential franchisees to conduct relevant due diligence.

The disclosure provisions in the Code do nothing to ensure that a prospective franchisee can act on the information they receive, simply because they cannot rely on that information. The disclosure provisions of the Code need to be revised and the following areas addressed:

- *The success or failure of a franchise*: There is currently no requirement for a franchisor to disclose any information regarding the sales figures of their stores, nor the success or failure rates of either their franchised or corporate owned stores. This means that the franchisor can hide not only the true failure rate of their individual franchisees, but the success or failure of their whole franchise system. Currently franchises closed, agreements terminated or not renewed, or stores taken over by the franchisor are only declared by the franchisor as a numerical value for the financial year that it occurred, with no requirement for further explanation. Due to this disclosure shortcoming, franchisors have been allowed to operate, without being monitored and to keep their failure rates, and churning practices, hidden through the lack of disclosure. Through the use of confidentiality agreements with exiting franchisees, the franchisors can keep the true franchise failure rate statistics hidden. These agreements, and the lack of requirement to provide any actual data *to anyone* inhibits effective due diligence and hides the negative side of a franchisor's system;
- *A failed franchisee or a failed franchise:* Currently a franchise is not deemed to have 'failed' until it closes; if the franchisee fails due to a business being unviable, this needs to be disclosed to any potential purchaser. The concern here is that a franchisor through 'smoke and mirrors' can state that they have an extremely low franchise failure rate, as they rarely close any stores, and this would be true. What it does not address is how many of their franchisees have actually failed in these stores, as this is not disclosed. Having to disclose this information will help prevent the same franchised store being sold repeatedly to unsuspecting franchisees. It will also go a long way to dealing with the usual platitudes so commonly used such as 'bad operator', 'poor financial manager' and place the blame firmly where it belongs – on the franchisor, whose system or chosen site does not work;
- *Sites already in operation:* The franchisor knows the risks involved with these particular sites, and the end result of the previous franchisee that owned and operated the store. This known risk of success or failure should be disclosed to potential franchisees to enable them to conduct proper due diligence, including contacting previous franchisees to discuss the business. The new disclosure provisions allow for former franchisee details to be provided to potential franchisees; however this process is flawed as the details are controlled by the franchisor. The time length of this disclosure is not long enough either – I wouldn't be on it;
- *Declaration of disputes or breaches:* There is currently no requirement under the Code for franchisors to provide information on disputes with franchisees that have not resulted in current litigation, or court judgements. This can be misleading for a

potential franchisee as the franchisor can hide a high level of disputation with their franchisees which would immediately suggest a high level of discontentment in the franchise system and warrant further investigation.

- *The requirement to provide details of mediation:* Currently a franchisor does not have to disclose to anyone their attendance at mediation with their franchisees, or the results. This information is totally hidden from any potential franchisee, and as stated above, this lack of transparency can hide a high level of disputation within a system;
- *Confidentiality clauses:* When a sale transfer of the franchised business is signed by the failed or 'exited' franchisee, it is often accompanied by 'confidentiality' terms that usually cover the terms of the relationship of the parties involved, the terms of the sale, and a release of liability to the franchisor and new franchisee. Again, the failed franchisee loses – this time it is the freedom to speak out and warn others, under threat of being sued for breach of contract and defamation. If a franchisor is acting with integrity, the only thing that should be treated with confidentiality is their intellectual property; not the deal that resulted in the franchisee losing their investment and/or their assets. There should be a provision in the Disclosure Document that prevents a franchisor from using confidentiality clauses to 'gag' their former franchisees.

There is also no requirement to provide records of the number of breaches issued by a franchisor to their franchisees. This type of information provides an insight into the true culture of the system and how a franchisor manages their business. The main issue is the lack of transparency regarding internal compliance and/or dispute resolution processes of a franchisor, which prevents a franchisee from truly understanding the conduct of the franchisor towards its franchisees.

Recommendation: That all Notices of Disputes are registered along with the results of mediation with an independent franchise authority.

Recommendation: That the Code is amended to require a franchisor to disclose the success or failure rates for their franchised and company owned stores.

Recommendation: That the Code is amended to require franchisors to disclose the success or failure rate of their franchisees.

Recommendation: That the Code be amended to extend the requirement to provide former franchisee details to 10 years, noting that litigation can take longer than the current three years provided for in the current Code.

Recommendation: That the Code is amended to require franchisors to disclose details on the number of disputes, breach notices, and termination notices they have issued, regardless of whether they resulted in legal action, in addition to the existing requirement to provide details of current litigation and court judgement.

Recommendation: That the Code is amended to include a provision that prevents a franchisor from using confidentiality clauses to 'gag' their former franchisees.

1.4. Education for franchisees

Most prospective franchisees have little, if any, small business experience. A well-designed introductory franchise course could ensure that prospective franchisees are made aware of their risks and obligations within the franchise relationship.

Even if the disclosure requirements are revised and monitored, a prospective franchisee will still need to understand what information has been provided and how to use it. Another area that prospective franchisees need to understand is how to determine the risks associated with buying a particular franchise, and then further understand how those risks will personally affect them.

When a prospective franchisee chooses to enter a franchise contract they will need education and guidance about the arrangement. Currently, a franchisee is not protected by the disclosure provisions in the Code because there is no explanation of the risks involved with particular contract terms. Education can assist prospective franchisees to make more informed decisions regarding the contract they are looking to enter.

Such an education program should be a pre-requisite to entering into a franchise agreement. Franchisors and the FCA should have no part in the delivery of this program due to their lack of objectivity.

Recommendation: An introductory franchise education course be developed and made a pre-requisite to purchasing a franchise.

1.5. Registration and Licensing

Registration and licensing of franchisors will assist greatly in developing information on the franchising industry here in Australia, but I believe we need to go a step further. In addition to registration and licensing, franchisors should have both their business 'system' and 'offer' examined by a regulatory body like ASIC, in the same way that ASIC assesses the prospectus of companies looking to list on the ASX. I believe that this could form part of the role of a newly established independent franchising authority.

When a corporation intends to sell shares it is required to prepare a prospectus which is closely vetted and approved by the ASIC. One of the main reasons behind the securities regulations has been to reveal risks to investors. These investors are afforded protections as consumers. Unfortunately regulators and legislators view franchising as a business-to-business transaction, failing to understand that franchisee relationships need protections more akin to business-to-consumer.

Recognition by legislators that franchisees need consumer protections is critical to establishing a level playing field within franchising. I repeat that I would put forward the model previously recommended by the FAAI which imposes liability on Directors, Officers and persons concerned with the management of the franchise company. Such a model could render individuals liable for misrepresentation, on a basis similar to that which one finds in the regulatory regimes administered by the Australian Stock Exchange (ASX) and the Australian Securities and Investment Commission (ASIC) with respect to public disclosure included on a public offering into the capital markets. The well established regulatory system in ASIC that already exists could be readily adapted to the franchising industry.

Franchisors are prepared to take hundreds of thousands, even millions of dollars, from their franchisee investors. Due to the lack of information they can rely on through the disclosure provisions of the Code, prospective franchisees need the protection of having their investment thoroughly investigated by an independent body.

Recommendation: That a mandatory federal registration scheme be introduced for franchisors, including the lodgement of Disclosure Documents and Franchise Agreements.

Recommendation: That a regulatory framework is established that requires all franchisors to be licensed to sell their systems. The regulatory system that already exists in ASIC could be readily adapted to the franchising industry.

The nature of the franchising industry is one of imbalance and opportunism. This is because franchisors hold the superior position within the relationship. Larger franchisors also have access to managerial, financial and legal resources, often including in-house counsel, which a franchisee simply does not have. The current regulatory conditions ensure franchisees little protection and few accessible rights.

Opportunistic franchise relationships are not accidental; they are calculated and they are systemic.

2. **Whether an obligation for franchisors, franchisees and prospective franchisees to act in good faith should be explicitly incorporated into the Code (having regard to its presence as an element in paragraph 51AC (4) (k) of the *Trade Practices Act 1974*);**

Currently here in Australia the provision of good faith is 'implied', not mandated. The assumption that a franchisor will act with good faith towards them is made by franchisees when they enter into franchise contracts, but many will be disappointed when they understand that 'implied' means little if a franchisor acts in an abusive or opportunistic manner towards them.

Also of concern is the ability of a franchisor to contractually exclude this implied duty of good faith. A franchisee has limited protection and few options when seeking redress when their franchisor abuses their contractual discretions and powers. By introducing the explicit provision of good faith and fair dealing, franchisor efforts to avoid the 'implied' provision of good faith through clever contracts will be prevented.

In his submission to the SA Franchising Inquiry, Associate Professor Frank Zumbo gave strong support to the idea of a statutory duty of good faith, with which I agree, writing:

> *The concept of good faith offers considerable potential as a mechanism for promoting ethical business conduct...Such a statutory duty of good faith should operate generally within the franchising relationship, including requiring the parties to resolve disputes in good faith.*

The inclusion of a statutory duty of good faith and fair dealing into the Franchising Code of Conduct would set out clearly the boundaries of acceptable conduct. This would be of benefit to both franchisors and franchisees as it would provide a point of reference of what is considered acceptable behaviour within the franchising relationship.

2.1. Contract Law without Good Faith

There is an acknowledged interdependence or 'relational contract' between a franchisor and a franchisee. This has allowed substantial imbalance into the business model that does not exist in other areas of business. The very nature of the contract suggests that between the franchisor and franchisee, each have an implied obligation of co-operation under the contract – this is the very nature of an interdependent or 'relational contract'.

These contracts, or franchise agreements, are also known as incomplete contracts, and do not comprehensively spell out all the rights and obligations of the franchisor. When a franchise agreement is signed there is no way the franchisee can know what is going to be required of them over the course of that 5, or 10 or even 20 year contract. This is why it is imperative that the duty of good faith is provided for in the Code. When the franchise agreement is signed the franchisor has a substantial amount of discretionary power built into the contract that enables

them to direct the franchisee to do certain things. An example of this is the refurbishment of a store, purchasing new uniforms, or other capital improvements. Franchise contracts are written to provide significant benefit to the franchisors, giving them significant power over the franchisee; these powers must be used in good faith else they allow for abuse and opportunism to enter the relationship.

Franchise contracts allow a franchisor to breach a franchisee for any perceived default in carrying out their business in accordance with the franchise agreement. It is possible for a franchisee to be breached for a completely fabricated, trivial or induced default. If this breach cannot be rectified by the franchisee within a given timeframe the result is that the franchise agreement can be terminated by the franchisor, fully protected by 'contract law'. Also of concern is the situation where a breach can be issued and without allowing the franchisee time to rectify the breach, the franchisor can terminate the agreement, also protected by the 'contract'. Some franchise agreements also contain clauses where a franchisor can terminate without the need to provide any reason. These are serious breaches of the terms of good faith within a franchise relationship.

Another reason for the requirement of the good faith provision revolves around a franchisees economic investment. Often substantial setup and development costs associated with building the physical business and operational side of the business are solely the franchisee's responsibility, including the often high supplier rebates to the franchisor. All costs associated with the operation of the business remain the responsibility of the franchisee. As the franchisee builds the business, the franchisor again benefits as the franchisee builds the brand in their local area through local marketing and promotion of the brand.

As the franchisee has invested so much money into the business, they will often continue to invest money when directed by the franchisor, as a condition of the contract, or to gain renewal of the contract. In essence, the franchisee becomes financially trapped by the franchisor as if they do not follow the franchisors directives, the result could be the loss of their whole investment. Many franchisees will give in to franchisor demands, even knowing that they will not be able to recover their losses, as they are not in the financial position to challenge the franchisor.

The concept of good faith being introduced into the Code has been recommended by numerous past franchising reviews (Mathews Review) and inquiries (both the SA and WA State Inquiries). It is time that these recommendations were accepted and introduced into legislation.

Recommendation: That the Franchising Code of Conduct be amended to impose an obligation to act with good faith and fair dealing on both parties.

3. **Interaction between the Code and Part IVA and Part V Division 1 of the *Trade Practices Act 1974*, particularly with regard to the obligations in section 51AC of the Act;**

The franchise industry is currently regulated under the Franchising Code of Conduct and set out in the Trade Practices (Industry Codes – Franchising) Regulations 1998. The Code is a mandatory industry code under the Commonwealth Trade Practices Act 1974 and binds all the participants in the industry. A breach of the Code is effectively a breach of the TPA.

As well as the regulations imposed under the Code, the conduct of the parties involved in a franchise contract is also subject to the general provisions of the TPA, particularly the provision of Pt IVA and Part V Division 1, which can be summarised as follows:

Pt IVA deals with unconscionable conduct and:

- Includes conduct engaged during the pre-contractual and contracted stages of the franchise relationship;
- Section 51AC states that in determining whether a corporation has engaged in unconscionable conduct, a Court may have regard to the requirements of any applicable industry code.

Pt V Division 1 prohibits:

- Misleading or deceptive conduct (section 52);
- Making false or misleading representations (section 53);
- False or misleading representations concerning the profitability or risk or any other material aspect of any business activity (section 59).

I note that common law also offers some courses of action that can be enacted by the parties to a franchise relationship including fraudulent misrepresentation.

3.1. Unconscionable Conduct

Whilst the intention of the unconscionable conduct provisions were to level the playing field for commercial parties of different sizes and bargaining strengths, the lack of clarity surrounding it's definition has meant that it is rarely used and is therefore ineffective.

The SA Economic and Finance Committee in its final report wrote:

> *The Committee was told that despite the inducements in the provision to consider a wider definition, judicial interpretation of statutory unconscionability has tended to rely on so-called "procedural" aspects of unconscionability, restricting its scope to cases of serious misconduct during the formation and performance of the contract.*

That approach seems to exclude instances where harsh contractual terms have been inserted in otherwise procedurally valid contracts.

Unconscionable conduct is rarely tested in the courts; lawyers are reluctant to run a case solely on 51AC due to the Australian courts narrow interpretation of the provision. As a result, the unconscionable conduct provisions within the Trade Practices Act, section 51AC, are rarely tested by franchisees due to the cost; both financial and emotional.

Recommendation: That section 51AC of the Trade Practices Act 1974 is amended to include the definition of unconscionable conduct, including a list of agreed examples of the types of conduct that would be considered to be unconscionable.

3.2. Unfair Contracts

We are currently in litigation against [redacted] in the Industrial Relations Commission (NSW) utilising the unfair contract provision. [redacted] is currently challenging the jurisdiction of this court to hear our case.

I believe that the Trade Practices Act would be improved if a provision was introduced that would enable legal scrutiny of unfair contract terms. This would also ensure that the laws regulating unfair contract terms in franchising can be utilised at a federal level.

Recommendation: That the Trade Practices Act 1974 is amended to include laws to deal with unfair contract terms.

4. The operation of the dispute resolution provisions under Part 4 of the Code

4.1. Current level of disputation

The idea that 'everything is fine' in franchising has been cultivated by biased self-interested franchisor lobby groups. Franchising suffers from inaccurate reporting due to a real lack of independent research undertaken. What research is undertaken is often deliberately interpreted to present the 'happy franchising' image that the franchisor lobby groups want exposed. The franchisor lobby group, the Franchise Council of Australia (FCA), self-proclaimed as the 'peak' franchising body, pushes the line that there is nothing wrong in franchising, but the increasing numbers of failed franchisees are contradicting this strongly guarded position.

The Griffith University study 'Franchising in Australia 2006' was sponsored by the FCA and stated that "some 35% of franchisors reported that they had been involved in a substantial dispute over the previous 12 month period". These numbers should have been cause for immediate concern, especially when the result is distorted due to the fact that only 212 franchisors out of the 960 suggested to exist in Australia actually took part in this part of the survey; only 22%. But of that 22%, 35% were in dispute with their franchisees. How can the FCA interpret these figures to mean that there is nothing wrong in franchising?

As I have done in previous submissions, I want to highlight this point by presenting just one section from the Griffith University survey. The survey results regarding 'franchised unit changes' are based on the franchisors own Disclosure Documents, so the information again is not independent. The survey used the results for the 2005 survey, this time with only 213 franchisor respondents.

Franchise business ceased to operate – 201

Franchise Agreement Terminated by franchisor – 80

Franchise Agreement not renewed when expired – 48

Franchise Agreement terminated and business bought back by the franchisor – 51

This adds up to 380 franchisees in just 213 franchise systems. Potentially 380 families financially destroyed; 380 franchisee failures from only 213 franchised systems. This does not include any obscure 'transfers' of a franchised business. The overall success rate of these franchise systems should be considered irrelevant if 380 families have lost their homes, their health and their future. The FCA sponsored this Survey and yet all they will freely discuss from the results are the economic benefits to Australia. I believe that they are hoping that by concentrating on the positives, they can gloss over the less desirable results.

I also do not believe that my former franchisor took part in this survey; nor do I believe that any franchisor who knows their system does not work, or who has a high turnover of franchisees because of an active churning strategy, would willingly take part in a voluntary survey of any kind.

There does need to be independent research conducted into the true failure rates and level of disputes within franchising. Due to the lack of reporting requirements, a franchisor can knowingly sell unviable businesses repeatedly, terminate or not renew agreements at their own whim without fear of retribution. The current suspected failure rate alone should be reason enough to want a more accurate accounting of former franchisees that have lost financially through their association with franchising.

4.2. The Dispute Resolution Process

The Code under Part 4 of the Franchising Code of Conduct specifies a procedure for dispute resolution that progresses through the processes of notification, negotiation, mediation, and then litigation. Central to the Code is mediation which is claimed to be a quick and relatively low-cost process. There is also a widely held, yet incorrect, belief that the mediation process promotes greater transparency and participation in conflict management and dispute resolution.

