

Secretary, Parliamentary Joint Committee on Corporations and
Financial Services
Department of the Senate
PO Box 6100 Parliament House
Canberra ACT 2600

Inquiry into the Franchising Code of Conduct

I thank the Parliament for the opportunity to provide this submission to the Australian Senate inquiry.

If it would assist the Senate inquiry into the franchising code of conduct to have my attendance at any hearings I will make myself available to attend.

It is always difficult for parliaments to balance the conflicting interest and the views presented. The view that is accepted is the one that is best able to influence.

Small business people do not have the resources that are available to associations or major corporations and fail to present a case for change. This submission and the research included are intended to present the case for change to the culture of the franchise industry.

This submission presents a view of the franchise industry from personal experience to help the senate in understanding the industry and the genuine franchisor business and major employer in the industry the franchisees.

The submission covers:

- The industry and procedure and practices.
- Appendix 1- Details my wife and I Personal experience of the franchise industry.
- Recommendations for change.
- References.

Yours Sincerely,

Leicester Ramsey

**Submission Secretary, Parliamentary Joint Committee
on Corporations and Financial Services
Department of the Senate
PO Box 6100 Parliament House
Canberra ACT 2600**

12 September 2008.

Introduction

At the introduction of my submission I must declare that I am currently in legal dispute with the [REDACTED] for breaches of the Trade Practices Act. I ask that the inquiry will not be prejudiced in reading my submission but take the time to understand the difficulties and issues that franchisees like me encounter and thank the Parliament for establishing this inquiry and hope it achieves some worthwhile recommendations and legislation.

Every day in the media there are reports about problems in the franchise industry. These include franchises/franchisors going broke, legal disputes between them or franchisors not wanting to renew franchisee agreements once a brand has been established in the market.

Below is a summary list of companies which been reported in the media. Some have had problems that include either the franchisor or a number of franchisees having entered into external administration (receivership, administration or liquidation) arrangements or are in legal disputes:-

[REDACTED]

[REDACTED]

[REDACTED]

This list does not include franchisees that have walked away and is not conclusive but a reflection of the systemic state of the franchise industry in Australia.

Franchisee Failure

When a franchisee fails, the Franchise of Council Australia (FCA) or the franchisor is quick to blame the lack of experience or capital to justify the franchisee's business failure. Generally the franchisee will have invested from savings or borrowed because the industry is promoted as low risk.

The net effect is that when franchisees fail they will accumulate substantial debt or loss of personal assets including family homes, forcing the individuals or family to go bankrupt and into poverty adding a financial and medical burden on the government and taxpayer. Thousands of employees are also made jobless and creditors including other small to medium business are financially affected.

While mediation is significantly cheaper than litigation, the cost of participating in the process may represent a significant expense for many franchisees.

Economic Benefit

The franchise industry growth between 1999 and 2003 and the contribution to the Australian economy with approximately 700 franchise systems operating employing approximately 388,500 people compared with 693 systems in 1998 and 708 in 1999. The number of franchised units increased 20% since 1999. (Source ANZ industry brief 2003)

A survey by Griffith University sponsored by the Franchise Council Australia (FCA) 2006 reveals Australia's booming franchising sector turns over an estimated \$128 billion or 14% of the country's GDP. This is up 10% of GDP or \$80 billion quoted in the 2004 survey.

Franchising Australia 2006 found the franchising sector has charted close to 13% growth overall between 2004 and 2006, with 960 franchise system operating across Australia. (FCA Media release October 2006).

The number of people employed in the franchise industry is estimated in 2006 at 426,500 the majority in NSW 34%, Victoria 24%, QLD 20%.

The survey figures show that the industry makes a major economic contribution to the Australian economy. With this mind, it is important that individual franchisees who risk the most financially, emotionally and employ the majority in the industry should have more protection and have a greater say in the industry. It should not be left to the FCA and the franchisors to determine industry regulations.

