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Dear Secretary, Parliamentary Joint Committee on CFS

Please accept the following as a submission to the current Inquiry into the Franchising Code of Conduct.

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The franchisee dilemma is part of a larger problem

To hold an inquiry into the franchising code of conduct is a courageous act, given that governments have not been totally somnolent regarding regulation of this domain. But the quantum of the current complaints highlight that previous changes, although in the right direction, have yet to confront the essential character of the sector.

It is admirable that Members of Parliament have relayed constituents' pain into Parliamentary proceedings, and with evident sympathy and understanding of details (House of Reps, 1 September 2008, is representative). I will quote some of their statements below.

It is vital that the PJCCFS not see this inquiry as a chore to be processed quickly for the sake of good form. Substance and the prospect of genuine reform matters more than timing and the ticking of boxes. The issues that will be aired in this inquiry are

relevant beyond the franchising sector *per se*; they go to the root of the status and sustainability of the small business community in Australia.

Related dimensions include:

- The pervasive structural subordination of small business in its commercial dealings, which includes the systemic abuse of power and unconscionable conduct by corporates against it.
- For franchising in particular, the tension between the arena as the supposed El Dorado of small business opportunity, the unsuitable backgrounds of many would-be franchisees, and the innate capacity for abuse in the franchisor-franchisee relation.
- A dysfunctional dimension in the major bank - small business relationship, odious in its own right but which has the capacity to enhance dysfunctional dimensions in other-party commercial relationships (*vide* franchising).
- A near total regulatory impasse regarding unconscionable or fraudulent treatment of small businesses.
- A culture in the two major professions which mediate regulatory structures and procedures, economics and law, that renders the concept of unequal power and unconscionability in commercial relations either marginal or invisible.
- A bipartisan political indifference to unconscionability against small business, with a preference for tinkering and stop-gap 'remedies'.

The pervasive structural subordination of small business in the marketplace

In most of the areas in which small business is predominantly located, small businesses face a subordination (intrinsic asymmetry) structured into their commercial relations. Official and expert observers are wont to say 'stiff cheddar', welcome to the cut and thrust of the marketplace. Often accompanying this benign mentality is the claim that any adversity that small business faces is the result of the 'hard bargaining' to be expected in commercial interaction of profit-driven enterprises. This latter claim is made perennially by spokespeople for the Australian Competition & Consumer Commission in particular.

However this structural subordination is also reflected in pervasive abuse of power and unconscionable conduct by the more powerful party against small business. After all, an integral object of large and corporate firms is the acquisition of market power, to be acquired not as a fashion statement but for its use and abuse. Use and abuse of market power once acquired is so much easier than the demands of ongoing product innovation and ensuring of customer satisfaction. Why else would Westpac want to take over St George Bank?

Franchising represents a newly fertile arena for unconscionability, with its own specific attractions for rorting; it also allows into the rorting game lesser players who now have the opportunity to match it with the corporates in terms of unsavoury practices for profit.

The variations on a common theme of unconscionability are outlined in my 2005 Working Paper, 'Small Business - Corporate Business Relations: Dimensions of Structural Subordination in Australia', available at: http://www.arts.usyd.edu.au/departs/political/PDF/ejon7226/Evan%20Jones1.pdf. For

those who favour more respectable sources, the bible is *Finding a Balance: Towards Fair Trading in Australia*, the 1997 report of the 1996 Reid inquiry of the House of Reps then Standing Committee on Industry, Science and Technology, available at: http://www.aph.gov.au/house/committee/isr/Fairtrad/report/contents.htm.

Finding a Balance was a genuinely bipartisan report, with Committee members demonstrating much concern for small business supplicants and an atypical concern for the confidentiality essential in an environment in which vengeance of the powerful is omnipresent. The Howard government inner circle had recognised the role of small business in voting it into office from the political wilderness, but the establishment of the inquiry had built on preparatory work under Labor, not least the 1990 Beddall Report, highlighting that the issues brought up in *Finding a Balance* had been simmering for a very long time.

The report marks a high point in Parliamentary consideration of its small business constituency, but it has been a period of marking time in the ensuing decade. Of course, two major developments emanated from the report – the franchising code of conduct made mandatory, and the legislation of s51AC (business to business unconscionable conduct) into the Trade Practices Act. But the adverse experience since 1998 with both those changes in practice highlights that political intervention in this arena must always be a work in progress.

Let's keep in mind that the mighty resources of the powerful are devoted 24/7 to unpicking whatever meagre gains the lower orders have managed to achieve. One has to keep moving forward in order to avoid going backward. With respect to franchising, the franchisors, even the johnnie-come-latelys, have their lobby group. The franchisees have no-one, not least because the ACCC has gone AWOL (of which more below).

The peculiar environment of franchising, one ripe for abuse

The peculiar environment of franchising makes it ripe for abuse. In the last several decades, franchising has been trumpeted from the rooftops as the Great White Hope for would-be small business people seeking 'independence'. It has been sold as the burgeoning welcoming home for the entrepreneurial spirit, a label that carries enormous emotional baggage in our culture. In some quarters, 'entrepreneurialism' has all the attributes of a religion. Various media shout the ripeness of the model and the availability of niches for a comfortable if not profitable future. Nothing could be more dangerous than this essentially snake-oil pitch, even if originating from naïve and well-intended sources.