Mediation does offer some benefits particularly if both the franchisee and franchisor want to continue the relationship. It can however simply serve to highlight the existing imbalance in the relationship, leaving the process open to abuse due to the confidentiality agreements that are required to be signed. Some franchisors may induce or fabricate a breach, then use the mediation process to apply further pressure to a franchisee to accept a poor deal knowing that they are desperate for a solution.

If informal negotiations fail, the Code directs both parties to attend mediation to try and resolve the dispute. Whilst some cases will be successfully resolved through mediation, mediation will fail for a number of reasons, including, but not limited to, the following:

- Successful mediation requires both parties to participate in good faith. For example:
    - If the franchisor wants to set a precedent to prevent other franchisees from pursuing this process, then mediation will not be successful; or
    - The franchisor has previously decided on the outcome – termination, or no settlement;
    - The franchisor induced or fabricated the breach in the first instance;
    - The franchisor uses the mediation to intimidate the franchisee;
    - The franchisor uses the mediation to threaten the franchisee with further reprisal action such as bankruptcy.

- There are no penalties or fines for a franchisor that breaches the Code, so there is no incentive for fair play, or even attendance at mediation, by franchisors;

- If a franchisor induces or fabricates a breach, a franchisee has no recourse except to rely on the dispute resolution process. If a franchisor has abused the relationship in such a way, negotiation or mediation will be a pointless exercise. If the breach results in terminations, as ours did, then the franchisee has no option but to launch litigation;

- Mediation can fail because those in attendance are not authorised to agree to a settlement or course of action;

- Failure to prepare for the mediation by both parties can result in the failure to understand the dispute and therefore reach agreement;

- Mediation usually occurs when the dispute has escalated towards termination or non-renewal of the franchise agreement. The franchisee is often under financial pressure at this point and may be disadvantaged in mediation by not being able to afford representation;

- Franchisors will continue to rely on the contract, even in mediation, which reinforces the franchisees poor bargaining position and allows the franchisor to try and dominate the process;

- The confidentiality agreements that both parties are required to sign effectively allows franchisors to conceal the number, reasons and results of previous mediations;
    - The Code lacks the process of collecting data regarding mediation that could be useful to both prospective franchisees when researching a franchisor, and current franchisees that are in dispute with their franchisor. The franchisor knows the nature and outcome regarding the mediations they have previously been involved in and can conceal this information.

4.3. Are the dispute resolution provisions effective?

The Code directs the dispute resolution process as follows:

1. Notice of Dispute
2. Negotiation
3. Mediation
4. Litigation

The first step in the process is for the franchisee, or franchisor, to issue the other party with a Notice of Dispute, detailing the nature of the dispute, and how the complainant believes the dispute can be rectified.

There is no requirement to lodge Notice of Disputes anywhere and therefore the opportunity to capture any real statistics regarding the number or nature of these disputes is missed.

There is no independent body capable of ensuring that the Code is adhered to. Our franchisor, Bakers Delight, ignored our Notice of Disputes, refused to negotiate and terminated our agreements without giving us the option of mediation. There is no authority to report this behaviour too, and no penalty for a franchisor that blatantly ignores their obligations under the Code.

The second step in the process is negotiation where both parties should try to agree about how to resolve the dispute. In rogue franchisor systems, this step will just not happen. There may be a meeting, but there will be no negotiation. Instead the franchisee will be left with no mistake regarding the vulnerable position they are in.

The third step is mediation. Franchisees are at a disadvantage in this process as they have no access to free advice or representation. Whilst franchisors will often have been through the process before, can call on the FCA or their lawyers for advice and representation, the franchisee will be facing this stressful situation for the first time and quite often they do not know who to talk to about it.

Mediation is costly, the average seeming to cost around $5,000.00, and cannot deliver court enforceable decisions. I have heard from former franchisees of two different systems that they spent around $30,000.00 on legal costs just trying to get their franchisor into mediation, and still failed. When a dispute reaches the stage of mediation the franchisor has usually breached the franchisee and repossessed the business and are in a much stronger bargaining position; the franchisees are often broken from months, or even years, of financial and emotional duress. The franchisors often have access to confidential financial information from suppliers and lenders on the franchisees, enabling the franchisor to enter into any mediation in a very strong bargaining position. The franchisee usually has access only to information provided to him by the franchisor.

I have been told of mediations that were used by franchisors as just another opportunity to lie, threaten, and intimidate a franchisee into accepting a poor offer, knowing they are protected by the mediations confidentiality provisions. Our mediation in May 2007 with [redacted] consisted of them trying to determine what evidence we may have on them as we were going through an ACCC investigation, and private litigation, whilst [redacted] tried to stare us down across the room. The mediation did not deal with our issues at all. Our agreements

were terminated in February 2005, and yet [redacted] only agreed to mediation two years later during the ACCC investigation.

When we were successful in getting [redacted] to mediation in May 2007, they were not represented by [redacted]. Instead they bought a lawyer from a different law firm, [redacted], who was not familiar with our case and sought only to find out what we had given the ACCC. At no time was the mediation serious about our issues; just fact finding for their defence in the ACCC investigation.

During our mediation with [redacted] laughed when the ACCC investigation was mentioned and told us that they "are not concerned about the ACCC. They will do nothing", confirmed that they knew beforehand that one of the franchises we bought wouldn't work and was "a dog", told us that if they were going to be harsh with us then they "would have done a [redacted]", and said "we would rather pay our lawyers a [redacted] dollars than pay you one cent". I am sure the [redacted] law firm were smiling that day. This was not good faith; instead it was another opportunity for [redacted] to waste our time, money and energy. When asked why [redacted] had done this, [redacted] said it was *because they didn't like us*.

It is also concerning that in the FCA submission to the SA State Parliament Franchising Inquiry, they state that they are looking to introduce their own, albeit informal, industry dispute resolution mechanisms labelled 'peer counselling'. This is hardly an independent process with the FCA controlling the process, the information and the outcomes. I doubt that this information would find its way into a public forum and would appear to be yet another way for them to manage issues 'in-house' and control the information that is released into the public arena.

Again there are no statistics available that can show that mediation is an effective way to solve a franchise dispute. The confidentiality clauses in the mediation agreement effectively keep quiet the true nature of any mediation results. Any statistics that are currently quoted cannot be substantiated and do not take into account those that walk away from mediation, broke and disillusioned, with nowhere else to go. Independent research needs to be conducted into this process to ascertain the true level of disputation in the franchising industry.

4.4. When mediation fails

The Code leaves the option of litigation open. I presume this to be because a failed mediation does not always lead to litigation. If mediation does not result in a resolution to the dispute, the only avenue remaining to the franchisee, both former and current, is litigation. However, this is usually not an option due to the high cost.

4.5. Litigation - The last resort

When a franchisor ignores the Code, or mediation fails, the only option left to a franchisee or former franchisee is the long and expensive process of litigation.

You will not hear of many litigation cases, and whilst the FCA and other lobbyists would have you believe this is because the level of disputation is so low and the Code is working, in reality, it is the cost, both financially and personally, that prevents most franchisees from pursuing this course of action. It just not a viable option when you are already financially destroyed.

In the few instances where franchisees have been able to mount litigation, they are often overwhelmed by the franchisor's financial might. Even when a franchisee does commence legal action, it is unlikely that they will have the financial resources to continue through to trial. Franchisor lawyers are experts in delaying the legal proceedings and appealing any point they can in an attempt to drain the franchisee's resources.

In their verbal submission to the SA Inquiry, [redacted], franchisor and partner of [redacted] law firm and representing the FCA said:

> *"Prior to ...1988, I saw a lot of disputes where a franchisor would just run the whole process out for a long time, but you really do not see that now. My firm would represent over 300 franchisors ... and I can tell you that, basically, most of our clients will be into mediation within a month if there is a real dispute happening. They get on the front foot to proactively resolve it. It is an excellent process and far more cost-effective than the most simple tribunal system that could ever be set up. Most times it would cost the franchisee under $3,000 or $4,000 to have even a half day or full day mediation. Sometimes it is even less than that—and most of the disputes are sorted out within a month. In that context it is really quite amazing..."*

This has certainly not been our experience at the hands of [redacted] and their legal counsel from [redacted] law firm [redacted]. In practice, drawn-out litigation can be very lucrative for the law firm involved. Our lawyers have told us to be prepared for the long haul in prosecuting our claims. In a letter from our lawyers just this week, we were told that [redacted]s "strategy continues to be to litigate this matter to a halt by attrition." We have been going through this process for nearly 3 years. How long and at what cost is it going to take to get our claims heard?

In our own litigation, we filed our Summons in November 2005 against [redacted] is being represented by [redacted] in this instance. We were not offered mediation. We were asked to a meeting in August 2006 to discuss settlement, where [redacted] and his lawyer made an offer of $40,000.00 'nuisance money' for us to go away. This

would not have even covered our legal fees. We have been financially destroyed by this company, and yet they considered our litigation to be just a 'nuisance'.

Our litigation has been repeatedly delayed by [redacted] and their law firm [redacted] in an attempt to get us to the point where we financially, or emotionally, cannot continue to proceed against them. We are heading to the Supreme Court later this year to hear an appeal brought on by [redacted] on a minor point as well as their challenge to the jurisdiction of the Industrial Relations Commissions to hear our case. They have said that if they lose in the Supreme Court, they will take it to the High Court. This wastes our time and is costing us a small fortune. We have now spent longer fighting [redacted] to get back what is ours, than we were actually franchisees.

We have been tied up in litigation now for nearly three years and are no closer to getting our case heard. This process has cost us over $250,000.00, with no end in sight. This is why you do not hear of many franchisees suing franchisors to recover their losses. Justice is just not affordable.

To me it is a simple truth; franchise disputes are usually won by the party with the deepest pockets, not the party with the greatest merit. This needs to be addressed.

4.6. Alternative option

The current dispute resolution process is flawed. Franchisee's interests are not being protected in this self regulated industry, where requests for mediation can be ignored by a franchisor without fear of penalty. There must be another avenue available for resolution if mediation fails, other than having to commence of legal action.

For this reason I would suggest the establishment of a franchise tribunal system as the next step if mediation is unsuccessful. A franchising specific tribunal would have the advantage of industry experts making the judgements; experts who can look at the issues of the relationship as a whole. Repetitive behaviour will also become obvious.

I also suggest that the introduction of a franchise ombudsman service be considered. This ombudsman service could be a resource for information, providing parties access to independent expert advice, and dispute resolution services. An ombudsman service could also collect important industry data including the number of disputes; mediations conducted and provide the true results of the process on public register.

Recommendation: That an Ombudsman's service be established.

Recommendation: That substantive fines and penalties are introduced for breaching of the Franchising Code of Conduct, and those franchisors that breach the Code are listed on a public register.

Recommendation: For substantial penalties to be introduced into the Franchising Code of Conduct for a franchisor that induces, or fabricates, a breach of the franchise agreement by a franchisee, including harsh penalties if a franchisor uses an induced or fabricated breach to terminate a franchise agreement.

Recommendation: That an Authority be set up to monitor franchisor compliance with the Franchising Code of Conduct and be empowered with the authority to administer fines and penalties.

Recommendation: That the Ombudsman service collects data regarding mediations conducted and the results, and that the list is provided in the Disclosure Document under Annexure 1, Clause 4 – Litigation, and on public register.

Recommendation: That a Franchising Tribunal be set up to allow access to a low cost, or free, dispute resolution process.

5. Any other matter

The real tragedy of franchisor opportunism is the extent of a franchisees loss. Franchisees put everything they have into buying a franchise; this usually means the family home, other property assets, and their life savings. The resulting loss means they have to start all over again, with a huge debt, often bankrupt and with a damaged credit rating. And this is just the financial cost.

There are other areas of concern in the franchise sector and I have discussed the more prevalent issues below:

- Termination
- Non-Renewal
- Goodwill
- Churning
- Privacy and confidentiality breaches
- Fraudulent activity by franchisors towards franchisees
- Bullying and intimidation by franchisors towards franchisees
- Franchisor Insolvency
- Lobbying
- Retail Tenancies
- Bank abuse in franchise lending
- The ACCC

5.1. Termination

I believe termination to be the cruellest demonstration of a franchisors power in the franchise relationship. Franchisees are rarely aware of the catastrophic consequences to their financial and personal situation as a result of the invoked termination provisions in their franchise agreements.

It can be justified that a franchisor should retain the right to get rid of poor performers from within their system, but the power to terminate a franchisee without proving a breach of contract to anyone is indicative of the extensive control that the franchisor is able to exercise in the relationship. The termination provisions allow a franchisor to seize the business from the franchisee and once the equipment has been purchased by the franchisor at a 'written-down' value, the franchisee is left with less than nothing. Franchisees who are terminated receive none of the goodwill that they have built up into the business. The franchisor maintains this.
I believe that franchise contracts are being used to discipline or intimidate franchisees who have fallen out of favour with the franchisor and their management.

In John Lorinc's book, 'Opportunity Knocks' he quotes a Canadian credit consultant Tom Davies who says that when a franchisee falls behind on royalties, "the franchisor will send out the terminator". Breach and termination notices are repeatedly sent out to marked franchisees, forcing them to hire their own lawyers to try and prevent the loss of their business. This is our experience.

The establishment of a franchising ombudsman and franchise tribunal would give franchisees access to free assistance when faced with losing their business by termination of their franchise agreement. The availability of this service could even act as a deterrent to those franchisors who currently act with impunity against their franchisees, knowing that no one is watching, and few, if any, franchisees could fund a legal challenge against them.

5.2. Non-Renewal

Few franchisees understand that their franchise agreements run for a set term; some for as little as 2 years, and some as long 20 years. The issue that franchisees need to be educated on is that when the franchise term expires, the franchisee must enter into a new agreement. Some franchise agreements have the provision for renewal of the same term, but many do not address a franchisee's right to renew at the end of the term.

The franchisees believe, falsely, that renewal offers them security, of both their tenure and their business goodwill, but this is no guarantee at all. If the franchisor chooses instead to keep the store, a franchisee is legally powerless to do anything. The franchisor will not pay for the franchisees goodwill either; the franchisee will only be offered the 'market value' for their equipment, as determined by the franchisor. One day a franchisee could 'own' a franchise valued at a million dollars, the next day all they have is a cheque 'buying' their equipment at a greatly depreciated value; with no legal recourse.

The renewal process again highlights the imbalance of power in the franchise relationship as it is completely controlled by the franchisor. Whilst there may be legitimate reasons behind a franchisors decision to not renew, this process can also be used by opportunistic franchisors to keep the goodwill generated by successful franchisees.

Some franchisees find when it is time to renew their franchise agreements that they are offered very different terms than their original agreement. These changes are usually around the financial and operational obligations of the franchisee. The franchisee will also have to pay a further franchise fee.

I have been told of instances where franchisees are directed to undertake expensive refurbishments or their agreement will not be renewed. Sometimes after the refurbishment is completed, the franchisor still refuses to renew the agreement and gains a newly refurbished store that they can either keep or re-sell. The franchisee is left with nothing except debt. I have seen letters from the [redacted] franchisor to franchisees stating that because the franchisees did not attend an overseas conference the franchisor "will not be renewing the

deed" ignoring that the franchisees had given prior notice that they could not afford to go. [redacted] used this non-attendance to cite that the franchisee was not 'following the system' (see Attachment A).

The establishment of a franchising ombudsman that would administer franchise agreements, ensuring a more balanced agreement, will prevent a rogue franchisor from using the contract law provisions in an unfair contract to legally 'churn' and profit off their franchisees. A provision of good faith will also help address this issue.

Recommendation: That a provision be inserted into the Code that states that all franchise renewal negotiations are to be conducted in good faith.

Recommendation: That a provision be inserted into the Code that places an obligation on a franchisor to renew a franchise agreement, or to pay compensation in lieu at full market value.

5.3. Goodwill

Franchise agreements do not take into account the goodwill that has been built into a franchise by the franchisee.

When a franchisor sells a company owned-store to a franchisee, they add goodwill to the price. Likewise, when a franchisee sells his franchise they will also add goodwill to the price. It should not be unreasonable to expect that at the end of a franchise relationship, for whatever reason, the franchisee is paid by the franchisor for their store at fair market value, including goodwill.

There is a very real incentive for a franchisor to act opportunistically when they can make a profit off their franchisee. When a franchisee is terminated or their franchise agreement is not renewed, the franchisor takes ownership of the goodwill generated by the franchisee through their investment and hard work. If they then sell that franchise on, the profit generated from the sale remains the property of the franchisor. It should not be legal for a franchisor to take over a franchise without fairly compensating the franchisee.

Recommendation: That the Franchising Code of Conduct be amended to include a provision that states that franchise agreements must include a termination or goodwill payment, determined at fair market value of the franchise, at the end of a franchise agreement, regardless of if the franchise agreement was terminated or not renewed.

5.4. Churning

The issue of goodwill is particularly relevant to churning. Some franchisors force franchisees out of business so they can resell that same franchise again, and in the process pocket additional franchise fees and the goodwill of the previous franchisee.

An issue that most prospective and current franchisees do not understand is that for most franchisors 'franchising' is their product. To stay in business, franchisors must continue selling franchises. It is the franchisee that sells the product or service. They are not in the same business and franchisors in reality do not have vested interest in their franchisees making a profit. In order to keep ahead franchisors can and do saturate their markets. Where a franchisee has an exclusive territory, the only way a franchisor can earn additional fees is by getting existing franchisees to sell out or to force them out.

Franchisors can intentionally exploit their franchisees by encouraging a percentage of their franchisees to become multi-site franchisees knowing that some will fail. Robert L. Purvin writes in his book *The Franchise Fraud* that:

> *Typically, the franchisor encourages investors to open several units knowing some will succeed and some will fail. The franchisor actually hopes the franchisee will be overextended and will give up the good units in order to escape the failed ones.*

It is a simple fact that reselling franchises is good for business. Every time a franchise is resold, a new franchise fee or transfer fee is generated to the franchisor.