Many takers of franchises have little or no business experience, as Shayne Neumann, Labor MP for Blair and experienced lawyer, highlights (Hansard, 1 September, p.112):

> ... a lot of franchisees go into franchising having been in the military, having worked in the public service or having engaged in all kinds of areas and they go into this kind of work in, say, their 40s and 50s. They pour their life savings into a particular venture; sometimes it is their superannuation.

Add the intrinsic relational asymmetry of the franchisor-franchisee relation by virtue of the structural characteristics of the model, and these three components combine to form a system ripe for unhappy outcomes.

Inevitably there are those who declaim that the lemmings have to be allowed to suffer their 'self-engineered' fate. But the easy attribution of blame to the victims neglects the inbuilt fragility of the relation – the phenomenon of 'churning', for example is a natural product of the relationship and has not been 'self-engineered' by the franchisee. More subtly, there is also a public interest in protection of those susceptible to being taken advantage of. There is a parallel between the hapless franchisee and those of advanced years who put their meagre nest egg into the ventures of the fast-talking Westpoints or Fincorps, etc. Of course, the lack of provision of adequate and accurate information as a basis for rational decision is *prima facie* evidence of malfeasance on the part of those seeking others' hard-earned moolah. But the imperative goes beyond the issue of information.

The mark of a civilised society is that it acts to protect the vulnerable, including the willfully so. Since the mid-19th Century, Western societies have increasingly opted for a paternalist state; they continue to do so, in spite of the cacophony of dissent from the corporate-funded 'think tanks' (the Institute of Public Affairs and the Centre for Independent Studies being Australian exemplars), for which hypocrisy is the *modus operandi*. Franchising is presently a sinkhole for the vulnerable. The costs to those who sign up to a shining promise and fall (as for the investment trust casualties) are enormous and typically irreversible. They deserve, demand, protection. Which resolution points to the fact that the franchising system itself needs drastic remediation.

Smell a big rat? Look for major bank involvement

All four banks in Australia are happy to find easy means to earn a quid, even if it means resorting to unconscionable or fraudulent practices. A natural consequence of financial deregulation is that banks cut costs to make more profit. This is what the economist cognoscenti call 'competition'.

Small business is the unwritten gravy train for the major banks. Forget funding adequate staff numbers or staff training. Put lending staff on sales targets to flog as much business as possible. Make short work of the prospects of the business proposal – too much work, too little time. Above all, grab as much of the prospective borrower's assets as possible under security, in particular the family home. It's a win-win situation. Any residual debt arising from customer default will be written off courtesy of the taxpayer's generosity.

And then along comes the franchising genie. Packaged $$ signs light up in the major banks' head offices. With the presumed sub-contracting of risk, here is on a platter another means of making an easy quid from the SME sector.

A prospective franchisee would feel blessed to have an unexpected entrée to a major bank for finance. What the franchisee would not know, and in any case would discount rumours to the effect as totally improbable, is that the major bank might find itself in the situation of a spat between a major customer and an irrelevant customer (in this

instance our hapless franchisee/s), and will exercise its considerable leverage over the minnow's financial lifeblood for the benefit of its more favoured customer.

Enter the [redacted] Bank (Joanna Gash, Liberal MP for Gilmore, quoting two [redacted] Bank managers, excerpts from internal emails, Hansard, 1 September, p.116):

> ... we will accept whatever [redacted] decides to give us from the sale of Kiama and Vincentia, without question.
> ... we have to consider the greater relationship with [redacted] given our overall exposure to this group within PM.

The significant of these disclosures cannot be under-estimated. Small business victims of bank malpractice perennially face difficulty in obtaining bank document discovery in relation to their case. These emails are rare 'smoking guns' par excellence. They highlight, as noted above, that bank officials will conspire to bring down a lesser customer in the interests of a 'more important' customer. This practice constitutes a species of duplicity never before acknowledged with respect to the Australian banking sector. I have been documenting for some time a major case of this kind, in which a sizeable and profitable Queensland business was brought down by a bank in the context of that business being an important regional competitor of a large industrial company which shared overlapping management and directors with the said bank. I know of another such case in the food processing sector in Western Australia. One such case of this nature might incline one to set it aside as an anomaly. The multiplication of such cases leads one to ask serious questions about the state of business ethics in the Australian banking sector.

Enter [redacted]. We find [redacted] calling in en masse its loans to [redacted] franchisees following a long dispute between the [redacted]-owned [redacted] stores and long-time US franchisor parent [redacted] with its own local franchises (Joanna Gash, Hansard, 3 September, p.96). Lo and behold, soon after in 2002, [redacted] acquires, through sale-and-leaseback, multiple [redacted] and [redacted] retail outlets, housing them in a 'Family Restaurants Property Trust'. One is pleased to note that this and a comparable unlisted trust are now to be closed and the properties auctioned, because the properties are not the gold mine that the bank had hoped from playing landlord (Russell Emmerson, *Adelaide Advertiser*, 9 September 2008). [redacted] apparently passed personal details of at least one defaulted [redacted] franchisee (Gash, Hansard) to his [redacted] competitors. As with the [redacted], so with [redacted] – go with the major money flow.

When the major banks decided to enter the franchisee lending business it was heralded as a positive step for the burgeoning sector. It is now clear that major bank involvement is a two-edged sword. What banks giveth, they also taketh away, and sometimes more besides. Any examination of unconscionability in the franchise sector has to confront the financing dimension, with the major banks bringing to the sector a long history of experience in unconscionable practices.

A near-total regulatory impasse

The Australian Competition & Consumer Commission has failed us mightily. In quick succession, it has brought us a fat exoneration of the retail duopoly and an unforgivable approval of the proposed Westpac takeover of St George Bank.

On the present matter, ACCC staff have never been comfortable in dealing with unconscionable conduct, especially business to business unconscionable conduct as embodied in s51AC. Its line is: it's a tough world out there – get tough or get out, and don't bother us. The line is embodied in the ACCC's little homily *A small business guide to unconscionable conduct*. The ACCC has been emboldened by absorption of the American mutually reinforcing Chicago and Contestability schools of thought that have re-interpreted the meaning of 'competition' – a handful of large corporations (or even one with another mythical one in the wings) will deliver all the benefits we need from the marketplace; forget numbers, SMEs are yesterday's model. Thus can ACCC Chairman Mr Samuel claim ('Big Business V Small Business – vigorous or vicious competition?', Speech to the Australian Graduate School of Management, 4 November 2004, available at: http://www.accc.gov.au/content/index.phtml/itemId/600864):

> Competition ... benefits those businesses that are able and motivated to take advantage of the powerful forces driving their particular market. The corollary, of course, is that businesses that are unable or unwilling to respond to the, often daunting, challenge of competition, will languish and may ultimately fail. But this is the essence of an open market economy. ...
>
> What is not clear however, in the claims and counter-claims that are made by small and big business respectively in relation to these matters, is whether the primary case has been made for regulatory intervention. ... The difficulty in this area is that so often those who seek regulatory intervention have failed to first demonstrate the case for intervention.

Similar sentiments have been expressed by the ACCC's designated Small Business Commissioner, Mr [redacted] This mentality is an imprimatur for Social Darwinism, pure and simple.

One must concede that the ACCC has been doing something on the s51AC front since its inclusion in the Act a decade ago. There is no public document detailing activity, but the ACCC has generously provided a list to me, dated 31 May 2007 (document attached as exhibit A) in response to earlier correspondence. One must be thankful for action an arena in which ACCC staff feel distinctly uncomfortable. Nevertheless, perusal of the list indicates that the bulk of the cases initiated have been against smallish to tiddler businesses. Of the 15 cases initiated, only 3 were against large businesses. Two of the cases, [redacted] and [redacted], were *lay down misère*. The third large company case, against [redacted], and thus the most significant, allowed [redacted] off the hook with acceptance of guilt on a narrow issue and allowance of a confidential settlement – disgraceful, because publicity and precedent has been denied for those experiencing ongoing predation by shopping centre landlords and management. Regarding timing, to May 2007, the ACCC under its present Chairman initiated only one case against a corporate ([redacted]). The too-hard basket rules. One infers that little qualitatively has changed in the ensuing 15 months.

It is therefore not surprising, and reinforcing, to read of various MPs' experience with the ACCC in representing their constituents in matters alleged franchisee predation. Mr Don Randall, Liberal MP for Canning, notes frustration regarding application of the Trade Practices Act, especially s51 (Hansard, 1 September, p.112):

> It is enforcement of suspected breaches by the Australian Competition & Consumer Commission that gives struggling franchisees the biggest headaches. Enforcement by the ACCC is something I am very concerned about.

Randall notes meetings with the ACCC's [redacted] "but there is very little action as a result of our meetings" (ibid.). More extensively, from Joanna Gash again (pp.115, 116):

> I believe there is evidence of unconscionable conduct on the part of some franchisors, but I am not confident the ACCC has properly examined the claims. ... a huge clean-up is long overdue. If the ACCC lacks adequate resources to effectively prosecute its brief then give it the resources it needs. But if the ACCC has the resources and cannot even prosecute one case then I would question the competency of that agency. ...
>
> I think each case should be examined by someone other than the ACCC because I am not at all heartened. ... If the act does not cater for the discouragement of such an immoral practice [churning] then it must be amended. If it does then the watchdog is not doing its job.

And again, re the fallout from the [redacted] dispute (Hansard, 3 September, p.96):

> Approaches to the ACCC were as fruitless then as they are today. [Mrs Gash notes that, following prompt and effective action by the Privacy Commissioner on a particular [redacted] franchisee's case, the ACCC's [redacted] "confirmed that they were moving".] ... Why is it that the ACCC, in a raft of cases that have been presented to them, could not reach the same conclusion in just one case? [Mrs Gash calls for the intervention of the Australian Federal Police.] There is no shortage of informants willing to assist the investigation who somehow have been ignored by the ACCC.
>
> The other thing that concerns me is the closed-shop operation of the ACCC in sharing with us how they actually conducted their investigations. If the privacy commission succeeded where the ACCC failed, serious questions need to be asked. The only sensible conclusion I can draw is that the ACCC is incapable of performing a forensic investigation and, as such, is incapable of protecting consumers even if they are franchisees.