Franchisors will keep high-turnover franchisees that are generating substantial royalty income and use them to sell their system. But there is little incentive to assist or support low-turnover or failing franchisees, in fact there is a financial incentive to let them fail. The chance to resell the franchise repeatedly adds income directly to the franchisors bottom line.

Franchisors and their lobby groups will either deny churning exists, or have a positive spin that tries to disguise the behaviour from what it truly is; the franchisee who claims they were churned is obviously "a poor operator", or "didn't follow the system". They will roll out all the indicators of franchisor success; a large number of franchises and increasing sales figures. These growth indicators never compare the net position of the franchisees.

5.5. Privacy and Confidentiality Breaches

Confidentiality breaches exist within the franchise industry. The sharing of franchisee's personal and financial information between franchisors, banks, suppliers and other franchisees appear to occur unchecked. Confidentiality breaches can have serious repercussions for the franchisee, often without the franchisee's knowledge. These breaches

of confidentiality can lead to inappropriate business dealings, from breaches of the privacy act, to fraud.

As previously discussed, the establishment of a franchising ombudsman will give franchisees a no cost option for seeking advice in the event that they believe that their franchisor has breached their privacy or confidentiality.

5.6. Fraudulent Activity by Franchisors

As so aptly written by Richard Solomon, an American franchise lawyer on his BlueMauMau website blog:

"You have to assume that abuse permitted, will be abuse committed".

There is evidence that franchisors in some systems are acting fraudulently towards their franchisees. There are many ways a franchisor can scam their franchisees. Undeclared kickbacks from contractors regarding the setup and refurbishments of franchise sites, premiums added to retail rents and rebates through the product channels that a franchisee must purchase from are just a few of the common ones. A franchisee has nowhere to go to have these issues addressed without fear of retributive action, or at such high financial cost that it is just inaccessible. When a franchisee approaches the ACCC, they believe, as we were told, that during an investigation if any of these issues came apparent they would be referred to the relevant agencies for further investigation. We were not advised that if there was confidentiality agreement binding the parties, the ACCC simply ceased their investigations and it went no further.

Franchisors control everything regarding the franchise. This obviously opens up areas for abuse, the most prevalent being the supply of services, stock, ingredients etc. The success or failure of a franchise is firmly in the hands of the franchisor. Control by the franchisor of outgoings such as suppliers can insure that even a store that turns over a million dollars can still lose money with every product that they sell.

There are major problems with the lack of transparency regarding franchisors and the deals between themselves and suppliers. Many franchisees are required to purchase their products only through the franchisors chosen suppliers. This totally negates any perceived 'group' purchasing power as the only one to benefit, through rebates or kickbacks, to the franchisor. The new disclosure requirements have partly addressed these issues, now requiring the franchisor to provide greater transparency regarding the financial rebates they receive from suppliers, however if there is no independent body to enforce these disclosures or investigate complaints, the disclosure of the information is open to abuse through the provision of misleading and/or deceptive information.

It should be mandatory for all franchise and business brokering firms to disclose if they are paid fees, or receive any financial benefit, from franchisors. This is because commissions will obviously play some part in what franchise system a potential franchisee is channelled to.

A franchising ombudsman would be able to investigate complaints of fraud, recording the number of complaints and results of investigations that will not only expose the true extent of the problem, but act as a deterrent to this type of behaviour.

5.7. *Bullying and intimidation by franchisors towards franchisees*

Bullying and threatening behaviour is present within the franchising sector. I know this because I experienced it firsthand from [redacted] representatives and I cover it in more depth in my section titled 'Our experience with [redacted]'.

Personally I was:

- Threatened with breach notices for being late with reports that were not late;
- Threatened with breach notices if I did not give the franchisor direct access to my bank accounts;
- Threatened, and later served, with breach notices for not paying franchisor generated invoices for services that I did not receive;
- Told by another franchisee from a different area that she had been told by her [redacted] representative that [redacted] was planning to 'exit' me. The next day I received breach notices for all three of my stores;
- Not invited to events held in the area, in order to isolate me;
- Stalked, harassed and threatened with physical violence by the franchisors agents;
- Told by a [redacted] representative that it was [redacted] intention to bankrupt me, "and they were working with the bank to do it";
- Left a death threat left on my home phone number – "You have 7 days to live".

In addition, my employees were also forced to suffer intimidation and threatening behaviour from [redacted] representatives; yelling abuse at sales girls until they cried, threats made towards one contractor that he would be stabbed if he went out after dark. My customers were also harassed by [redacted] representatives in an effort to create financial duress through the disruption of my business.

The threats against my contractor and me were both reported to the NSW police. I advised [redacted] Head Office and asked for their assistance. They refused. I kept them apprised of the escalation of events, including the vandalism of one of my delivery vehicles, but they continued to refuse assistance. I felt I had no other option so I finally took out an AVO application. Two weeks later I was given breach notices for all three of my franchise agreements with 7 days to rectify, and then my agreements were terminated.

My experiences of intimidation and threatening behaviour may seem far-fetched, but I can assure you that I am not the only one to have experienced this type of behaviour in a franchise. If you ask questions that the franchisor does not want to answer, it is far too easy for them to respond in a malicious way. When this type of behaviour is part of the culture of a franchisor, there is no one to go to for protection.

Before the AVO hearing date was scheduled, the lawyer representing the [redacted] agent contacted my lawyer and offered a deal. It was stated that as I was no longer a franchisee, the [redacted] agent was no longer interested in me, and would leave me alone. This would also form this man's defence. If I dropped the AVO application, the [redacted] agent would give an undertaking that he would stay away from me for a twelve month period. It was my lawyer's opinion that I should take the deal, as if the undertaking was broken I could immediately re-apply for another AVO. I would also save myself about $6,000.00 in legal costs. As we were in the process of preparing legal proceedings against [redacted] Holdings Ltd, we decided to drop the application.

This does not excuse the behaviour of this man or the encouragement of this type of behaviour by a franchisor towards a franchisee. A franchising ombudsman could investigate claims of intimidation and threatening behaviour. It cannot be acceptable that when a franchisees only avenue to protect themselves and their business is by going to the police for help, that the franchisor can act in retribution by terminating the franchise agreement and 'legally' take the franchisees assets.

5.8. Franchisor Insolvency

Franchisors fail. The issue of franchisor insolvency is complicated and there is a very real lack of accessible information on the franchisor failure rate. But the fact remains, franchisors fail.

The issue of franchisor insolvency has never received a much attention but it is very real risk for franchisees and they have no protections under the Code. The Code allows a franchisor to terminate a franchise agreement if a franchisee becomes insolvent, but it does not give a franchisee the same rights. This means that even if a franchisor enters administration or is made insolvent, the franchisee classed simply as an unsecured creditor, has no rights with the franchisor's administrator gaining control of the franchise agreement, and effectively the franchise.

Franchisees do not fall within the jurisdiction of the Australian Securities and Investments Commission (ASIC) which means that they are not protected by current insolvency laws. Even though it is the franchisee who has invested the bulk of the capital associated with the franchise they do not have the same legal rights under contract and insolvency laws as other creditors, and could lose their franchise, and therefore other personal assets, when the liquidator seeks to recover franchisor losses for their secured creditors.

Whilst franchisors are fully cognisant of the franchisees financial position, having access to their sales and financial reports on a weekly and monthly basis, the franchisee knows very little about the franchisors financial position. The franchisee will be the last person to find out if their franchisor is in financial trouble. Ms Jenny Buchan made the following point in her submission to the SA Franchising Inquiry:

> *Any disclosure document is a snapshot of the franchisor's business at the date it is made. It is always going to be of limited value for that reason. Accountants making submissions to the inquiry will be able to explain how a franchisor can legitimately sign the statement of solvency required at the end of the disclosure and then become insolvent within weeks.*

Ms Jenny Buchan also told the Committee that the matter had been the subject of a recommendation by the Matthews inquiry which reads:

> ***Recommendation 21***
> *The Risk Statement and ACCC educational material should clearly describe the risks and consequences associated with franchisor failure.*

The Code does not consider franchisor insolvency. This needs to be addressed and I would suggest that the Matthews inquiry recommendation 21 be implemented.

Recommendation: That the Franchising Code of Conduct be amended to include Recommendation 21 from the Matthews Inquiry that reads: "The Risk Statement and ACCC educational material should clearly describe the risks and consequences associated with franchisor failure".

5.9. Lobbying

Both sides of politics have been lobbied aggressively by franchisor representative groups to inhibit any legislative amendments that may help even the playing field or tighten protections for franchisees.

For this reason it is imperative that any consultative groups regarding legislative improvements include representation from all parties to franchising and that those participants are truly independent.

Recommendation: That franchising consultative groups include representation from all parties to franchising, and those representatives are truly independent.

5.10. Retail Tenancies

Along with a franchise agreement, a franchisee will usually be contracted to a separate agreement regarding the site where the franchise business will be conducted. This will usually be in the form of a lease, sublease or licence. As a [redacted] franchisee I was subject to the arrangement where the franchisor holds the head lease, and then licences it to their franchisee. Please find my submission to the Retail Tenancy Unit Inquiry – Department of State and Regional Development, at Attachment B.

A licence agreement offers the franchisee no protections or involvement in negotiating the terms of the lease that governs their retail site. A licence agreement offers the franchisee no protections if the franchisor were to become insolvent, as the lease along with the fittings and fixtures contained within the site become an asset to be controlled by the administrator.

Retail leases represent a common cause for concern for all retail franchisees, and again it comes back to the imbalance of power. It is a common practice for the franchisor to deal directly with the landlord, taking the head lease, and then licensing or subletting the same site to their franchisee. The benefits to the franchisor are obvious; the franchisor maintains total control over their retail sites whilst supposedly negotiating a better deal with the large retail centre managers. Unfortunately this 'better deal' is not always to the benefit of the franchisee, and due to there being no requirement for transparency in these dealings; the franchisee can be exploited in numerous ways. When a franchisee signs their franchisors licence agreement, they are binding themselves to the lease, without having any of the protections offered by the lease. Neither the landlord nor the franchisor is required to provide the franchisee/licensee with any information about their negotiation process, nor does the franchisee see the landlord's disclosure document – if they even know it exists. As a [redacted] franchisee, I did not even see a copy of the leases for two of my stores until after I had signed the licence agreement because of a clause within the Licence Agreement which stated that they didn't have to show me until after I had signed. The third one I never saw.

[redacted] has their own internal property department and they negotiate the head leases on all of their retail sites. They then, through a 'Licence Agreement', grant a licence to their franchisee to use the retail site to operate a franchised bakery.

The term of my licence was for 5 months only, after which time it continued as a monthly licence until one of the following things happened:

- The franchisee or the franchisor gives the other party one months notice of termination;
- The lease expired;
- The franchise agreement was terminated; or
- The franchisee breached the terms and conditions of the licence agreement.

I am aware of other [redacted] franchisees that have the same licence agreement 'term'. You can see that, regardless of the term of the licence, the franchisee has no rights and can lose their substantial investment at any time on a whim of the franchisor with only one months notice. A month by month licence agreement gives the franchisee no security of occupancy; in fact, when the franchisee becomes aware of this clause they then must live everyday with the knowledge that the franchisor could terminate the licence agreement and they could lose their business. They would not even have to breach the franchise agreement.

As a 'licensee', you have no direct access to the landlord. Whilst in some centres this may be relaxed, there is no guarantee that the franchisee will be involved in, or even informed of, any decisions made by the landlord that may impact on the franchisees business.

Recommendation: That the Franchising Code of Conduct is amended to include the requirement to disclose a copy of the lease and/or any sub-leases held over the franchise business site.

Recommendation: That franchisors, as lessees, can only sublet or licence their retail sites with the condition that it is for the same period that remains on the lease.

Recommendation: That the Franchising Code of Conduct is amended to include the requirement that all interrelated contracts regarding a franchise are for the same period, i.e. the franchise agreement has the same term as the lease.

Recommendation: That it be made mandatory for licensees to be registered on a lease with the lessee, thus giving them the same rights and protections as the holder of the head lease.

Recommendation: That all franchise and business brokering firms be required to disclose if they are paid fees, or receive any financial benefit, from franchisors.

6. Our [redacted] Experience

"The South Coast Bakeries Group heads closer and closer to oblivion."

Email between [redacted], CFO [redacted], to [redacted] Victorian and Tasmanian franchise manager for the [redacted], dated 22 February 2005.

Between the period December 2001 and February 2005 we owned three [redacted] franchises – Vincentia, Kiama, and Shellharbour. We were never treated with respect, or even common courtesy. Emails such as the one quoted above shows the attitude of the top level management towards us as franchisees, and I would suggest that we are not an isolated case.

During our time as franchisees, and continuing now as former franchisees, we have experienced conduct unbecoming a major franchisor, including, but not limited to:

- Poor training;
- Bullying, intimidation, harassment and threats;
- Fabricating breach notices designed to cause financial duress and take control of our business assets;
- Misrepresentation;
- Corporate Support not what is promised;
- Opening marketing fund not spent;
- Fraudulent accounting;
- Inducing financial pressure;
- Rumours and defamation;
- Withdrawal of support and contact whilst still required to pay royalty;
- Termination of franchise agreements, including breaching the Code by ignoring Notices of Dispute, and terminating our franchise agreements after refusing mediation;
- Manipulating the sales process of our franchises for their own financial advantage;
- Collusion with the [redacted];
- Theft of stock and uniforms from our Vincentia and Kiama franchises and theft of the equipment and fittings from the Shellharbour franchise;
- Failure to repay us the unused portion of our franchise insurance premiums and franchise fees after termination;
- Breaches of our privacy and confidential business and personal information.

Our background is military. I personally served in the Royal Australian Navy (RAN) for over 12 years. My husband remains a currently serving member of the RAN. It was my decision to buy a franchise upon my discharge from the Navy and as I had no business experience and was looking for support and the skills that I lacked, franchising seemed the obvious choice. My husband, Mark, and I researched a number of different franchises, eventually deciding on [redacted]. The franchise was to be operated by me as Mark was remaining in the Navy.

In December 2001 we purchased our first franchise, [redacted] Vincentia, for approximately $410,000.00. I was immensely proud of my Vincentia store. I worked hard to achieve a turnover of $730,000.00 p.a. in its first full year of trading; in my small town with a population of 5,000 people. I set up systems, trained my staff and worked hard in the local community to gain their support.

In early 2003 a [redacted] representative suggested that I purchase the Kiama and Shellharbour franchises. They were being sold as a 'package'. Whilst the Kiama store was showing a net profit, the Shellharbour store was not. Due to the misleading representations and promises of support I made the decision to purchase the two stores.

This is a very basic outline of our experience, and can be clarified further on request.

6.1. Poor Training

We had to pay over $10,000.00 for training that was of poor quality, incomplete and not given by a qualified instructor.

6.2. Bullying, intimidation, harassment and threats

I personally experienced threatening, bully and intimidation by the Regional Manager in the following ways:

- *Debtor Statements*
    - I was made to agree to pay money in accordance with [redacted] Debtor Statements which were incorrect or be breached;
    - The Regional Manager determined a repayment plan for unpaid royalties that was unrealistic, but when I tried to negotiate a plan I could stick to, it was refused and I was told I would be breached if I missed a payment;
    - I was threatened with being breached for:
        - For debts incurred by other franchisees that were on my Debtor Statement;
        - Over non-payment of suppliers, when their own information was incorrect;

        - For "bringing the brand into disrepute" for Marketing campaigns that had previously been approved by [redacted];
        - For any report that was late. This resulted in having to confirm reports many times as [redacted] would deny receipt;
        - Following a request to close the Shellharbour store due to it being financially unviable – I was told that if I shut the store then I would be breached and lose my other franchises;
    - On one occasion, the Regional Manager had a Breach Notice fee put on the Vincentia franchises Debtor Statement 3 weeks before the store was actually breached.

- There were a number of other issues that may be circumstantial, but all contributed to the stress and pressure:

    - *Vandalism of property:* In July 2004 I was directed by [redacted] to stop doing wholesale. I refused as this was a condition of taking over the Shellharbour store and was the only thing keeping the store from going under. Not long after my delivery van was vandalised in the shopping centre car park – the only thing taken from the van was my customer delivery receipt book and a [redacted] cap. The next day all of my wholesale customers were approached by another franchisee and told that I was no longer doing wholesale;
    - *Private Investigators:* There were many times that I felt I was being followed. A current franchisee of [redacted] told me in 2007 during an unrelated conversation that she had been breached after a Private Investigator had followed her wholesale run. She said to me "it is probably the same one they have on you";
    - *House robbery:* About 6 weeks after our franchise agreements had been terminated our house was broken into. Initially we could not find anything taken, however I am missing backups of business information.

I was stalked, harassed and threatened by a member of the franchisors family. I was followed everywhere I went, including when I drove between my three bakeries. This person would then go to a bakery I was not at and abuse my staff. This person also harassed my wholesale customers, swearing and yelling abuse at them for dealing with me. This behaviour progressively got worse throughout 2004, culminating on Saturday 20 November 2004 with threats to 'break her f.... legs' if he saw me in town.

After over a year of being harassed, stalked, and threats made against me and my staff, including minors, my husband had had enough and drove me to the police station to make a statement, where I was advised to take out an AVO against this person, which I did. I rang my Business Consultant who told me to email him and Head Office with what had happened.

The following Friday during a meeting with this Business Consultant he told me that [redacted] were going to bankrupt me.

6.3. Fabricated Breach Notices

On the 25 June 2004, I attended a meeting I had requested with the [redacted] National Operations Manager. The meeting was to request assistance with a number of issues including that of the failing Shellharbour store. I wanted to discuss with her the intimidation behaviour I was experiencing from the NSW Regional Manager and harassment and physical threats from another [redacted] representative, a member of the franchisors family. The Operations Manager insisted that the Regional Manager be present in the meeting, making it extremely uncomfortable for me. The Operations Manager responded to my requests for help by handing me breach notices for all three of my stores. These breaches were fabricated. [redacted] immediately withdrew all contact and support, forbidding their representatives from making contact with me. I was still required to pay the royalty and advertising levies.