I couldn't have put it better myself.

To complement Mrs Gash's excellent summation of the ACCC's incapacity, I attach a letter (exhibit B) from the ACCC to a medium-sized bank victim. This letter is representative of others in my possession, notifying the recipient that there is nothing that the ACCC can do for him. The letter is important for at least two reasons, one

specific and one general. The specific reason is that the recipient, [redacted], via the business that he built and presided over as Managing Director (Bundaberg-based [redacted]), was the victim of a mammoth sting operation. It would take a conscientiously blind regulator to infer that "the alleged conduct does not appear to indicate a breach of the Trade Practices Act". Two months after this letter was sent, the bank's fabricated claim against [redacted] and his company was granted under a Summary Judgment hearing (no document discovery, no cross examination) presided over by a compliant bench in the person of the Chief Justice himself. The [redacted] were subsequently bankrupted by the bank. [redacted], reduced from assets of over $60 million to destitution, has since died of a heart attack brought on from overwork trying to put food on the table. Scandal anyone?

The general reason for importance of this January 2001 letter is the claim that "This office has now concluded its review of your complaint in the light of the further information that you provided". Given that the perfidy of the [redacted] case screams at the most casual of observers, I can infer with some confidence that the ACCC carried out no review of the complaint from [redacted]. In other words, someone in the ACCC is lying. I can infer with respect to comparable claims in letters to other bank victims that a comparable lie is operative. Either that or ACCC staffers have opened the lid, discerned the name and size of the alleged assailant and quickly closed it again. Scandal anyone?

The [redacted] case does not involve a franchise. However, I proffer the ACCC's letter to [redacted] to highlight that the ACCC has long inculcated a culture of inaction with respect to unconscionable (or fraudulent) conduct. When the franchising disputes blew up and the ACCC did not come to the party, it was merely following a practice of calculated inaction that had already become well entrenched.

Regulatory responsibility for unconscionable conduct in financial services regarding retail customers was moved from the ACCC to the expanded Australian Securities and Investments Commission in 1998, and regarding businesses beginning in March 2002 (section 12 of the ASIC Act replicates its origins in the Trade Practices Act). In that time, ASIC has not pursued a single case of unconscionable conduct of business against business. ASIC spokespersons simultaneously deny responsibility for the arena and that there is anything unconscionable on their watch that they have missed.

Thus the contributory involvement of [redacted] and [redacted] in unconscionable activity in the franchising arena would inevitably pass untroubled through the regulatory sluice gates. Hence the necessity for the fortuitous intervention of the Privacy Commission in the [redacted]-linked [redacted] - [redacted] internecine dispute.

Worse; both the ACCC and ASIC are not merely inactive on unconscionable conduct perpetrated by major players but belligerently so. Impasse.

Action against unconscionable conduct probably needs a single roof; responsibility for unconscionable conduct in financial services, certainly that of business against business, probably needs to be retrieved from the useless ASIC and returned to the ACCC.

However, the ACCC needs to be reconstructed root and branch. It appears to be politicised at the top and ill-educated in the ranks. In the entire period of Graeme Samuel's chairmanship, he has displayed not a whit of understanding of or commitment to dealing seriously with the threats to the life blood of small business, abuse of market power and unconscionable conduct, embraced in s46 and s51AC respectively. Admittedly, Samuel's reign has covered only half of the period of existence of s51AC, and difficulties of legally encasing conceptual subtleties combined with adverse judicial interpretations have contributed to the impasse of the 'small business' sections of the TPA.

However, the *coup de grâce* to any pretence of heart-felt concern for the small business sector was delivered with Samuel's aggressive fronting of the massive strategic cover-up for the retail duopoly which was the June 2008 ACCC's report into groceries retail pricing. Brutal, quintessentially unconscionable, treatment by [redacted] of small suppliers, long-time bread and butter behaviour, has been given an indefinite green light by the ACCC report. No wonder that [redacted] CEO, [redacted], was looking so serene on the related 4 Corners program of 1 September last.

The icing on the cake is Samuel's specious lobbying that the 2007 'Birdsville' amendment to s46, currently returned for consideration in the Senate, is contra to small business interests. How to interpret Samuel's behaviour and statements? A resolute dimness is a possibility, but the consistency of Samuel's line obviates that option. One must reluctantly infer that Samuel has become a flunkey for the big end of town (the box cartel fell into the ACCC's lap and is unrepresentative).