My husband and I requested a meeting with the founder and Managing Director, Roger Gillespie to discuss what had occurred, but in breach of his own franchise agreement the request was refused.

These breaches were fabricated, based on the failure to adhere to a repayment plan even though I was within terms. These breaches included invoices for services that I did not receive, or had not authorised but I had to pay them in full, or risk losing my stores. Even after all breaches had been rectified, I was informed by my business consultant that the Regional Manager still wanted me out of the system and would use any opportunity to breach and get rid of me. In his own words he was told "to hurry up and exit this person". In less than six months I was breached six times and threatened with more.

6.4. Misrepresentations about Kiama and Shellharbour franchises

[redacted] made many misrepresentations to us over the years.

[redacted] offered me substantial support and marketing assistance and spent many hours convincing my husband and me that the Shellharbour store had enormous potential and that I could make it work with their help. [redacted] representatives told me that the stores were being run poorly by the previous franchisee who had all but abandoned the Shellharbour store when it didn't immediately become a million dollar turnover store. My new Business Consultant promised to work closely with me to turn the store around to reach its full potential.

The decision to purchase the Kiama and Shellharbour franchises was based on information provided and representations made to my husband and me by [redacted], in particular

the condition and standards of the stores as achieved by the [redacted] internal auditing system, and the Disclosure Document. These were subsequently found to be misleading, if not deceptive and form part of our litigation. Regarding the Disclosure Document we noted in particular that there were no litigation proceedings against [redacted] and that the average sales for NSW stores had increased since we had bought the Vincentia store. I now feel strongly that the lack of relevant information regarding disputes within the [redacted] franchise resulted in the franchisor being able to present the franchise to me as a 'happy family' that works and makes money together.

I purchased the Kiama franchise in August 2003 and settled on the Shellharbour franchise at the end of January 2004. I never received the support or extra assistance for the Shellharbour store that I had been promised. It was obvious that that something drastic needed to be done in order to turn the store around.

6.5. Corporate Support

[redacted] makes many promises to a prospective franchisee regarding the support they will give you as franchisee of their system; training, marketing, administration, financial and business. The reality is much different.

The corporate support I received was almost non-existent due in part to the regional area I was in, but also because for a substantial period there was no franchise consultant for our area. There was a lack of direction from head office. It became obvious that [redacted] were in an aggressive expansion period.

6.6. Store Opening marketing fund

On set-up of a new [redacted] franchise it is a requirement within the budget to give [redacted] $5,500.00 to market it. In our case this money was not spent and I was often refused when I requested to use it for local marketing campaigns. It was when I fell behind in royalties, for which [redacted] accepted part of blame due to their own accounting errors, did they use it to offset royalties that I owed them.

I have a [redacted] email from 2004 that shows that [redacted] were holding over $200,000 in unspent initial marketing funds, some as far back as 1999. This did not include all of Australia. This money belonged to the franchisees. This is to be regarded with suspicion; not allowing franchisees access to their own money whilst the franchisor had use of it.

6.7. Fraudulent Accounting

There were many issues of what we believe to be fraudulent accounting:

- *The set-up reconciliation of the Vincentia franchise:* We set this store up in December 2001. I made a number of requests for reconciliation, receiving four contradictory statements whilst in the system. It is now September 2008 and we still do not have a full and final reconciliation. I have found this non-provision of financial reconciliation to be a common theme with other [redacted] franchisees that have also set up and/or refurbished stores. It is our belief that [redacted] is trying to cover up the substantial kick-backs they receive from contractors and suppliers. We suspect approximately $40,000 kick-back per refit/store build, which adds up to a multi-million dollar fraud;

- *Royalties and Advertising:* [redacted] accounting was often incorrect. We were required to be on Direct Debit which gave [redacted] direct access to our business bank accounts. [redacted] abused this by taking large sums of money without authority. On occasion royalties were paid and offset against a different bakery, with [redacted] then threatening me with breach notices for not paying;

- *Invoices*: Our Debtor Statements were often incorrect with invoices added for services or products not received or authorised.

- *Direct Debit*: Our bank statements showed that [redacted] often debited the incorrect amounts from our accounts – usually a couple of cents, but still this is our money, and if this was happening to all their franchisees, this could build up to be quite a substantial amount of money.

6.8. Inducing Financial Pressure

[redacted] increased the pressure on me by:

- Contacting my suppliers and putting pressure on them to call in my debts;
- Creating cash flow havoc through random withdrawals from the business bank accounts and demanding immediate payment of money that was not on Debtor Statements;
- Being put on payment plans that were designed to fail;
- Not being allowed to close the failing Shellharbour store under the threat of losing all three franchises;
- Applying late fees for reports that were not late;
- Charging interest on debts that were in dispute, or already paid and refusing to refund the money;

6.9. Rumours and defamation

The rumours that have been spread about me have been hurtful and often defamatory. Unfortunately it is often easier for franchisees and others to believe the rumours than to consider the alternative.

The rumours started that I was a bad operator, I was living above my means, I couldn't pay my bills, my husband and I were having problems, I was going bankrupt; none of them were true and all started surfacing months before I even started having the financial troubles brought on by the failing Shellharbour franchise.

Today Tonight reporter Laticia Gibson told me that [redacted], then CEO of the FCA, told her when she was researching her story on [redacted] that I was a bad operator who did not follow system or proper process. I have never spoken to [redacted], and yet he is prepared to pass judgement on my ability to operate a [redacted] franchise. He failed to note that the FCA had refused to assist me when I requested it, even though I was a member at the time. He also failed to note that I had won numerous baking competitions, a Federal Ministers Award, and had trained a [redacted] franchisee and Business Consultant. Not bad for a poor operator.

In June 2004 my sister was looking to purchase a [redacted] bakery in the Coffs Harbour area. She went and met the franchisees of the Toormina Gardens bakery as they were interested in purchasing form them. The franchisees told my sister that their Business Consultant had told her that [redacted] was "working to get Deanne out of the system". I rang the franchisees who confirmed what they had been told but said to me that they couldn't help me as they "were in a precarious position themselves". I had a meeting with the State Manager of [redacted] the next day – and I was breached, three times.

In an aside, [redacted] prevented my sister and her husband from buying the Toormina Gardens bakery, instead poached them to lease a Company Owned store in QLD. They deprived those franchisees of a sale – again using their position to manipulate the sales process.

6.10. Withdrawal of Support

When I was breached in June 2004, I was informed by the Regional Manager that I would not be receiving any contact from them until the breaches were rectified. I was cut off from my Business Consultant, and excluded from [redacted] activities.

I experienced the following:

- *The refusal to assist*:

- When I asked [redacted] for assistance with training of my sales team, budgets and business planning I was ignored;
- When I asked for help regarding the threats made to my staff, my customers and myself by a cousin of the franchisor it was refused;
- [redacted] withdrew all marketing support for all three franchises when I disputed a marketing invoice on one bakery;
- I was excluded me from [redacted] activities.

- *My Business Consultant*:
  - Told me in August 2004 that the Regional Manager had a plan to get me out of the system;
  - Told me in November 2004 that [redacted] wanted the Vincentia store and [redacted] were going to bankrupt me;
  - Told me that he had been told to stay away from me and not to assist or support me in any way.

6.11. Termination Of the franchise agreements

I received three breach notices by email three days after my Business Consultant told me that [redacted] were going to bankrupt me.

These three breach notices, issued on the 29 November 2004 and one for each store, gave me just 7 days to rectify. I retained legal representation and issued [redacted] Notice of Disputes regarding these breaches in accordance with the Franchising Code of Conduct. My Notice of Disputes were acknowledged, and then intentionally ignored, by [redacted] Chief Financial Officer, [redacted] who sent an email to my lawyer stating that they would be moving to termination immediately. Mark and I were called to a meeting with [redacted] where we were told there would be no mediation. We were given the 'option' of letting [redacted] sell the stores or being issued with termination notices immediately. With no alternative our stores were put up for sale on 15 December 2004.

On Christmas Eve 2004 we received, by email, formal notification of the termination of all three of our franchise agreements. The termination notices gave us until 28 February 2005 to have achieved the sales or we would be terminated immediately.

6.12. Manipulation of the Sales Process

[redacted] took control of the sale process, including the approval of any potential purchasers. We were not allowed to be involved. The Regional Manager told me they did not want to speak with me or have any further contact with me so I was to appoint a broker. My accountant agreed to fill in this role.

[redacted] did not advertise the bakeries for sale until the middle of January 2005, and then only after I sent emails asking why they had not been advertised. [redacted] manipulated the sales process, even preventing us from achieving a fair price for our stores by offering special deals to prospective genuine purchasers. These deals involved 'leasing-to-buy'.

In the case of the Shellharbour franchise, [redacted] terminated the lease before my time to sell was up. [redacted] did not inform me of their intentions to terminate the lease, nor was I advised when they entered into an agreement to terminate with centre management. I believed I had a store to sell. This truly highlights their misleading and deceptive conduct towards me as only two months before, at the urging of [redacted], I had been conducting trials and negotiating with Shellharbour centre management to build a kiosk-site. [redacted] encouraged me to conduct the trial, meet with centre management (which I did with a [redacted] representative) regarding handing back the current leased site and leasing a smaller kiosk site, source equipment and costing the build. Once I had completed the trial and had an approved site I was informed by [redacted] that they had changed their mind; they were not going to approve me do it.

So it was that in early February 2005 one of my sales staff telephoned me to tell me that [redacted] shopfitters were in the Shellharbour bakery measuring up, informing my staff that they were starting construction as soon as we were gone. That was how my staff and I found out that the lease had been terminated. All my staff immediately gave their notice. I could not blame them; it was a cruel way for them to discover that they didn't have a job at the end of the month. With no staff, I could not open the store and so my Shellharbour Franchise Agreement was terminated for 'abandonment'. The store never re-opened. On 29 January 2004 I bought the Shellharbour store for $440,000.00. On 22 February 2005 I was locked out of my store and [redacted] kept all of my equipment. This is how I learnt that although you may own the assets of your business, you do not control them – the franchisor does and they can do what they like with them. In March 2005 I received a letter from [redacted] stating that their 'market value' for all of the equipment, fixtures and fittings was only approximately $122,000. Even so, they never paid for what they had taken. Nearly three years later [redacted] has not paid me for anything belonging to the Shellharbour store. This is theft.

On 28 February 2005 my remaining two franchise agreements were terminated and [redacted] locked me out of my Vincentia and Kiama bakeries.

The Vincentia and Kiama stores continued trading under a 'lease-to-buy' arrangement with the people who went on to buy the stores four months later. These two purchasers had previously made offers, albeit lowball, to purchase. One of the purchasers had been employed by me as my Sales Manager in the Kiama store. At the end of March 2005 [redacted] also sent me by mail "the written down values" for the Vincentia and Kiama franchises.

[redacted] then paid directly to the [redacted] approximately $187,000.00. For three franchises that have been independently valued at 2 Million dollars.

We could not believe what was happening to us could be lawful, so we engaged legal representation. We now believe that [redacted] was churning us and if all of our companies had gone into liquidation, the $187,000.00 would have been the only money we would have received. Because we had each franchise set up as different companies, we believe we made it harder for [redacted], as they had three entities to get liquidated; it was also harder to bankrupt me. We also had five properties, including our home that enabled us to keep the creditors away for longer period of time.

6.13. Collusion with the [redacted]

Our issues regarding the [redacted] are discussed in our Bank Section of this submission. I can further clarify our position on request by the Committee.

6.14. Theft of ingredients, equipment, fittings, fixtures, insurance premiums and franchise fees

[redacted] kept all of the ingredients, packaging and uniforms from both of the two operating stores. I still have not received any money for those either – again, theft.

We were never refunded the portion of our insurance premiums for our three franchised bakeries. They each had three months left to run.

We were also never refunded the portion of our franchise fees for the franchises.

[redacted] kept this money; this is theft.

6.15. Breaches of Confidentiality

Confidentiality is a major area of concern that we have regarding our dealings with [redacted] Included in this is the relationship that [redacted] has with the bank where our personal and business situation appears to be discussed freely and without consultation with ourselves. This was highlighted by the [redacted] Regional Manager who informed us she had been in discussions with the 'Portfolio Manager' of the [redacted] regarding the winding up of our accounts a month before we even knew who this manager was.

[redacted] had also spoken with our suppliers informing them of our financial situation and putting pressure on them to no longer deal with us. During our first breach and throughout the termination process it is obvious that [redacted] have not maintained confidentiality with regard to our business and their intentions.

One of the 'Without Prejudice' offers we received from [redacted] was for $20,000.00 and for them to take over the business debts to creditor [redacted]. We refused. The next day I was served a bankruptcy notice by [redacted]. Coincidence or just tough business?

6.16. The Result

Not only have I lost my three franchised businesses, independently valued at $2 Million dollars, my husband and I have lost our family home and another four investment properties. One of the properties was a home that had been in Marks' family for many years, originally belonging to his grandmother. The financial and emotional pressure placed on us has been immense. We were left with business debts of about $1.4 Million which is growing every month due to interest and charges, but that we continue to pay off. We will be paying off these debts for many years to come.

I have lived with the constant threat of bankruptcy for nearly three years. If I had received the fair market value for my bakeries the business debts would have been cleared and my husband and I would not have lost any of our assets.

[redacted] acted unconscionably towards my husband and me and my businesses. They used threats and intimidation tactics to create emotional and financial distress. They misrepresented the level of training and support I would receive as a franchisee, as well as ignoring the Code and their own responsibilities within their franchise agreement. Their behaviour was calculated and designed to result in their own monetary gain.

We did eventually get [redacted] into mediation – two and a half years later! This only happened after we raised the issue with politicians and in the media, but the mediation was a waste of time. I believe [redacted] to be the type of franchisor that do not settle fairly if they believe they can wait you out until you run out of money and/or the will to continue fighting them. Unfortunately the only people that have settled with [redacted] are bound tightly with confidentiality clauses. I have spoken with a number of these people. They will talk generally of the terrible time they had with [redacted] the intimidation, the threats, the lack of support. But these people will not come forward as they are still all scared of the retributive action [redacted] will take if they find out that these people have spoken with me.

Perhaps the most disappointing part of this whole experience is when we realised that there was no one looking whilst [redacted] stole our businesses and worked with the bank to ensure that we lost all of our assets to prevent us from fighting them in litigation. There was no help to be found; no advice or assistance in any form. The Code let us down when we needed it; it lets down all franchisees.

6.17. The future

[redacted] is using the court system to try and deny us justice.

We have been in litigation against [redacted] since November 2005; we have no choice but to continue to try and get out case heard in court. The personal cost is enormous, the financial cost is crippling – over $250,000.00 in legal bills and rising.

7. Bank Abuse of Franchisees

7.1. Franchise Lending

Franchise lending is a lucrative business. This type of business loan generates continuing business and healthy profits for a bank. The acceptance of the franchising model by the banks in Australia has meant that franchising, and franchisors, have grown quickly.

The process is simple. Franchisors promote their chosen lending institution to the franchisee. The franchisees then borrow the money from the bank in order to 'rent' the franchisors brand, often using their home as security, whilst operating what they believe is their 'own' business.

In regard to banks and their lending practices what should concern the committee is that the banks are complicit with franchisor opportunists. When a bank knowingly writes a loan for the same franchise business, knowing that the previous franchisee is in default, they are colluding with the franchisor to profit from the demise of a franchisee. The question needs to be asked: To whom does the Bank owe their Duty of Care? It does not appear to be to the borrower - who is their client. Rather, it appears that the stronger relationship is with the franchisor, who is *also* their client, and with which they can do repeated business.

It is through their own policies of foreclosure and re-lending where banks can work with franchisors, assisting the franchisors with their churning process. I base this statement on personal experience. The churn model greatly benefits the banks as well as the franchisor as the bank gets to re-write the loan for the same business every few years, instead of waiting for the term of the loan contract to end. It is mutually beneficial for the banks and the franchisors to work together. The franchisor gets the business back and the bank is secured from loss through mortgages held over the franchisees other assets. Both the franchisor and the bank can then go through the process again, and again.

7.2. Statistics on franchise lending and failure

Information can be found on the internet and in the media that suggests that there are a large number of small business customers who have been treated in a disgraceful way by their lender. This type of information has also passed to me through word-of-mouth from other former franchisees. They all tell me of their catastrophic losses through franchising. Their treatment by their franchisor is often appalling and the banks are always part of the problem, never the solution.

The allegations I have heard are related to breaches of confidentiality, no access to account information including balances, the banks acceptance of undervalued prices on their franchises and unconscionable, or harsh, conduct in regard to the repossession and sale of

mortgaged properties. I believe these allegations to be based in truth as I have experienced every single one of them myself.

It is my hope that the inquiry will request and acquire from Australia's franchise lenders the true statistics of franchise lending, and the associated default rates of franchised businesses. These statistics will assist in understanding the true rate of failure of franchised business, not just the figures produced by biased industry groups.

Recommendation: The Committee acquire from Australia's franchise lenders the true statistics of lending and default/failure rates.

7.3. History of bank abuse

In 1997 the House Standing Committee on Industry, Science and Technology (1997), produced a report titled '*Finding a balance: towards fair trading in Australia,*' Chapter 5 of this report summarised the variety of abuses suffered by SME borrowers by their bank lenders. The Committee listed the substance of its submissions in the following categories:

- Lack of disclosure of the terms of a loan
- Breach of confidentiality regarding client details
- Restricted client access to account details
- Reneging by banks on their responsibilities in a loan agreement
- Harsh conduct in relation to repossession and mortgagee sales
- Banks obstructing dispute resolution by recourse to costly court action

Unfortunately for the borrowers like me who came after this inquiry, the Committee chose to take no action other than the listing of these abuses. The list presents serious malpractice behaviour by the bank; some of which I have experienced personally, and have heard repeated in every franchisee case I have been told. Perhaps if these issues had been addressed in 1997, thousands of franchise owners like me would not have had to go through the devastation of foreclosure and repossession of their family home.