I would tend to agree with the public pronouncements of both Senator Joyce and Ms Dee Margetts (sometime Parliamentarian and now expert on the conditions of the Western Australian small business/farming communities and their supply chain relationships with corporates) that Mr Samuel has lost the confidence of the small business/family farming community. Reading between the lines of public statements by the necessarily more circumspect Allan Fels, previous ACCC Chairman, one can infer a similar sentiment. It is possible that Mr Samuel's considerable skills in merchant banking might be more profitably employed anew in that sector which is currently experiencing some turbulence. In addition, the titular Small Business Commissioner, Mr [redacted], on the evidence a time-serving hack, might be offered a generous retirement package.

An impoverished regulatory culture rooted in an impoverished culture of the relevant professions

Economists and lawyers dominate staffing in the regulatory agencies and, of course, the latter dominate in the legislative process and the judicial system. The recognition of and redress for business to business unconscionable conduct has been a glacial process. A key reason, apart from the tidal wave of lobbying in defense of the powerful, is the impoverished culture within these two professions, substantially linked to an impoverished education. The *weltanshauung* of both professions has a black hole with respect to the issues currently under consideration. Power and power imbalance – entrenched in the marketplace and its cultural and legal trappings? Unthinkable. Inconceivable. Literally inconceivable because the conceptual socialisation of

economists and lawyers precludes the issues or, at best, consigns them to the margins for consideration by the lesser mortals amongst their breed.

For both economists and lawyers, the quintessential businessperson is rational, informed, on her/his own; if they fail it must inevitably point to their own failings. The impersonal market has no favourites and takes no prisoners.

For economists, the central and abiding paradigm by which economics is differentiated from other social disciplines, Neoclassical economics, is constructed self-consciously on the systemic transcendence of the conceptualisation of power. Economics is that discipline for which the 'market' and 'power' are mutually exclusive entities. At best economists are allowed to confront the phenomenon of market power against ultimate consumers; wrought through market failure – hence the dominant emphasis of antitrust legislation in general and the Australian Trade Practices Act in particular.

The impoverished syllabus with respect to the theorisation of real market processes is compounded by the systematic failure to theorise the public corporation, the characteristic business enterprise since the early Twentieth Century. Those economists concerned with real corporate behaviour in real markets, under the rubric of 'industrial organisation' studies or some such, are typically confined to the margins of the discipline as low status. Courses in 'industrial organisation' have been disappearing from the Australian economics syllabus at a rate of knots, so the number of people currently graduating from Australia with a smattering of learning in trade practices would be not significantly different than zero. It is incidentally surprising that a current ACCC Commissioner, Stephen King, long-time economist well versed in the 'industrial organisation' heritage, should have disappeared into the vortex of the ACCC's evidently politicised agenda.

No matter. The hard yards of the 'industrial organisation' economists' have recently been overwhelmed by American-sourced ideological stalking horses of the Chicago School and its blood brother in Contestability theory, which jointly promise, from *a priori* principles, the universal delivery of the public benefit from the offices of the large corporation whose reach should allow to become untrammeled. The Chicago/Contestability ideology has been exported to Australia and has been happily appropriated by the incumbents in the ACCC as cover for their benign indifference to the sustainability of the small business sector.

As for economists comprehending the structural subordination of the small business sector, forget it. Moreover, because economists prefer static to evolutionary analysis they have never institutionalised at the centre of market analysis the axiom that market power is not an aberration but a dominant ambition of most corporate participants. Increasingly, rather than (or as well as) the ultimate consumer, smaller (typically 'petty bourgeois' family businesses or farms) suppliers or competitors have become the object of attack for the acquisition and use and abuse of market power. Economists have belatedly caught up with the trend, but their analytical efforts, because ivory tower-based and dealing with concepts intrinsically counter-intuitive to their socialisation, have been lamentable. Witness Chapter 14 ('Buyer power') of the ACCC's report into groceries retail pricing – an embarrassment and a joke. Such is the intellectual vacuum that confronts small businesses attempting to obtain regulatory redress against their oppressors.

The lawyers display a variation on a common theme. A central theme in legal culture is that a contract is a contract is a contract, period. The law and the bench have trouble confronting a contract that is intrinsically unconscionable. Consider section 5 of the [redacted] overdraft contract:

> Despite 6 below [regarding review of the customer's operation of the facility], the *Bank* may cancel the facility at any time whether or not *you* are in breach of this agreement. Where the facility is cancelled: (a) the *Bank* will give you notice of the cancellation as soon as practical.I.e. – an intrinsically

unconscionable contract for the most fundamental of financial instruments underpinning commercial life. Does this status bother anybody in regulatory circles? Not a jot, so the [redacted] continues to use this unconscionable contract unconscionably to good effect ([redacted] 2001, unreported).

Further, the law and the bench have trouble confronting a contract that is formally above board but binds parties whose relationship is rooted in asymmetry. Enter the franchisor-franchisee contract, etc. All contracts between bank lenders and small business borrowers fall into this category.

As a consequence the bench has trouble confronting that the more powerful party to a formally above board contract will use its structured power to profitable effect. Compare the odious outcome in Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd, HCA 18, 9 April 2003 (this suit took place in more stroppy days when Allan Fels was the ACCC Chairman).