7.4. The imbalance of power

The imbalance of power that is prevalent in franchising is also present in banking.

Again there is the possession of knowledge by the bank that the borrower may not have access to, and the full understanding of the contract and how the banks can use it against them. Everyone understands when they borrow from the bank that they are in the weaker position, but there is an expectation that bank personnel are professionals and will not abuse

their position. It is a relationship, as is the franchisor/franchisee relationship, based on trust. There is a belief held by a borrower that the bank will treat them, the customer, fairly.

Of course, it comes as a complete shock to the borrower when the bank moves aggressively on their assets in the midst of being terminated by their franchisor. It can happen suddenly, within days. A franchisee can be breached; their franchise agreement terminated, and coincidently, their loans are called in at the same time. The franchisee's world is tipped upside down. Suddenly they must confront the dishonesty and duplicity of not just their franchisor, but their bank. It is so shocking and stressful that many just cannot react.

In some cases, banking relationships have been developed over many years. Like us, when a franchisee is in dispute with their franchisor they believe that the bank will understand that time is needed to go through the dispute process. No one expects that the bank, in collusion with the franchisor, will immediately call in their loans, often informing the franchisor before telling the franchisee, and start the legal procedure to repossess their home and other assets. This of course works in the franchisors favour.

I give one example of how this collusive behaviour works to detriment of the franchisee, and it is mine. When my husband and I walked into a meeting with our franchisor during the termination process, they knew that the bank was in the process of terminating our loan facilities. We did not. Every decision we made that day did not include any consideration of how we would be affected if the banks terminated our business loan facilities. The bank had informed the franchisor prior to our meeting, but failed to provide us, the customer, with the same courtesy.

It is inevitable and perhaps understandable that once the bank has made their move, many franchisees will accept a poor deal from the franchisor, to enable them to save the family home. Franchisors walk into mediation knowing the financial position of the franchisee; this gives them a very strong bargaining position.

Many franchisees will agree to a poor deal: take a little or lose the lot.

7.5. Collusion

> *"advise [redacted] tha[redacted] will back off....and we will accept whatever[redacted] decides to give us from the sale of Kiama and Vincentia, without question".* [redacted] Senior Manager, [redacted], Corporate and Business Banking, email dated 10 March 2005 to [redacted], Victorian and Tasmania Franchise Manager, [redacted] (Attachment C).

This email confirms the worst fear for a franchisee. I saw this email 2 years after it had been written, and of course the damage to our personal and business assets had already been done. The bank had done their deal with [redacted] and we had lost everything, including our home.

It is appalling to now know that whilst we were scrambling to save our assets; paying lawyers to talk to the banks lawyers in an attempt to hold them off from foreclosing on our home, the bank had already done a deal with [redacted] that ensured we would not be able to pay our business debts. We were allowed no input into this deal. We were not even advised by the bank or their lawyers of the values they had accepted for the sale of our Vincentia and Kiama franchises. Nor were we told that the bank had agreed to accept nothing for the sale of our Shellharbour franchise assets and yet the bank knew we were unaware of this fact. We discovered this years later.

Despite numerous attempts, we have never been formally advised what our franchises were sold for. All we know is what we have seen from [redacted] statements that we were able to obtain through our lawyers. These statements detailed [redacted] deposits to the Vincentia and Kiama franchise loan accounts. In total we received just $798,840.00 for two franchises that were independently valued at $1.5 Million. And absolutely nothing for our third, Shellharbour franchise.

In August 2003 the [redacted] loaned us $1,515,000.00 for three [redacted] franchises, later valued at $2,000,000.00 In March 2005 they stepped back and allowed [redacted] to sell the franchises that saw us receive less than 40% of the total value of our franchises. Whilst [redacted] was free to continue on and sell off our franchises, the bank moved in on our personal assets.

The bank obtained a financial advantage through colluding with [redacted]. This advantage came from the charging of excessive penalty fees and interest, to the tune of approximately $220,000.00 and the ability to re-write the loans to the next franchisees.

8. Our Relationship with the [redacted]

> ***"...we have to consider the greater relationship with [redacted]"*** *[redacted], Victorian and Tasmania Franchise Manager, [redacted] in an email dated 10 March 2005 to [redacted], Senior Manager, [redacted], Corporate & Business Banking, Portfolio Management explaining why the bank should accept a nil return from [redacted] for one of my franchises.*

I will not attempt to detail all aspects of our relationship with the [redacted] in this submission. Suffice to say that the evidence we have gathered over the past few years strongly points to serious banking malpractice by the [redacted] where they induced us with substantial discount interest rates to shift our business loan facilities to them in 2003 and then, in collusion with [redacted] systematically defrauded us.

We believe that our defaults were calculated. I personally believe that two methods used to achieve calculated defaults are the 12-month interest-only facility and the simple overdraft. We had both. Loan pre-approval, either written or verbal can later be refused when needed, or

offered at a much higher interest rate. With us, requests for overdraft facilities were originally verbally granted, and then later refused when needed. The overdraft facility can also be cancelled at any time, with demands for immediate repayment. My request for an extension of our 12-month Interest-Only term was approved in writing; and later refused.

8.1. Background

In March 2002 the [redacted] gained preferred lender status with [redacted] and released their lending policy for franchisee funding. At the time I was a new franchisee and not interested in re-financing but when I began looking to purchase another bakery I contacted the [redacted] and the [redacted] and asked for their terms.

Th[redacted] lending policy for franchisee funding fo[redacted] included the [redacted] Rewards [redacted] Franchisee" statement which incorporated the following:

1. The [redacted] will lend up to 70% secured against an existing bakery, or 75% against a 4 or 5 Star bakery;
2. For loans in excess of $388,000 [redacted] will require an independent valuation
3. For 4 & 5 Star bakeries interest rate discounts of 0.25% (4 Star) and 0.5% (5 Star)

The 'Star' ratings refer to the [redacted] internal audit system.

Whilst the discount interest rates may appear to be a great incentive to change banks, once the change had been effected, the pressure to achieve a 4 or 5 Star rating from [redacted] became an additional stress noting that the repayment amount of your franchise loan was tied to your 5 Star audit results. Again, [redacted] could directly influence the financial outgoings of your business.

8.2. The Relationship between [redacted] and th[redacted]

I submit to the Committee that the [redacted] has engaged in unconscionable practices with regard to their relationship with [redacted] and their behaviour during the sale of our bakeries by [redacted], and foreclosure of our home and other investment property.

Our banking and personal information was discussed by the [redacted] and [redacted] and decisions made without our knowledge. These decisions concerned our businesses, loans and assets and yet we were excluded from the discussions. Both parties were aware that the repercussions of their actions would be financially catastrophic for my husband and me.

The [redacted]

1. Reneged on the terms of two of our loans which were both set up as Interest-Only, by refusing to honour an Interest-Only extension on one, and changing the other to Principal and Interest 6 months early;

2. Informed [redacted] that they were going to terminate our loan facilities before they informed us. This provided [redacted] with an upper hand during our final meeting with the franchisor during the termination process;

3. Accepted sale prices for two of our businesses that were vastly short of the banks own valuation that they used to lend us the money;

4. Agreed to accept a nil return on our Shellharbour franchised businesses, knowing the consequences to us and yet putting the relationship with the franchisor before us, the client.

5. Hid behind their lawyers, using the legal system to deny us access to details of their agreement with [redacted] and to our true financial position due to their charging our accounts with penalty interest, interest and legal fees;

6. Diverted part of the sale proceeds from the Vincentia franchise to ensure that the loan was not settled, instead ensuring that part of the loan remained unpaid and the bank could continue to charge penalties, interest and legal fees;

7. Changed the mailing address for our loan accounts from our PO Box to "[redacted] Sydney NSW 2000" so that we did not receive our Statements. This meant that we were never aware of the true financial status of our accounts, including what the [redacted] was charging to these accounts, or the amounts paid into it by [redacted];

8. Charged to our accounts almost $220,000.00 in legal costs, penalty interest and fees;

9. Verbally agreed to hold off repossession action on our home to allow us to access our superannuation, whilst simultaneously getting judgement against us;

10. Sold our repossessed home and investment property under-value.

8.3. Debt Escalation

Due to the bank adding fees and interest to our accounts, our debt to them escalated. These loans were simply business loans, secured against the businesses themselves as well as two of our other property assets.

We undertook our own risk assessment before we purchased the second and third franchise. We determined that our financial position was strong and that our worst case scenario may involve the sale of one of our investment properties. We did not consider that the [redacted] would collude with [redacted] to accept below market values for the businesses, and in the case of one business a nil return, and further justify the indiscriminate drive-by 'forced-sale' valuations of our home and other investment property by selling our properties below value. We did not take into consideration that the bank could profit from terminating our loan facilities and foreclosing on our properties.

The Vincentia franchise was valued at $750,000.00
The [redacted] accepted $364,903.00

The Kiama franchise was valued at $750,000.00
The [redacted] accepted $433,937.00

The Shellharbour franchise was valued at $500,000.00
The [redacted] accepted NIL. [redacted] kept everything without paying.

Our home was valued at $500,000.00
The [redacted] sold it for $390,000.00.

Our investment property was valued at $270,000.00
The [redacted] sold it for $215,000.00

Total value of Franchises and Properties: $2,770,000.00
Total accepted by the [redacted]: $1,403,840.00

Our Total Loss caused by [redacted] $1,366,160.00

This does not include the 3 properties we managed to sell ourselves. In total we lost 5 properties and 3 businesses.

8.4. Re-financing stores

Our loans with the [redacted] bank were set up to allow the re-finance of the Vincentia franchise and the purchase of the Kiama franchise to happen on the same day in August 2003. The settlement of the Shellharbour franchise was not to happen until January 2004.

A month after the Vincentia and Kiama settlement I received a letter from the [redacted] confirming the advance of those two loans. The settlement statement for the [redacted] Kiama store showed that [redacted] was paid $45,710.16. Noting that transfer fee due to

[redacted] was $28,400.00, or 4%, this meant that the previous franchisee owed [redacted] over $17,000.00.

During the month after I had settled on the Kiama franchise I received two letters from the [redacted] The letters were addressed to me but contained the previous franchisees bank details, including the fact that he owed them over $13,000.00.

On 29 January 2004 I received correspondence from our lawyers regarding the settlement of the Shellharbour franchise. In this transaction [redacted] made $25,340.63. Noting that the transfer fee for this store would have been $17,600.00 it is again obvious that the previous franchisee owed [redacted] money.

It would appear that both the bank and the franchisor, [redacted], knew that these two franchises, and the previous franchisee who owned them, were in trouble. And yet [redacted] allowed the transfer of these stores and the bank refinanced them, to me.

8.5. Portfolio Management

On the 17 June 2004, not even 5 months after settlement of the Shellharbour store, I was called to a meeting with [redacted] bank Franchising Manager NSW [redacted] for a review of my borrowings. [redacted] opened this meeting by telling me I must sell the Kiama bakery and one of my investment properties. I was certainly surprised at this as Kiama was profitable and I had only been operating the Shellharbour store for 5 months. [redacted] knew that I was on a repayment plan for my Royalty payments, which I had not informed her of as I believed the issue had been sorted out; she could only have been given this information by [redacted] When I noticed that [redacted] had a number of emails in her hand from [redacted], the Regional Manager of [redacted], I asked to see them. This was refused but [redacted] did tell me that both the [redacted] and [redacted] had decided that I needed to sell a store and the Kiama franchise should be the one to go on the market.

In an [redacted] internal Diary Note dated 28 June 2004, the Franchise Relationship Manager writes that she has:

"contacted Regional Manager [redacted] to ascertain the outcome of her meeting with Deanne on the 25/6/04. The following is advised:

- [redacted] have issued a default notice on all 3 stores
- Should the position not be rectified within the specified time frame, a termination notice will be issued terminating the licence agreement
- [redacted] will then dictate to Deanne which bakery to sell and Deanne will be given 60 days to complete this sale
- If within 60 days bakery is not sold, franchise agreement will be terminated on 1 store, with [redacted] to take possession and on sell..."

I was not informed by the Regional manager of what she had told the [redacted]. Again, other seemed to know more of what was going on that I did.

On the 25 June 2004 I received breach notices for all three of my franchises. Four weeks later, on 22 July 2004 we were informed that our accounts had been transferred to the Portfolio Management Department section of the [redacted] due to "inability to demonstrate capacity to repay loan commitments' and 'Notice of Default by [redacted]'. It was nearly three years later that we received copies of some of the emails that [redacted] had from [redacted] that day, where [redacted] was informed by [redacted] that if I was breached, which I was just a week after the emails were written, [redacted] would terminate my franchise agreements and that they would seize my stores one at a time. [redacted] had not seen fit to inform me.

8.6. Changes to loan facilities

Although the loan facility for the Kiama franchise did not end until 2010, in October 2004 we received a letter from the [redacted] stating that our loan facility had expired. This letter also stated that the loan for the Shellharbour franchise was $20,218.85 in arrears which was incorrect as the loan was Interest Only until February 2005; however the bank refused to acknowledge this and changed our loan terms to Principal and Interest. The amount declared as owing was never explained.

8.7. Recovery Action

On the 7 December 2004 I received an email from the [redacted] stating that a letter had been forwarded to me. Coincidently that very same day I received a phone message from [redacted] Manager [redacted] stating that they had been talking to the [redacted] and that we needed to have a meeting. My breach notices had expired – and I had not rectified them.

On the 13 December 2004 we met with [redacted] where we were told in no uncertain terms that our franchise agreements were to be terminated. We were given a choice; immediate termination or termination at the end of March, which gave us three months to try and sell the franchises. We chose to trade over Christmas as it was the peak season and we could use the cash flow to clear some of the bakery debt. At this meeting the Regional Manager repeatedly referred to someone named Mark from the [redacted] that she had communicated with several times and that she knew what their plans were. We did not know at the time, but Mark was to turn out to be [redacted] from Portfolio Management section of the bank. Emails received from the [redacted] also show that the [redacted] had told [redacted] that they were going to terminate all our loan facilities and call in our loans before they told us.

On the 14 January 2005, the [redacted] formally terminated all three of our franchise loan accounts and called in the bank rental guarantees. The demand was for immediate payment of both

facilities. This added yet another stress to us, although I did not believe at this point that the bank would move on us as they knew that if we couldn't sell the franchises [redacted] would be taking over the assets. Their interests were protected. My husband rang [redacted] who was now our contact in Portfolio Management, who told him it was a formality at this point.

On the 10 February 2005 we were again served with documents prepared for the [redacted] demanding payment in full for the three business loans. With interest added, the loan amounts were now:

1. Shellharbour - $464,270.82 + $4940.00
2. Vincentia - $317,043.57 + $2,000.00
3. Kiama - $766,336.19 + $6,166.00

The total demanded was: $1,560,756.58. We were still franchisees.

On the 10 March 2005, the [redacted] went to the Supreme Court and got judgement against us for the three business loans, plus $396,470.54 for a residential investment property loan. The [redacted] had also terminated this facility on 14 January 2005, demanding immediate payment. This loan had been taken out to purchase two investment properties. They were not associated with, or secured against, our franchises. We had no choice but to immediately put the two properties on the market for sale. This compounded the stress and financial pressure.

On the 11 February 2005 we received Letters of Demand from the [redacted], calling in all our loan facilities for the three franchises. A month later the [redacted] served us with notification of legal proceedings to exercise the sale of our home and three investment properties. The pressure was again compounded. The [redacted] were moving to seize our assets whilst we were still franchisees and their actions suggest that they knew that the stores were going to be sold under value.

On the 28 February 2005 our franchise agreements were terminated and we lost control of our business assets. Over the ensuing months we managed to sell three out of four of our investment properties which saw us pay an extra $... off the business debt. We believed that the bank was not being reasonable as [redacted] owed us money. Little did we know that the bank had accepted a deal with [redacted] that saw over $760,000.00 in business debt remain outstanding in July 2005.

Despite our efforts to hold off the [redacted] by attempting to access our superannuation we were evicted from our home on the 26 November 2005. On the 05 April 2006 the [redacted] sold it under-value.

On the 03 May 2006 I was served with bankruptcy proceedings. A few days later, my husband was also served. We made an appointment with the Honourable Joanna Gash to ask for her assistance. It was very important for us to avoid bankruptcy for two reasons. Firstly, if we were made bankrupt we would lose the ability to litigate, and therefore would never be

able to get our day in court. Secondly, Mark is an officer in the Royal Australian Navy and as such, bankruptcy could mean immediate discharge. The bankruptcy Notice was not followed through by the [redacted] who after a phone call by Joanna Gash, agreed to hold off any further action until after the court case had been heard.

On the 12 May 2006, the [redacted] informed our lawyer that our debt to the bank was $608,948.36. We had originally borrowed $1,515,000.00. Through the [redacted] banks deal with [redacted] they wiped over $1,366,160.00 off the value of our business and personal assets.

We managed to repay $312,102.83 from the sale of three of our properties; added to the sum achieved from the two franchises, we have effectively paid the [redacted] $1,110,942.83.

If the bank had not accepted [redacted] deal, we would not have lost all of our personal assets, including the stress of losing our home and living under the constant threat of bankruptcy for the last 3 years.

The [redacted] and [redacted] used their superior position to obtain a financial advantage, through deception.

9. The ACCC

The Australian Competition and Consumer Commission (ACCC) is the independent body responsible for administering the TPA, and therefore the Code. In relation to franchising, the ACCC has the dual role of ensuring compliance with the TPA and therefore the Code, as well as educating the parties to franchising regarding their rights and obligations.

As I submitted to the SA and WA State Parliamentary inquiries, numerous current and former franchisees have expressed to me their disillusionment and disappointed with the approach taken by the ACCC when they have made complaints about their franchisor. Whilst every franchisee that makes a complaint expects that it will be investigated, the reality is quite different.

The ACCC is not effective in its role as enforcer of the TPA, nor is it seen to be effective. I am not privy as to whether this is because of a lack of funding and resources, conflict of interest regarding their dual role, lack of confidence to litigate under the current legislation, or just lack of will.

Quite simply, the ACCC does not investigate or take action in all complaints, particularly the smaller complaints of breaches of the Code. Franchisors can breach the Code every day knowing that the likelihood of the ACCC investigating is minute. Meanwhile, a franchisee can be breached indiscriminately with no recourse knowing that if they do not rectify the breach, or pay the fine, they can lose their business and their entire investment.

The ACCC will always in the first instant advise franchisees in dispute with their franchisor that they must follow the Code and attend mediation. This does not help franchisees who have franchisors that ignore the Code, refuse to attend mediation or do not conduct mediation in good faith. Unfortunately the ACCC is not set up to investigate everyday complaints against a franchisor; they cannot assist a franchisee if a franchisor ignores the Code. The ACCC can only investigate a franchisor after the fact, and only after evidence has been provided of a breach. By then it is too late for many former franchisees, who have been left devastated both financially and emotionally.

As a solution to this, I refer to my previous recommendation regarding the establishment of a franchise ombudsman or a tribunal as a way to deal with these disputes. I believe that if such a body was established the number of disputes reported would substantially increase. At the moment, franchisees have no faith in the ACCC taking action and do not even bother reporting their complaint.

Another area of concern with the ACCC is that even if you can get their attention, it takes months to get investigations underway, and months for them to go through their own

processes. Franchisees are often sent away with the words that 'they do not have enough evidence'. In our own case, we wrote to the ACCC in 2005 after our agreements were terminated. Our lawyers also wrote to the ACCC regarding their belief that collusion existed between our franchisor and bank, and that [redacted] had breached the Code. In response we received a letter from the ACCC telling us that they could not help us as it sounded like a personal matter. Two years later we tried again, this time armed with statements from another 13 other former franchisees of [redacted] and the support of one politician, the Hon Joanna Gash, who could see what was going on in [redacted]

Franchisees often believe that the ACCC will take on their case against a franchisor who has conducted themselves in a questionable manner, but they will nearly always be disappointed.

The ACCC is not equipped to deal with the magnitude of policing the Code; a franchising ombudsman or tribunal should take on this role.

9.1. Educating franchisees

The ACCC has committed itself to educating potential and current franchisees about the Code and their rights and obligations. This 'teacher' role is contradictory to their enforcement role. The education role cannot be undertaken by the ACCC at the same time as they are trying to enforce the rights of franchisees and franchisors.

9.2. The ACCC investigation into [redacted]

The result of the investigation by the ACCC into [redacted] was not only disappointing; it raises real concerns as to the investigative ability of the enforcement officers and the internal processes of the ACCC.

On the 16 April 2007 my husband and I met with two investigators from the ACCC and made a formal complaint against [redacted] from the National Federation of Independent Businesses (NFIB) attended with us.

9.2.1. Common Themes - Confidential

At this meeting Mark and I outlined our history with [redacted] We gave two enforcement investigators an outline of our complaint and a list of the Common Themes [redacted] we had developed after being contacted by other former [redacted] franchisees. We discussed the intimidation, the threats, the termination process, the breaches of the Code and the TPA.

We also handed the ACCC 13 statements from former franchisees of [redacted] including ourselves. This number grew to over 20 during the course of the investigation. I believe that the Honourable Joanna Gash, MP had also previously handed the ACCC copies of the 13 complaints.

Over the next twelve months we provided the ACCC with extensive documents and were interviewed twice more. Once for over five hours. I referred a number of other former and current franchisees who were experiencing problems with [redacted] to the investigators during the course of the investigation.

In October 2007, all but six of the complainants, were informed that the ACCC would not be pursuing their complaints any further due to lack of evidence. The fact remains that all of these people experienced the same treatment, and the ACCC has the powers to investigate these cases. But they chose not to use those powers.

On 15 February 2008 we were again interviewed by the ACCC enforcement investigators. The questions centred on the contracts and he/said type arguments. We walked out of that meeting with the same thoughts – they were not asking the right questions. They were not interested in conduct. They had a confidentiality agreement and this had become a show-stopper for them.

In the letter we received from the ACCC detailing why they were not proceeding against [redacted], they listed complaints about third parties not being the conduct of [redacted] Some comments we made to explain the background of events were used as main points in their reasons for not continuing, even though they did not form part of our complaint. One example was the "conduct engaged in by Mr [redacted]", but we did not make a complaint about Mr [redacted]. Our complaints were regarding the misrepresentations made by [redacted] regarding the state and potential of the stores, particularly the support we would receive from [redacted] if we bought the Shellharbour store. The fact that we purchased the stores from [redacted] is irrelevant, it was the misrepresentations made, and the conduct during and after the purchase, that made up our complaint. When the investigators bought up [redacted], we knew that [redacted] had successfully confused the investigators by transferring the blame to him.

On 21 April 2008 I received a telephone call from the Senior Enforcement Officer on our case who stated that the ACCC had decided to progress no further with their investigation. I was not given any reasons. I was also informed that the media release had already been prepared and would be released the next day. We did not have any time to digest the information and prepare our response. I have since been told that [redacted] and their legal representatives were informed more than a week before we were.

9.3. The ACCC website comments on [redacted]

During the course of the investigation into [redacted], the ACCC bowed to pressure and placed comments on their website regarding previous franchisor investigations. Up until the decision not to proceed to prosecution, the comments were very general and non-committal.

After the completion of their investigation into [redacted] the ACCC posted further comments on their website. Throughout their statement I believe the ACCC make deliberately misleading statements.

The ACCC states:

> *"During the course of its investigation the ACCC received a number of complaints from (mainly) former franchisees within the [redacted] system. The number of complaints received was small when compared with the size of the [redacted] franchising system".*

There were 20 complaints. It is incomprehensible that the ACCC tries to pass off the number of complaints as insignificant. These 20+ former franchisees, plus a couple of current franchisees, all complained about the same things, and yet, most had never met. The ACCC statement that the number of complaints was small gives credence to the argument that if a franchisor keeps the percentage of churned franchisees low then they will get away with it.

The ACCC responded to everyone's complaints in context to the contract. The complaints were all about conduct. The question needs to be asked. Does the ACCC understand the task they have been given?

The following statement by the ACCC is misleading:

> *"In October 2007 the ACCC issued an investigatory notice requiring [redacted] to provide information relating to their dealings with particular franchisees. The issuing of a notice such as this is a usual step in this type of investigation and should not be taken to indicate that [redacted] were not cooperating with the ACCC in its investigation."*

During the interview with ACCC investigators in February 2008, my husband and I were told that [redacted] were not co-operating and that they (the ACCC) had had to use their powers to get [redacted] to provide information. In a letter I received from the ACCC dated 07 July 2008, in response to my Freedom of Information request, the writer stated that the investigation included "the use of the ACCC's compulsory information gathering powers to obtain evidence from [redacted]". The ACCC had to issue s.155 demands to get information from [redacted]. And yet the ACCC website statement suggests the opposite. This statement appears to be deliberately misleading.

The statement continues with:

> *"During the period between December 2007 and February 2008 [redacted] provided approximately 11 boxes of documents to the ACCC in response to the investigatory notice. The material provided included communications between the complainants and [redacted] and internal documents relating to the dealings [redacted] had with the complainants".*

9.4. The failings of the Regulator

Of real concern is that the ACCC failed to interview any third parties as part of their 'in-depth' investigation. The ACCC came out saying that "there were a few circumstances where franchisees alleged that [redacted] representatives had made misleading verbal representations which investigations have neither been able to substantiate or dismiss". And yet, *they did not approach these representatives in order for our claims to be substantiated.*

A child with his hand caught in the cookie jar will still tell his mum that he didn't eat the last cookie.

The ACCC comment "there was no evidence produced to or obtained by the ACCC that evidenced widespread or systematic problem of compliance within the [redacted] franchise system", is also misleading. As I have previously written, there were over 20 complaints. Everyone had experienced the same problems. I personally gave the ACCC a list titled 'Common Themes' that Mark and I had put together after listening to everyone's story. It had started as our own, but it was more like a checklist. It wasn't long before we could tell a former franchisee 'their story' before they had a chance to tell us themselves.

Through failing to proceed against [redacted] the ACCC sent a strong message to everyone that they are incompetent. To franchisors they confirmed that they are incapable of acting against them. [redacted] told us that the ACCC wouldn't do anything.

9.5. Request for information through the Freedom of Information Act 1982

Also of concern is the inability to access information as to how the ACCC conducted its investigation into [redacted]

On 07 May 2008 in accordance with the Freedom of Information Act 1982, I requested copies of, or access to, documents and transcripts prepared by the ACCC during the full investigation conducted into the complaints against [redacted]. I was telephoned and told that my request would cost me around $150,000.00, but was going to be refused regardless based on the time it would take to put my request together. I was offered the chance to review my request, which I did.

I was again asked to review my application, which I did but on the 14 August my request was formally refused under section 24(1). The reason given is that it would take too long; it would "unreasonably divert the resources of the ACCC from its other operations".

In their letter the ACCC gave the following explanation as their reason for refusal:

- over 1,100 hours of staff time would be required to draw together the relevant documents
- 6,500 hours of staff time would be required for tasks including examination of documents, consultation, copying of documents

That's over 7,600 hours.

The ACCC then put this into perspective for me by stating that "if one person were dedicated to processing your FOI request, then working a standard 7 hour 21 minute day, 5 days a week, the person could complete your request in just under 4 years".

Let's put this into context. The investigation into [redacted] on over 20 complaints took 12 months, with 2 investigators (37.5 hour working week, that's 75 hours per week, over 12 months makes it approximately 3,900 hours spent on the complete investigation). Yet, simply copying and providing me with information regarding me personally would take twice as long; 4 years. This just does not seem believable.

Through my Freedom of Information requests the ACCC I can only determine that the investigation was not conducted in a comprehensive, in-depth manner. Rather it appears that it was a superficial investigation, run by enforcement officers who either do not understand the concept of unconscionable conduct, or lack the will to move past confidentiality agreements to investigate the criminal activity that is lies behind them.

10. Other [redacted] franchisees

I have spoken with a great number of former franchisees of [redacted]. All of them have lost considerably, many everything, through their association with this franchisor.

Many of them are broken people; having suffered major depression, emotional and physical breakdowns. Many of them lost everything they had, including their relationships. I do not think some of them will ever fully recover.

These people believed for a brief moment, as did I, that the ACCC would expose the business practices of [redacted]. Many were hopeful, but the experience has bought back all the feelings of anger, shame and defeat.

As a result, not everyone would put in a submission to this inquiry. They didn't know what to say. They just want to bury the past and move on. Unfortunately this is the reality of franchise failure, and these are the victims that the 'happy franchising' statistics will call insignificant.

The ACCC has the statements of many of these people; perhaps you can get a copy of them. I have included a few statements here from some of those franchisees. I have been given permission to add these statements to my submission, and a couple I have taken directly from the SA State Inquiry website.

Attachment F.

10.1.1.1. William [redacted]
10.1.1.2. James [redacted]
10.1.1.3. Rebecca [redacted]
10.1.1.4. Peter and Carol [redacted]
10.1.1.5. Wayne and Karina [redacted]
10.1.1.6. Andrew [redacted]
10.1.1.7. Peter [redacted]
10.1.1.8. Blaise [redacted]

11. Recommendations

1. That all Notices of Disputes are registered along with the results of mediation with an independent franchise authority.

2. That the Franchising Code of Conduct is amended to require a franchisor to disclose the success or failure rates for their franchised and company owned stores.

3. That the Franchising Code of Conduct is amended to require franchisors to disclose the success or failure rate of their franchisees.

4. That the Franchising Code of Conduct be amended to extend the requirement to provide former franchisee details to 10 years, noting that litigation can take longer than the current three years provided for in the current Code.

5. That the Franchising Code of Conduct is amended to require franchisors to disclose details on the number of disputes, breach notices, and termination notices they have issued, regardless of whether they resulted in legal action, in addition to the existing requirement to provide details of current litigation and court judgement.

6. That the Franchising Code of Conduct is amended to include a provision that prevents a franchisor from using confidentiality clauses to 'gag' their former franchisees.

7. That an introductory franchise education course be developed and made a pre-requisite to purchasing a franchise.

8. That a mandatory federal registration scheme be introduced for franchisors, including the lodgement of Disclosure Documents and Franchise Agreements.

9. That a regulatory framework is established that requires all franchisors to be licensed to sell their systems. The regulatory system that already exists in ASIC could be readily adapted to the franchising industry.

10. That the Franchising Code of Conduct be amended to impose an obligation to act with good faith and fair dealing on both parties.

11. That section 51AC of the Trade Practices Act 1974 is amended to include the definition of unconscionable conduct, including a list of agreed examples of the types of conduct that would be considered to be unconscionable.

12. That the Trade Practices Act 1974 is amended to include laws to deal with unfair contract terms.

13. That an Ombudsman's service be established.

14. That substantive fines and penalties are introduced for breaching of the Franchising Code of Conduct and those franchisors that breach the Code are listed on public register.

15. That substantial penalties are introduced for a franchisor that induces, or fabricates, a breach of the franchise agreement by a franchisee, including harsh penalties if a franchisor uses an induced or fabricated breach to terminate a franchise agreement.

16. That an Authority be set up to monitor franchisor compliance with the Code empowered with the authority to administer fines and penalties.

17. That a newly established Ombudsman service collects data regarding mediations conducted and the results, and that the list is provided in the Disclosure Document under Annexure 1, Clause 4 – Litigation, and on public register.

18. For a Franchising Tribunal to be set up to allow access to a low cost, or free, dispute resolution process.

19. That a provision be inserted into the Code that states that all franchise renewal negotiations are to be conducted in good faith.

20. That a provision be inserted into the Code that places an obligation on a franchisor to renew a franchise agreement, or to pay compensation in lieu at full market value.

21. That the Franchising Code of Conduct be amended to include a provision that states that franchise agreements must include a termination or goodwill payment, determined at fair market value of the franchise, at the end of a franchise agreement, regardless of if the franchise agreement was terminated or not renewed.

22. That the Franchising Code of Conduct be amended to include Recommendation 21 from the Matthews Inquiry that reads: "The Risk Statement and ACCC educational material should clearly describe the risks and consequences associated with franchisor failure".

23. That franchising consultative groups include representation from all parties to franchising, and those representatives are truly independent.

24. That the Franchising Code of Conduct is amended to include the requirement to disclose a copy of the lease and/or any sub-leases held over the franchise business site.

25. That franchisors, as lessees, can only sublet or licence their retail sites with the condition that it is for the same period that remains on the lease.

26. That the Franchising Code of Conduct is amended to include the requirement that all interrelated contracts regarding a franchise are for the same period, i.e. the franchise agreement has the same term as the lease.

27. That it be made mandatory for licensees to be registered on a lease with the lessee, thus giving them the same rights and protections as the holder of the head lease.

28. That all franchise and business brokering firms be required to disclose if they are paid fees, or receive any financial benefit, from franchisors.

29. That the Committee acquire from Australia's franchise lenders the true statistics of lending and default/failure rates.

References:

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www.fca.org.au

www.[redacted].com

Illawarra Breads Pty Ltd and ors v [redacted] Holdings Limited (2007) NSW IRComm 6076 of 2005

Disclosure Document, [redacted] Holdings Limited, 2001 and 2002

Franchise Agreement, [redacted] Holdings Limited, 2001 and 2003

Letter from [redacted] *dated 07 September 2006*

Problematic Relations: Franchising and the Law of Incomplete Contracts, Gillian K. Hadfield, Stanford Law Review, 1990

The Franchise Fraud, Robert L. Purvin, American Association of Franchisees & Dealers, USA, 1994

South Australian Parliament Economic and Finance Committee, *Inquiry into Franchises*, Final report, May 2008

South Australian Parliament Economic and Finance Committee Submission, by Professor Elizabeth C. Spencer, 1 January 2008

South Australian Parliament Economic and Finance Committee Submission, by Franchise Council of Australia, 21 January 2008

South Australian Parliament Economic and Finance Committee Submission, by Associate Professor Frank Zumbo, 3 March 2008

South Australian Parliament Economic and Finance Committee Submission by Franchisees Association of Australia Incorporated, 13 March 2008

South Australian Parliament Economic and Finance Committee Submission, by Ms Jenny Buchan, 6 February 2008

South Australian Parliament Economic and Finance Committee, Submission by Professor Andrew Terry, 20 February 2008

[redacted]

7 September, 2006

Dear

Re: Non-attendance at the Auckland Conference

It is most disappointing that you are not attending the Auckland conference and you have given no valid reasons for this.

We are very serious about our business; we have been operating it for over 26 years. Also important to us is the development and growth of our business and ensuring that [redacted] continues to be a major retailer for many years to come. We regard all our franchisees as closely aligned business partners, you appear not to have a reciprocating regard to us. If this is the case, please contact your Regional Manager and put your bakery on the market. With the current optimism and recent significant sales jumps in the last months across the country, your bakery will sell quickly if the price is reasonable. We are not interested in forging ahead with business partners who are not aligned and have no desire to be part of the network.

Your deed with us has a 10 year duration. [redacted] Holdings has no legal obligation to renew that deed and [redacted] will not be renewing the deed where franchisees are clearly not following the [redacted] system. Implicit in 'following the system' is conference attendance.

We are disappointed in having to send such a communication.