Further again, the bench even has trouble ruling against the more powerful party when that party chooses to break the terms of a contract at will ([redacted] VSC 36, 16 February 2004; [redacted], 2001, unreported). Not merely a limited education but transparent prejudice ('apprehended bias') dogs the beatific delivery of 'justice' by the Australian bench.

In context, there is no wonder that the status of 'fiduciary duty' or of 'duty of care' appears so irregularly and is treated so derisorily in the law. A contract is a contract. With respect to the banking field, for example, an arena of systemic malpractice against small business customers, the then venerable Professor Weerasooria (whose Banking Law Centre at Monash University was thoughtfully funded by the [redacted], that inveterate supporter of worthy causes) could claim with assurance that "well established judicial decisions holding that the banker-customer relationship is basically a contractual relationship of debtor-creditor", and could point indubitably to the fact that "Banks owe no fiduciary or 'special duty' to customers" (*Australian Banking & finance Law Bulletin*, 15, 9, April 2000).

Thus with economists and lawyers dominating the gate-keeping regulatory and judicial arenas, small businesspersons (franchisees not least) hardly need enemies.

The point of this diversion is to highlight that the means to a better deal for franchisees is a long haul. The main professions themselves need to be re-educated, but for this the established paradigms in those professions need an overhaul. Hell will freeze over before this happens in economics, and we want workable solutions tomorrow. By default, there is more hope in the law and amongst the lawyers.

Light in the gloom

Enter the notion of 'incomplete contract' (*vide*, e.g. Gillian Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts', *Stanford Law Review*, 42, 4, 1990). Contracts might be open-ended rather than definitive and inclusive, leaving discretion to participants – more particularly, one participant rather than other. More, confront the contract that implies an ongoing relationship, period incompletely determined. Slip in the inevitable phenomenon of asymmetric power and the rejigging of terms for the benefit of the more powerful party becomes implicit in an otherwise above board contract. Enter the relationship between a shopping centre management'/landlord and shopping centre retail tenant (other than the privileged 'anchor' tenant/s of course). Enter the relationship between franchisor and franchisee. Enter the relationship between bank and small business customer. Etc. In particular, for both shopping centre tenant and franchisee, what guarantee is there of an ongoing relationship? Regardless of the wording in any contract, none whatsoever. What about the goodwill built up by the business acumen of a retail tenant or a franchisee? Forget it.

These complexities ought to be sufficiently self-evident as to make their articulation superfluous, were it not for that the fact that our forefront professions, economics and the law, think predominantly in terms of grand abstractions with simple dimensions. Thus when a retail tenant, franchisee or small business bank customer claims that /she has been dudded, our economist/lawyer adjudicators throw up their hands in condescension because the source of the complaint cannot be comprehended.

Thus could ACCC Chairman Samuel proclaim before an audience of small business representatives, in referring to shopping centre tenancies, that "market forces play a central role in determining prices for areas like the amount of rent a business must pay". Samuel continues: "I would suggest, however, that a closer dialogue between tenants and landlords such as shopping centre owners may address some of these concerns." (Speech to National Small Business Summit, Sydney, 3 July 2007.). A closer dialogue, of course, has been occurring for a considerable period, and it is all one way, and to little effect. Chairman Samuel is not merely out of his depth, but a charlatan to boot, insulting his audience with remonstrations that effectively counsel succumbing in good grace to the unconscionable conduct that follows inexorably from structural subordination.

What an intellectual struggle for the slow learner, but that's academia for you. Conceptual enlightenment is already on hand in the domain of the capital-labour relationship. There we find structural subordination, the quintessential 'incomplete contract' (labour is by definition subject to ongoing instruction not designated in the contract because the discretionary instruction is of necessity incapable of being designated in a contract), etc.

As capitalism developed, the liberalist philosophy that legitimised the employers' self-interest could not be contained from trickling down to the lower orders, so the combination of bolshie workers from below and enlightened conservatism from above (Henry Bourne Higgins as Australian exemplar) established elaborate institutions to mediate the conflict that could not be contained within a contract built on conventional commercial lines.

It is curious that the phenomena that is the bread and butter of all labour law practitioners has been quarantined from more general application. After all, the petty bourgeoisie are the new *de facto* wage labour – industrial fodder, feeding food, for ongoing exploitation through the marketplace, with the added attraction that the formally self-employed flog themselves to the bone under the misconception that they are an independent entity. There is nothing like the cold shower of losing the family home through predation to disabuse them of their erroneous self-image. The corporate use of formally independent but structurally tied sub-contractors (the hapless truckie as exemplar) so as to eschew the on-costs of increasingly 'privileged' labour on the books exposes the nexus that joins subordinated wage labour to the subordinated petty bourgeoisie.

Those of establishment sensibilities should not take fright at the prospect of borrowing the institutional conventions overseeing wage labour for a put-upon small business class. Labor law was constructed on the hierarchy of pre-capitalist master-servant relations and remains so under the twentieth century rubric of 'managerial prerogatives'. Nevertheless, the Australian industrial relations institutional fabric acknowledged that wage labour had a rightful place in the sun and that it deserved a reasonable share of the economic pie. (It is this outrageous vision that the AWA mafia has sought to undermine.) The enlightened conservatives were exactly right in seeing the imperative of nipping in the bud a conflict that was embedded in the system which they wanted to survive and flourish and that this action was in the general public interest. Enlightened conservatives built the twentieth century and forged the material prosperity and relative stability that advanced industrial countries now enjoy.