Yours sincerely,

[redacted]
Executive Chairman

[redacted]
Executive Director

[redacted]

Subject: [redacted]

From: [redacted] (Add as Preferred Sender)
Date: Tue, Jul 29, 2008 11:51 am
To: [redacted]

Hello Deanne,

It is nice to hear from you. As time goes by, we have moved on from the stressful experience we suffered protecting our interests from the bullying tactics of [redacted] Holdings. Many of the details have now faded from memory. However, I am willing to assist you in your endeavours to preven[redacted] from subjecting others to their unethical practices in whatever way I can.

I am pleased that you have kept a record of my submission to you of 7/5/07. I consent that you use this in your submission. Please contact me in future if there is a possibility that I may be able to provide you with more information.

Regards,

WILLIAM [redacted]

[redacted]

-------- Original Message --------
Subject: Re: [redacted]
From: "[redacted]
Date: Mon, May 07, 2007 10:59 pm
To: [redacted]

Hello Mark,

Thanks for the e-mail. **As I told you yesterday over the telephone, our settlement agreement included a restraint clause. Having sought legal counsel, I have been strongly advised against making a statement to the ACCC.** I believe that it does not violate the restraint clause to make general comments and to say that for most of the 5+ years that my wife and I were [redacted] Franchisees, in order to protect our own interests, we constantly had no option but to stand up against intimidation, financial and otherwise, and bullying from [redacted]. I felt that [redacted] took the attitude that the franchise partnership was an unequal partnership; the role of the franchisee was just to comply unquestionably. From [redacted]s point of view, there was no room in the franchise agreement for any form of discussion or negotiation. Feedback or comment from the franchisee was consistently and entirely disregarded.

The Franchise Agreement is one-sided, with the provision for grievances on the part of the franchisor being catered for, but not on the part of the franchisee. When we tried to implement the dispute reconciliation protocol as set out in the franchise agreement, [redacted] chose to disregard entirely my Notice of Dispute and to continue issuing Breach notices. We found that it was virtually impossible to make [redacted] take any notice at all, short of going to court.

Over the five and half years duration that we were franchisees, to my recollection, our area was handled by 7 Business Consultants (one twice) and 5 Regional Managers. Though various in number, there was a remarkable consistency in the implementation of the [redacted] strategy. This made it very obvious that the unethical tactics of bullying, intimidation and fraud were no accident. They were clearly manifestations o[redacted]s business strategy and policy.

Like the reports from other former franchisees, we found it very difficult to get out of the business. For over 2 years after our bakery lease came up for renewal, we were not in possession of a lease agreement - a violation of the Franchise Code of Ethics. We informed [redacted] of our intention to offer our bakery for sale in October 2003. No potential purchasers were directed to us, and after May 2006, [redacted] refused to list our Bakery in the *Bakeries for Sale* list. They were effectively preventing us from moving on. My impression was that [redacted] strategy regarding us was an attempt to drive us to bankruptcy between now and the expiry of our franchise licence. Evidence of this allegation is that [redacted], behind our backs, did not roll over the lease as expected. Instead, [redacted] instructed their lawyers to draft a brand new lease agreement, with brand new terms. Not only did this cost a great deal more in legal charges, all of which were charged to us, but furthermore, some of the new terms were outright unacceptable to us, and probably to any other potential investor in the business. By doing this, [redacted] had deceived us, the legal charges made to us were fraudulent as they were not in compliance with the terms of the Franchise Agreement, and by making adverse changes to the terms of our 10-year lease, they had substantially reduced the market value of our business.

Over the years, there were a number of incidents that demonstrated that [redacted] takes the view that when it comes to negotiation between franchisee and franchisor, there is no negotiation. Feedback or comment from the franchisee was consistently and entirely disregarded. There have been a number of occasions when mistakes made by [redacted] have led to unbudgeted expenditure. On each occasion. [redacted] has billed the franchisee. When payment had not been forthcoming, [redacted] has issued a Breach Notice. I do not recall a breach notice and its associated charges to the franchisee ever being cancelled.

These are general comments regarding our experience as [redacted] franchisees. As I have already pointed out, due to the restraint clause in our settlement, for a stipulated period of time, I am unable to broadcast the details of any past or current negotiations or transactions relating to the bakery business. I doubt that [redacted] would hesitate to take action against me in the event that I should violate the agreement.

I hope this information can help you in your good cause.

Regards,

WILLIAM

James [redacted] **Employed** [redacted] **13 years**

I started with [redacted] in 1992 as a baker in several of the first stores in NSW and continued working as a production manager up until 2004. Throughout this time I increased sales in all the stores I managed and won numerous bread competitions. Due to my performance I [redacted] the state manager NSW offered me the opportunity to lease and then buy my own business in Queensland. [redacted] put me in contact with [redacted] from the Queensland office and upon arriving we discussed several options and were given a long list of stores that [redacted] were prepared to finance me into. I knew of several of these stores and questioned [redacted] on the considerably lower prices that [redacted] were quoting compared to the advertised prices, she commented "Don't worry they will take that price their shops have been on the market for years they are desperate". This did concern me at the time considering there were about half the stores in Queensland on the market and here attitude seemed ruthless.

We settled for Jimboomba the owner had it listed for $250,000 however [redacted] made the deal at $100,000 [redacted] informed me that the deal was done and instructed me to move my family to Jimboomba. I raised my concerns to [redacted] that relocating would cost me a substantial amount of money. [redacted] assured me that they would help by paying for the Registration of my company. Everyday I would receive a call from [redacted] or the QLD Training manager asking if we had moved. Rental accommodation was scarce and the pressure from [redacted] forced us into a $250.00pw home with a 12mth lease. I informed [redacted] we had moved, we where running the store the next day. While waiting for [redacted] to organize our lease we increase the sales from $4000.00 to $6000.00 through a lot of hard work. After months of running the store and questioning when our lease would be ready to sign I was informed that the NOW profitable store was to be sold to another franchisee. I was told my last day would be 3rd Aug 2005 and I was to relocate to Toowoomba by the 1st Sept 05. I could not believe my ears, we had just moved!! We had just signed a 12 month lease and now they wanted us to move and take over [redacted] Toowoomba Central on the 1st September 05. I told [redacted] this was not financially viable for us as we could not possibly afford another move, the expense of another bond and the expense of paying double rent. [redacted] said [redacted] would cover the cost of this move, we signed a lease on Toowoomba Central and took over on 1st Sept. [redacted] reneged on the promise of paying our relocation costs leaving us to pay for everything:
-The broken lease in Jimboomba
-The new bond
-The removal costs
-Relocation of my children's schooling, the list goes on.

The two moves cost us over $16,000 all they paid was $1,000 for registering our company to lease their Store. To cover the the remaining costs I had borrowed money from my elderly mother (money that had been put aside for her funeral) and Toowoomba Centrals takings. Due to this we were behind with our bills from day one and it did not take long for us to be approached by [redacted] the state manager for Queensland concerned of the situation. Regardless of having a 30% increase in sales, the highest in Queensland and a turnaround in profits from negative to a positive I was still told I had 7 days to be up to date with all bills. I had secured the money from a good friend in Sydney who was quite happy to be paid back in installments from the profits and assured me he would have the money in my account before the 7 day. It was only 4 days later when I was awoken during the day by my partner with a

message from the sales staff that they were locked out of the store. Shortly after I received a call from [redacted] stating that they were reopening the shop with their own staff using the bread that I had produced the night before. To add further insult they kept 2 days banking in the safe and all my ingredients leaving my family broke and dependant on Salvation Army emergency accommodation and food vouchers. This has placed a great deal of pressure on my family not only financially but also emotionally and I hope that by telling my story if I save just one person from the same fate it was worth it. In retrospect with all the years working for the company and all that I have heard and witnessed [redacted] doing to there franchisees I should have seen it coming.

www.[redacted].com/jim viewed 29 July 2008

Re: Disclosure of information to potential franchises and dispute resolution

In early 2000 [redacted] advertised for a Franchisee for a bakery to be located in Liverpool. I lived and worked in Liverpool at the time and was excited because my partner often talked of opening a [redacted] Franchise after he retired with his son-in-law, a then [redacted] Production Manager at Tuggerah. Geoff was impressed with the system as he had seen and we both loved the bread.

By April 2000 we had made all the right enquires undergone interviews and testing and were offered the site in Liverpool [redacted] We were provided with a written estimate of $330, 000 from [redacted] (the Business Development Manager) and given approval "in principle" finance by [redacted]

By May 2000 the original estimate was revised to $344 500 ex GST. Verbal advice from [redacted] was that while GST would be payable on some items, it could be claimed back at that some purchase prices for equipment etc would be reduced with the removal of sales tax.

In August we paid our training fees, franchise fee, purchased uniforms etc. and commenced training. Our planned opening date was 1 October 2000.

In September 2000 a revised budget of $401 290 ex GST was presented to us along with a projected delay in our opening time. We were now $71290 over our initial budget estimate with out the prospect of any increased return.

At a meeting with the NSW Regional Manager, Project Manager and Business Consultant, the variations were explained and we were asked to agree to the new budget in order for works to continue. We had already paid out over $50, 000 and both left our $70,000p.a. Jobs with state government. We were NEVER offered a refund of monies paid up to that point and felt that we had no choice but to seek additional funds from the bank.

On settlement, (19/12/00) the day before opening the store and amid total chaos we signed variations bring the total cost of the bakery to 451 843.47. **$120,000 more than the original quote**. This amount included $39 918.43 GST so ex GST the final price was $411 925. The additional funds to meet settlement were arranged from the bank by the project manager with our knowledge but without our involvement.

We weren't off to a very good start. No paid employment since June 2000, the bakery opening delayed until 20 December 2000 and a huge budget blowout.

Our training that we paid $5000 for was very inadequate. It was in a 2 star bakery with a Franchisee who lived in Spain. It did not have point of sale (POS) or any product safety

& quality (PSQ) processes in place. On the first day of trading in our new store I realized that I had never done a "close" as part of my training, it took me hours to figure out what to do.

In preparation for the bakery we had budgeted for opening sales of $15000 per week reaching $20000 in the first 12 months. We had 4 deck ovens installed, TWO slicers, 6 windows and 6 racks. We hired and provided uniforms for over 20 staff, though our Business Consultant advised us that we would need more staff!

Our rosters and production sheets had been approved by our BC but they were hopeless! It was 4 days before Christmas and we projected sales of $4000 for opening day! I had sales staff rostered 1 for every $50.00 per hour expected as was the WRITTEN recommendation from [redacted] to achieve one on one customer service. We baked over $4000 worth of product and had sales of $1700 on our opening day.

I remember the second day of trade 22 people over for 22 hours (from midnight to ten PM) for $2200. I'll never forget it. The story doesn't get much better.

Our Grand Opening held at the end of January 2001, was a huge event everyone was there. All our staff (even the ones that didn't normally work on Saturday) our friends and family, bread head, the spruiker , the magician we had a full page ad in the local paper with a complimentary block offer, we went all out with every trick in the book and our sales were $2500 with wastage of $2000.

Our finances were out of control but we kept our chin up and did not give on the [redacted] system. We were at the shop every day. We never turned on the TV and we never cooked a meal at home for 12 months or more. We lived and breathed [redacted] and did everything we could to be the Local Baker. We both got in the front of the shop and talked to customers.

Late 2001 we realised we were broke. We went to [redacted] and sought advice. We made arrangements with our creditors; [redacted] paid our rent and waived any other payments while we got back on our feet. The debts were put onto our debtors account.

In March 2002 [redacted] offered us Royalty Relief in lieu of a rent reduction (or rent relief from [redacted]) in return for our commitment to the business. It was agreed that we would reduce wages to below 45% and work hard on building the business. This plan was with the proposed redevelopment in mind. The redevelopment originally scheduled for completion by early 2004 was the light at the end of the tunnel. At this time, it was believed that the redevelopment would occur before the end of our lease period so that we would have some assistance with the relocation of the store.

We worked harder than ever to keep costs down, keep out rent payments up and pay off our debt to [redacted]. In late 2002, [redacted] voluntarily "wrote off" about $60,000 of debt that was owed to them by us. We understood this to be rent component of the debt. As if we had of "walked away" in late 2001, [redacted] would have been

responsible for all the rent to [redacted] as they were the head lease holders. It was our understanding that [redacted] could see we were committed and chose to assist us.

During 2003/2004, we just "kept going" we continued to work hard to maintain high standards, keep our staff motivated and keep our costs down. We followed the system and really did our best. We responded to any advice from [redacted] we followed all promotions, worked hard to be the local baker. In a letter to [redacted] from [redacted] referred to us as "exceptional and efficient" Franchisees".

In June 2005, [redacted] gave the first hint that they were considering NOT renewing the lease with Liverpool.. In a meeting they presented the following three options

Option 1 (remain in [redacted])

Closure of current location in Feb 2006 and reopening in new development in July 2006. Cost approx $275 000 (in addition to current debt of $250 000).

Option 2 (relocate store)

Closure of current location and relocation outside centre into Mall area.
Cost approx $325 000 (in addition to current debt of $250 000).

Option 3 (Walk away)

- End of lease in November 2005
- Franchise agreement comes to an end/terminated
- Sell equipment to SBS/Moffat

It was further discussed that option 1 and 2 were unlikely because finance would be an issue and that there were no suitable sites outside of the [redacted] complex. Leaving option 3.

I explained that option 3 leaves me bankrupt due to existing debt of $250 000. At this point I was encouraged to seek bankruptcy because; I'd feel much better if I was to walk away and be bankrupt, as it would be 'all over'.

At this point I refused to give up. I was determined to keep going and look at options for refinancing, saving my business, avoiding bankruptcy. I felt sure that [redacted] and Westfield would come to some agreement regarding the ongoing lease arrangement.

[redacted] staff were very negative towards me. They continually threatened breaches, hounded me for financial information and continually sought to find fault. On several occasions I was offered incentives to "walk away".

In October 2005, I was formally advised that [redacted] would be terminating the lease 30 November 2005 and arrangements were made for the "closing of the store". Due to health reasons I did not continue to trade past 16 November 2005.

I was left with various debts.

Approximately $30,000 in unpaid PAYG tax and superannuation payments for staff (I managed to pay all outstanding wages and holiday pay.

$140,000 to the [redacted]

$80,000 to th[redacted] of the remaining lease on the equipment
$10,000 (approx) in debts to main suppliers e.g[redacted]t.

Rebecca[redacted]

Peter and Caro[redacted]

Hi my name is Peter[redacted]

My wife and I were franchisees with[redacted] for 18 years and our story goes like this. In 2001 we sold our Canterbury store to[redacted] for another store in Studfield. We were told at the time that if we wanted to expand this was the way to go as the Canterbury and Hawthorn area was already saturated with[redacted] stores. We already had the Tooronga store and lived in Ferntree Gully so it made sense to expand into the area. We were advised at the time by our franchise consultant John[redacted] that we would have a better chance of expansion in the area if we brought the existing Studfield[redacted]. The store was located half a kilometer from the Knox shopping center. Although the stores were close they serviced completely different customers. From our experience Knox was a regional shopping center that serviced the region where as Studfield was a local shopping area that serviced the local communites. Another consideration was the fact that the store was already 12 months old.

The stores sales rapidly increased from $8,000pw to $11,000pw shortly after we purchased the business. We heard rumors tha[redacted] were going to open a store in Wantirna mall another local shopping area about 1.5k away from our store. Most of Studfields customers were from the Wantirna area so we decided that we would apply for this store. We also knew it would take customers from our Studfield store and thought better to be in our pocket than in someone else's. When we heard that[redacted] was going for the same store we were still confident with our application as we complied with all requirements. We also felt confident as it was[redacted] original recommendation that we move to the area so that we could expand. When we heard that Lyle got the store we arranged a meeting to protest the decision. We met with our new consultants[redacted] Regional manager N[redacted] and[redacted] We discussed the issue of[redacted] conflicting interest as the Property Manager for Head Office and his inability to meet all the requirements for purchasing a store. We were given the response that the decision has been made and[redacted] stood by it.

We were still upset about this decision and further insulted by the treatment at a[redacted] forum which my wife attended. My wife broached the subject of losing sales from the Wantirna store.[redacted] and[redacted] suggested that she stop whining and that the desicion was made. They also suggested that their would be no effect in sales (something they would not substantiate in writing).

The store opened and as we predicted the sales of our store declined to around $8,500pw. We started having difficulty in paying our bills and began laying off staff. We tried everything that we had learnt over the past 18 years nothing was working. We were having more and more trouble with our finances and had to let even more staff go until my wife and I were working 7 days a week We were lucky to hold the sales at $8,500pw. We were then threatened by the new Regional manager[redacted] that[redacted] may not renew the 5 year option on the expiring lease at Studfield. We rang him to find out why they doing this and arranged a meeting with[redacted] and our new consultant[redacted] We received a breech of franchise agreement notice for the reason of having difficulty paying bills and the store apparently not performing as well as it should be. We explained that since the store in Wantirna had opened sales had dropped and my wife and I were working 7 days. We explained that if they did this they would ruin us and we would seek legal advise to recover loss of sales, loss of future sales and the devaluation of the business.

On the 1/5/2005 [redacted] decided to do an audit on both stores to find out what was causing our financial difficulty. Their conclusion was that Tooronga was paying most of the bills and they would get back to us with a solution. After seven months without any response we asked for another meeting. We me[redacted] with [redacted] and the person who conducted the audit. They told us we needed to sell Studfield, we laughed because we had already put the store up for sale in early 2005 and found no buyers. They could see we were getting deeper into trouble and by January [redacted] rang us and said he had a buyer for Studfield. He was a new franchisee so we would have to wait until he finished his training in March. By this time my wife was diagnosed with major depression and was still working 7 days. She was getting worse so we sold Studfield for $250,000 just enough to pay out the loan. We lost $175,000 on the sale and still owed for the Taxation and superannuation. We concentrated on Tooronga and worked on reducing debt.