It is powerfully instructive to know that franchisor-franchisee disputes may presently be brought before the New South Wales Industrial Commission. Aha. Lateral thinkers out there have realised the conceptual connection between labour-capital disputes and franchising disputes. More to the point, those presiding on the specialist bench, unlike the thickheads mediating the litigation of commercial disputes, appreciate that asymmetric power is at the root of the dispute before them.

A bipartisan political indifference to unconscionability against small business

Governments, on a bipartisan basis, have rarely been on the front foot in demonstrating perceptive and active support for Australia's sizeable small business community. There has been a preference for tinkering and stop-gap 'remedies'.

The effusive but empty rhetoric is always with us – 'small business as the lifeblood/backbone of the Australian economy'; blah – with the previous Treasurer, Peter Costello, being a past master of the art. Add the perennial 'we will reduce red tape' line, but instead the Howard government gave small business its unpaid supremely taxing role as tax collector for the GST.

The Howard government pulled another swiftie by saying to the small business fraternity: the class divide is not between corporate and small business but between employers and employed – "wage labour is your class enemy; join us in the universal move to AWAs". Brilliant. The depredations continued from above, so the small business community is expected to recoup its losses by taking it out of the hide of its workers. Fast forward into the past.

A small but telling instance of Liberal Party condescension towards small business is apparent during the Parliamentary gabfest in which an unprecedented number of backbenchers rise to read into Hansard the carnage amongst their franchisee constituents (as above). Into this stream of complaints, Judi Moylan, Liberal MP for Pearce, slips a word of alarm whose significance was probably missed. Moylan begins (Hansard, 1 September, p.117)

> The coalition recognises the importance of having both diversity and balance in the marketplace. While we recognise the importance of promoting and encouraging the growth of small business, this should not be to the detriment of corporate Australia.

The blah quotient escalates. She concludes the homily with the statement: "This is the very reason the Trade Practices Act was written: to develop and maintain a free and fair market that benefits consumers as well as business owners, both large and small." Well, no it wasn't. Moylan's dissonant insertion into the flow of speeches is code for a desire to maintain small business as a milch cow for corporate Australia; emancipation of small business be damned.

In addition, the junior small business portfolio has been effectively useless for small business almost from its inception. Joe Hockey was a time-server, on his way to richer pickings; Fran Bailey served as emissary from her Treasurer to her constituency to be satisfied with peanuts; Craig Emerson has conscientiously no idea – a doctorate in economics (I speak from experience) is of course the ideal qualification for his vacuous role of studied inactivity.

Why governments have been reluctant to tackle forcibly the depredations against small business by more powerful businesses remains a mystery. The Howard government at least elevated the franchising code of conduct from voluntary to mandatory status and gave us s51AC, courtesy of the exemplary Reid inquiry. (The other byproduct of Reid, a designated Small Business Commissioner in the ACCC, has proved a monumental failure.) It was all down hill from then on, with Treasurer Costello determined to deliver amendments to the Trade Practices Act that favoured the big end of town while throwing window-dressing morsels to small business. (My critical comments on Costello's mooted mid-2007 amendments are at: http://www.aph.gov.au/senate/committee/economics_ctte/completed_inquiries/2004-07/trade_practices/submissions/sub17.pdf)

My attempts to engage Treasurer Costello in early 2007 on the complete regulatory inaction on unconscionable conduct in financial services (given his double Ministerial responsibility) met with a belated cynical transference of responsibility for reply to a senior Treasury official, whose letter to me would have provided inspiration for a Hollowmen script. Thus is the relevant bureaucracy also compromised by willful political inaction.

Thus we have the Trade Practices Act we 'enjoy' today. Thanks to a craven Parliament, a generally complicit judiciary (the High Court's 2003 decision on Boral as exemplar) and an accommodating administrator of the Act in the ACCC, we have an Act (apart from s45, which only corporate boneheads would flout, *vide* the box cartel) which offers no constraint to the acquisition and abuse of market power before a façade that

promises the contrary. Nothing could be more ideal from the point of view of the big end of town. The banks and the big retailers know it, and it's business as usual.

Interesting then the unvarnished ferocity, dishonesty and general hysteria with which the big end of town and its propagandists (the big law firms, the *Australian Financial Review*'s opinion pages) have attacked Birdsville. This behaviour would tend to indicate that Birdsville has something going for it, that it runs against the trend.

Costello's acceptance of Senator Joyce's initiated 'Birdsville' amendment to s46, legislated belatedly in September 2007 after the window-dressing amendments of July, was wholly uncharacteristic of Costello's approach to that date. The concession to the 'unreliable' Joyce may have been an opportunistic vote-chaser. But it also reflected the substantial influence of radio commentator Alan Jones who relentlessly attacked the Howard government's alleged failure to address the '[redacted] factor'.