My wife was approached in May 2006 by Nicole [redacted] with an offer of $300,000 for Tooronga. I believe [redacted] asked my wife because of her illness. A week later they withdrew their offer with the excuse that the Tooronga shopping center was due to be demolished and replaced with a new shopping center. It is now August 2007 and the shopping center is still open. While this was all going on the tax office were getting impatient with our accumulating debt of $300.000 and sent us a Directors notice demanding payment within 21days. Obviously we did not have that money so we organised a meeting with Micheal and Nicole. We asked for help hoping that they may put the offer back on the table considering the Tooronga store turns over $1,000.000 a year. The only advice given was to talk to your accountant. The accountant advised us to see BK Taylor who is a liquidator so we went into liquidation our last trading day was on the 6/9/06. Head office broke into Tooronga on the 7/9/06 and started trading a week later. They only offered our liquidator $50,000, not sure what happened with this offer? We now know that [redacted] can legally take over stores in this manner. It's no wonder they withdrew their offer, they were sitting back waiting for this to happen so they could take the store for nothing. My wife is still unable to work due to the major depression it has now been 11months.

From Peter and Carol [redacted]

Karina and Wayne [redacted] - [redacted] Lies (sighted 05 September 2008)

We have just finished on a sour note after 10 years with [redacted]

It is with much sadness that we read Peter and Carol [redacted] story as they had the hugely successful store at Tooronga in which we did our training. They were extremely passionate franchisees and recognized as "successful franchisees" by [redacted] Holdings.

As we lived in Carnegie we hoped to puchase a store close to home but we were told that Carnegie was the wrong demographics. After leasing a store in Keysborough we purchased our Bentleigh store. We attended forums, conferences, achieved five star for our store and set our sights on becoming multiple store owners. East Bentleigh was opened less than 2km from our store, we were advised by email that it was to be a company store, which was not the case.

Then we were advised that they had secured a sight in Carnegie (Amazing how quickly the demographics changed.) We requested Carnegie but that was also given to somebody else. We were finally given a new store in Clarinda.

The details surrounding this store I am not at liberty to discuss, however this is when our relationship with [redacted] started to break down. As the Clarinda chapter came to an end we had a meeting with [redacted] Holdings. After lengthy discussions we were offered 12 months to decide if we would keep our Bentleigh store and carry out a refurbishment.

During the following twelve months of juggling debts we realized that we would not be in a position to service our debt if we added the cost of a refurbishment to our already sizeable debt and indicated that we would be selling our store. When we actually submitted our intention to sell to [redacted] Holdings it was 20th August, 2005, our asking price was $595,000.

On the 21st February, 2006 we received a call from [redacted] to advise us that they had decided our store was overpriced and would no longer be listed in "Crumbs" unless the price was considered a saleable price. We dropped our price $80,000 and were told that it could once again be listed.

At was at this stage that we asked if there was anyone in a situation to purchase our store. We were told that there were two people in the system currently doing training that would be looking to purchase on our side of Melbourne our other option was to sell to an existing franchisee. We ask if we were able to contact the people in training to try and market our store. We were told due to privacy laws they could not give us details.

Five weeks after reducing our price to $515,000 We were told as our deed was nearing the end it may be a good idea to drop the price again as there was no interest and in their opinion overpriced. It was becoming extremely clear to us that it was not our price that was too high it was that there was no one to buy. We told [redacted] we would be happy to discuss price if anyone was interested in looking at our store. It became evident that time was running out for us to sell our store and it had been made clear to us that our deed would not be renewed.

We called a meeting with [redacted], [redacted] and our consultant [redacted] and we bought along a friend who could think and listen clearly without the emotion that we were struggling with. We were asking if we could build a bridge and renew our deed if we could prove ourselves as committed and motivated franchisees. We were told that this was not an

option. Our friend asked if there was a reason and the reason given by Michael [redacted] is that we were not "happy franchisees".

We finally sold to an existing franchisee who [redacted] had suggested we call. Our sale price was $445,000.

It is interesting to note that when we had two stores and we were in serious financial trouble [redacted] suggested we meet with [redacted] to try and find a solution. If we had followed his advice I shudder to think what may have happened.

It was suggested that we should sell our good store to free up funds for the struggling store. We were asked did we really need two cars?, What else did we have to sell so that we could inject more funds into our second store.

We considered standing up to [redacted] on many occasions but decided we just didn't have the strength left to fight them any further. We still have a fantastic marriage and four beautiful children to consider and the price may have been more that we were willing to pay.

We will continue to read with interest "[redacted] Stories"

Kind regards
Wayne and Karina [redacted]

Andrew [redacted] **Franchisee 12 years**

I Purchased [redacted] Rozelle NSW from [redacted] Holdings for $ 320,000 with a verbal conformation that the profit was around $80,000 per year which seemed fair at the time. We went into the business earlier then we expected due to them not having a operator to run the business, and a promise from [redacted] that the paperwork on the profits would be passed on to us from head office in Melbourne (we ended up with no figures on the profits.).

From the first day of business the shop was running at a massive loss and when I questioned [redacted] on the subject firstly I just received excuses then later on the breaches started arriving some of which were just made up and made no sense at all. At one point I became so desperate I asked [redacted] to buy back Rozelle for just $100,000 so we could keep our profitable Avalon store.

I tried to get legal help through several lawyers however [redacted] made sure that the whole process was extremely expensive with legal fees beyond $30,000 just to get to mediation. The other problems we had with legal help was further hindered due to the fact that we were trying to survive financially with a business that was running at a loss.

Up until this point I had a very successful business in Avalon but due to the financial pressure Rozelle placed on us we put both stores on the market. The store remained on the market for 3years with no interest, a large problem I am assuming is due to the fact that [redacted] controls the sale of shops as all stores are sold internally. We gave up on trying to sell in May 2006 and placed the company into liquidation. [redacted] used a clause in the franchise agreement that gave them the right to lease the shops out.

To this day and over 12 months since liquidation [redacted] still collects a lease fee from Rozelle on an asset that they dont even own. Avalon was leased for six months and then purchased for exactly half the amount that I purchased the business for. This all seemed extremely unfair and one sided however it is all completely legal and all part of the fine print hidden in the franchise agreement.

It was not until recently that I was made aware that [redacted] were forced by lawyers to buy Rozelle from the original franchisee they had sold it to using a 'buy back' clause in the franchise agreement (subsequently that clause has now been removed) and Rozelle was sold on to me to recoup their costs.

To this day I can't believe that a large very wealthy company like [redacted] Holdings could let me take the fall for their dodgy business and their loyalty towards me after over fifteen years owning and operating shops.

Giving us our daily bread

A baker who scored seven top awards was among those smiling after thousands of entries in the Sydney Fine Food shows. SUE BENNETT and JACQUI HOCKING meet some winners.

There are more than 130 [redacted] branches in NSW but one branch — Avalon — won an outstanding seven gold medals at the Sydney Fine Food shows.

"I knew we made good bread but I didn't know it was *that* good," said franchise operator/baker Andrew [redacted], 29.

As part of the [redacted] company, he has a recipe book of 200 breads of which he regularly uses about 60.

The raw ingredients come from one of two Sydney flour companies where they are made to the company guidelines but, from then on, it's down to the individual operator.

It's what makes each of the 520 [redacted] branches different across Australia and New Zealand.

When Austin and his team of seven bakers begin their two daily shifts they start the process from scratch with flour, water and yeast.

"Actually, you would not believe how very much breads vary from one operator to another," said a company spokeswoman.

Since buying the Avalon business one year ago, Austin has increased the shop's turnover by 30 per cent.

In a comparative list of branches it propels him well up the scale towards where [redacted] in Erina, Central Coast, sits as king pin for highest sales.

[redacted] joined the company after leaving school, buying a franchise in Hobart six years ago. He moved to Sydney last year where he says: "I fell in love with Avalon and I was just lucky enough the business came up for sale here."

It wasn't long before customers began commenting on the quality of the bread and people began travelling considerable distances to buy it.

It prompted Austin to take his bread to the Sydney Fine Food shows. "I thought: 'Let's see how good we really are.' "

Judges thought him good enough to win a first prize for his white bread rolls, white vienna, white cob loaf, wholemeal bread, wholemeal loaf, wholemeal vienna and 50 per cent rye sourdough vienna.

"Everyone has the same recipes but the difference is that everyone makes a recipe in a different way," he says. "We take a lot of care and we never take short cuts.

"There are a lot of small things we do carefully like checking the temperature and resting the bread for enough time. When you rest bread, it adds flavour."

His favourite bread, and greatest challenge, is the sourdough. "It's a hard bread to make but I love making it."

On April 2, Austin will find out whether he's the show's champion breadmaker. Judges award marks for each entrant and the entrant with the highest total is champion.

Other bread-makers enjoying first places at the show were:

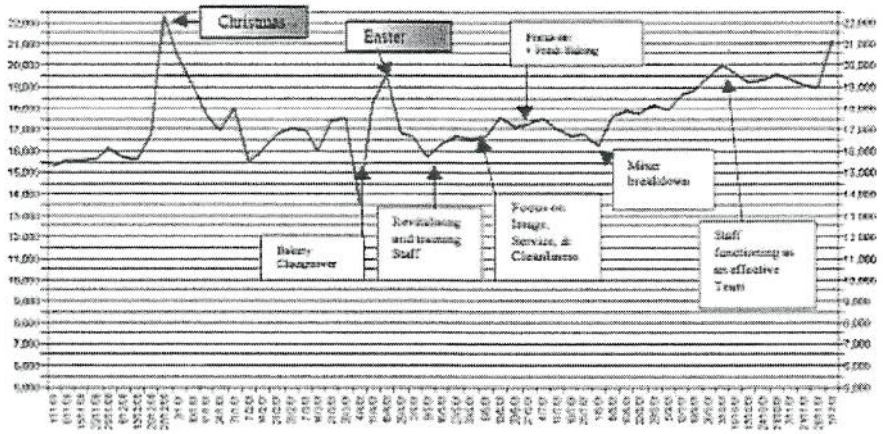
Micks Bakehouse, Leeton; **Jason Barton**, East Gosford; **The Hot Bread Spot**, Condell Park; **Mignon Cakes**, Greenwich; **Garran Bakery**, Garran, ACT; **Sauers Bakehouse**, Milperra; and **Bakers Delight** shops at Rozelle and Warringah Mall.

Case Study

Case Study - Avalon, NSW (Bonnie [redacted] and Andrew [redacted])

Michael [redacted]
Business Consultant

	Year 2001	$ Increase on Year 2000 figures		Year 2001	$ Increase on Year 2000 figures
June	$17,195	+$2,195	September	$19,100	+$3,100
July	$16,557	+$2,557	October	$18,441	+$3,441
August	$17,884	+$2,927	November	$18,315	+$3,815



Bonnie [redacted] and Andrew [redacted] who have been in the system for almost 10 years being involved in Vic, SA, Tasmania and now NSW, took over the Avalon bakery on Sydney's northern beaches on 3rd April 2001.

Avalon, one of the smallest (almost kiosk type) bakeries in the group is situated on Sydney's furthest northern beach and would be one of the most picturesque areas to live in Australia.

On assessing the potential of a bakery averaging around $14,000 per week. They set out to focus immediately on the most important areas for growth which included Image, Service, and Product.

Image and Service:

In the areas of Image and Service, they were able to accomplish much in a short space of time - the largest obstacle being the resistance to change from the existing staff. Unfortunately, a few decided that they would rather leave than do it the [redacted] way, but being able to take on new blood with the right attitude, reliability, and a sense of purpose, who were enthusiastic and willing to learn, soon paid dividends and customers were extremely impressed. Soon, by word of mouth recommendations the customer numbers began to increase significantly.

"Fresh Baking"

The greatest challenge was to introduce fresh baking - Andrew attributed fresh baking as the major influence in increasing his sales in Kingston, Tasmania. Once the new team of bakers were trained and stabilised, the major focus was to fresh bake and rationalise the range. Sales continued to increase from day one and the customers have now been reeducated in their purchasing patterns. Every day, the fresh "hot" product is available to within two hours of closing and this freshness has achieved phenonomal increases in the sales of traditional breads. I.e. average daily sales include 240+ block loaves, 100 flour loaves, 30 Pane Di Casa loaves and also 70 Twisted [redacted] and savouries have doubled.

"Your Local Baker"

Andrew and Bonnie also remain focused on 'localising' their bakery. They are involved in interactive school tours of the bakery and donations to school fetes.

Their efforts can clearly be seen in their top weekly sales, at hand over the sales were $14,000. Last week they hit $22,500. The major message from the team at Avalon is stick to the system, fully involve your staff and keep the hot quality product rolling out.

Key Drivers

Key Drivers on the road to MEGA SALES and PROFIT have been non-negotiable, high standards of service speed/quality, product freshness/quality, staff/bakery presentation. It is also worth including that initially they did not focus primarily on profitability believing that first you had to have people (both staff and customers) along with standards (consistently as high as possible), and the natural flow on would be a dramatic improvement in sales along with profitability. Operating Profit is now 19.1%. Bonnie and Andrew are continuing to invest in people and standards because they believe there is still huge potential for growth.

From [redacted] www[redacted].com (sighted 12 September 2008)

Subject: [redacted]

[redacted] Holdings Ltd

From: [redacted] (Add as Preferred Sender)

Date: Tue, Jun 19, 2007 9:03 pm

To: [redacted]

Cc: [redacted]

Dear Mr Farrell and Ms Deleeuw,

To introduce myself, I am the Franchisee with [redacted] Urban Quarter – Townsville and have today established contact with [redacted] Subsequently I have been referred to you both.

To explain briefly, I built a [redacted] Greenfield site and commenced trading in Jan 2005. Since this time I have been subjected to express and implied misrepresentations, intimidation, non-performance and basically what appears to me as being a systematic and strategic policy of destruction.

At the request of Mr Walter Styke, I have today established contact with the Office for the Federal Member for Herbert (Peter Lindsay MP) and now will be constructing a chronology of events for submission.

I have previously attended upon the ACCC office in Townsville and a comprehensive discussion occurred over a few hours. I have been advised that I was required to undertake the "mediation process" in accordance with the Franchising Code. I have not done so at this stage as [redacted] Holdings Ltd now require that I complete a "Notice Form". Notwithstanding, the current National Operations Manager [redacted] attended Townsville in February 2007, issued what I consider to be a defective and unlawful breach notice, listened to my concerns, made promissory statements and since this time has failed to act upon those concerns and promises.

In the period that I have been exposed to [redacted] Ltd I have collected a very, very large volume of evidence. I hold a long list of instances involving my dealing with [redacted] Holdings Ltd that may be considered as deceptive conduct, misleading conduct, misrepresentations, bullying, intimidation, third line forcing, entrapment resulting from false statements, non-performance etc etc, I provide just one example of behaviour that I find somewhat unconscionable:-

Example #1:

In August 2007, I had a breakdown, was prescribed medication and undertook professional advice. This included a medical certificate being issued and forwarded to [redacted] Holdings Ltd to advise that I was unable to undertake any bakery type work.

Soon afterwards, [redacted] Holdings Ltd declined to accept temporary management to assist in accordance with the Franchise Agreement and "business partner" but instead advised that I could operate the business remotely.

Within a few weeks of this occurring I received a letter from [redacted] to advise because I did not attend the bi-annual conference in New Zealand that it was their intention not to renew my Franchisee Agreement when renewal occurred.

Soon after this occurred, the [redacted] Holdings Ltd Business Consultant travelled to Townsville during my illness and took my head baker/bakery manager out to the pub and paid for a large quantity of alcohol and food.

It was during this time that my then employed baker was offered the management of my bakery by [redacted] Holdings Ltd without my knowledge.

I was then advised soon afterwards by my then employed baker about the conduct of [redacted] Holdings Ltd Business Consultant so I immediately attempted to contact the Business Consultant and

Regional Manager involved by mobile, office telephone, text message and email in desperation as I was suffering from depression, for which I was receiving medical treatment and unable to perform any bakery work due to risk of suicide and on the verge of basically the loss of every asset I owned.

It was apparent to me that [redacted] Holdings Ltd were instructed not to communicate and/or assist me in any way (I can provide written confirmation that other Franchisees have been subjected to similar treatment) that would prevent the closure of my business, significant financial loss and effective the funding or capital investment to construct prior to the repossession and on sell process for financial benefit to [redacted] Holdings Ltd.

Approximately 6 weeks after my cry of desperation I received a telephone call from [redacted] Holdings Ltd Business Consultant to advise that he was instructed to take the course of action that he did by the then Regional Manager who was no longer employed.

Whilst [redacted] Holdings Ltd now deny that they ever offered the management of my bakery business to my current employee without my knowledge, implying that they were going to remove me as the Franchisee it is interesting to note that The [redacted] Holdings Ltd Business Consultant was too intoxicated to attend my bakery business and conduct the audit after he had been out with my head baker. Moreover, in February 2007, the [redacted] Holdings Ltd Acting National Operations and now current National Operations Manager, [redacted] attended Townsville, admitted the conduct of the then [redacted] Holdings Ltd Regional Manager was wrong, apologised and I then confirmed this afterwards in writing to [redacted] to confirm conversation and no response disputing same was received.

Many more examples of behaviour can be provided.

Please provide your insight as to what steps I could consider in attempting to resolve this situation. The [redacted] Holdings Ltd Business Consultant once advised me that he had been informed by [redacted] Ltd Business Development Manager Qld that I should just comply with the reporting requirements as they are a big company, don't give a f##k and will just drive over the top of you.

After the breakdown of my marriage, almost the loss of reasonable contact with my 3 & 5 year old daughter, loss of health and almost loss of all financial means due to such questionable behaviour I find myself trapped.

Regards,
Blaise
[redacted]