Equally curious is the new Labor government's mad rush to reverse the amendment as if the health of the free world was at stake. That people who have never before stood up for small business rights and now claim to be worried is another curiosity. The claims that small business itself will be the major casualty of Birdsville is hogwash. Predatory pricing, in particular, is an almost exclusive weapon of the powerful, effected through general financial power.

In the notorious concrete masonry affair of the early 1990s, the SME [redacted] led the chase with an innovative cost effective plant (i.e. genuine competition). [redacted], which had only recently displayed its anti-competitive credentials by active engagement in a classically illegal pre-mixed concrete cartel, set out to destroy [redacted] (and the other smallish co-competitors) by predatory pricing, using its financial muscle. The case against [redacted], not least with smoking gun evidence, ought to have been a *lay down misère*.

It is instructive that the non-government majority authors of the 2003 Senate Economics References Committee report, *The effectiveness of the Trade Practices Act 1974 in protecting small business*, argued the necessity for including in the Act, with respect to s46, that "the court may have regard to whether the corporation has substantial financial power. 'Financial power' should be defined in terms of access to financial, technical and business resources." (p.23) The recommendation was vigorously repelled by the government.

One cannot overstate the importance of 'financial power' as a fundamental component to transform a weak s46 into a powerful section. Apparently the 'financial power' component was mooted for the Birdsville amendment, but Treasurer Costello drew the line. Costello, of course, knew the significance of this proposal – its inclusion would have given genuine clout to s46. No way, josé.

The current attack on Birdsville by Labor is in the same vein. Assuming that Labor is not self-consciously in the pockets of the corporates (the attendant intention to move jurisdiction of s46 to the Federal Magistrates Court belies that likelihood), one must infer that Labor has been finessed by the hegemonic presence and discourse of the suits.

Other signs from Labor are also not promising. It shows every indication of continuing the scandalous neglect of the impasse on financial services unconscionable conduct against small business. Its reappointment of Mr Samuel as ACCC Chairman in July was unthinking. Its coincident appointment of [redacted] as Deputy Chair for consumer affairs was an obvious and appropriate choice, given [redacted]'s previous experience and informed commitment to the cause. But the choice of [redacted] as Deputy Chair for small business is questionable. [redacted], although no doubt well meaning, appears to have previously displayed no interest in the dimensions of small business operation (fundamentally the pervasively oppressive environment) that are relevant to the administration of the Trade Practices Act. [redacted] was not the only option. Is Labor strategically opting for a continuance of past practice – lip service to assertive action, speeches aplenty, but substantive neglect?

In sum

This submission may be considered a long diversion from the main issues at hand. But the intention is to provide the context to be confronted if substantive reform of the franchising arena is to be achieved.

Codes of conduct are just lightning rods for condescension from those for whom commercial corruption is second nature; weak provisions and neglected enforcement is an open invitation for those so inclined to act with impunity. As previously noted, the franchising arena has opened the gates for lesser spivs to get into the act; they rightly observe that if corporates can do it with impunity why not them? Although the placement of s51AC and a franchising code of conduct in the Act was a major step forward, weak provisions and lax enforcement effectively legitimises the corruption that the provisions were designed to prevent.

By all means improve the dispute resolution mechanisms through amendment to the provisions of the code of conduct. Let us have compulsory dispute resolution procedures, including requirements to act in good faith, prohibition of breach of confidentiality, and so on. But let us learn from failures in related domains, and the failures of the broader regulatory framework in which franchising regulation is a part.

Mediation has been seen as a solution, both procedurally and cost-wise, for seemingly intractable disputes between bank lenders and small business borrowers. But it has proved a false hope. The same root imbalance of power is brought to the mediation table. Any unconscionability on the part of the more powerful player (the bank) is assumed away. The powerful party dictates the terms of the outcome. As with the tropism of moths to light, most professional mediators, like most lawyers, tend towards the money and the power.

This inquiry needs to look beyond platitudes and platitudinal solutions, like mediation, 'better communication', 'more goodwill' on the part of conflicting parties, etc. Such formulae are not merely farting in the wind but dangerous, because they, once again, perpetuate the problem and give a green light to the guilty parties.

The root problem is that the character of franchising, by its very nature, exposes the structurally weaker party, the franchisee, to abuse. The root problem needs a root solution.

Two avenues, at the least, present themselves.

One, possible – the creation of an institutional mechanism for handling franchising disputes comparable to that existing for capital-labour disputes (before the onset of the AWA mafia), in which the bench/panel comprises a cross-section of people with deep legal and sectoral expertise. The mechanism to be funded at the public expense.

Two, essential – the staffing of a reconstructed ACCC with a rank and file staff who understand the nature of unconscionable conduct and a senior management with the independence and will to enforce the Act. At the moment, the wording of the issues underlying s51AC appears to be less problematic than those of s46; one needs a commitment to enforce the section. Budgetary provision of adequate resources to facilitate enforcement against cashed-up and belligerent (allegedly) guilty parties is, of course, an integral part of improving the administration of the Act.