The level of franchising disputes is shown as low in the Griffith University Survey, funded by the Franchise Council of Australia, giving politicians and the public the impression that the franchise industry is a low risk industry. This, however, does not reflect media reports or anecdotal evidence.

What is needed is independent data for the industry through reporting to the ASIC. Without such data it is very difficult to establish the true state of affairs and allows the industry to create a false sense of security for the unaware.

In Australia, it is impossible to know with certainty how many franchise systems have failed. The public records do not require businesses to identify whether they are franchising. This makes it difficult to refute the franchisor rhetoric that franchising is safer than going into business alone.

ACCC

Over the years the ACCC has been ineffectual in prosecutions before the courts. I am informed that there have only been 15 successful prosecutions and argue that the current legislation makes it difficult to prosecute or that not enough evidence is available to justify further investigation and prosecutions.

Tell that to the wife's, partners and children who are thrown out of their homes and put on the poverty line because of unethical behaviour by franchisors.

ACCC's Response Fails to Quell a Protected Car-Care War: The Australian
Peter Switzer – July 04, 2007

The competition watchdog's failure to settle disputes has riled former franchisees involved in a protracted war with their franchisor. The saga has had everything from cyber-crime to suicides to underworld figures, and should be a federal election issue.

██████████ and his partner ██████████ were involved here, their franchise being ██████████ specialising in car mufflers. The pair complained to the ACCC about corporate bullying, intimidation, refusal to negotiate with franchisees, misrepresenting company profitability, misuse of marketing funds, non-payment of rents and - believe it or not - a whole lot more. "I was disgusted at the ACCC's reply," Ms ██████████ said. "It seems like they contacted ██████████ and asked them if they were doing what we accused them of. ██████████ said 'no' and the ACCC believed them".

Ms ██████████ admits this is just her impression and she can't be sure of how deeply the ACCC dug, but this is not the first such criticism has been levelled at the commission.

The president of the National Federation of Independent Business John Farrell thinks big business mistreatment of small business ingrained.

“You need to know the commercial rape strategies that are in place in the franchising, leasing and contracting area,” he said. “Billions of dollars are involved in the ‘theft’.”

Be clear on this: franchising can be great. But some franchisors behave like bullies, while some franchisees are duds who want to blame someone else for their failings.

This, with supporting evidence was submitted to the ACCC, but still was no action. John Farrell said there was a endemic problem in Australia of middle-order franchisors systematically and deliberately recycling franchises.

He claimed that [REDACTED] was a classic example of where the owners did not care if franchisees stayed in business because they could make more money by reselling and restarting the stores.

The devil is always in the detail, and small business can only hope that both sides of parliament get serious on this subject. A Small Business Commissioner linked to an effective resolution system is long overdue.

ACCC investigation staffers suffer no financial penalty if no legal action is taken against breaches of the code even though there may be a case to answer. Leaving the franchisee trying to instigate legal action while financially ruined or on the brink of bankruptcy who suffers.

As the current system has not produced results only spin, the proposed ACCC Small Business Commissioner secretariat should be financially bench marked against any funding through successful prosecutions for breaches of the code and registration fees. This would focus the ACCC Small Business Commissioner more on successful outcomes, making the industry more stable and economically viable.

I have personally lodged a complaint by registered mail. After a month I received a phone call from an ACCC representative who asked how it was going. I explained I was in court against the bank. The person wished me success with my legal action and asked for other franchisees to speak to and hung up. I have, as yet, not received any correspondence from the ACCC to even acknowledge my complaint.

Other [REDACTED] franchisees have also told me of similar stories: they received an initial phone call with no further follow up from the ACCC.

I have also contacted the appropriate Minister’s office for follow up with no success even though I have correspondence confirming the office has taken the opportunity to contact the ACCC.

Many Small Medium Enterprises (SME) franchisees are too busy trying to build the business, blaming themselves for business failures, threatened or intimidated through legal action, issuing of breach notices by the franchisor, lack of support from the FCA or

the ACCC and are not prepared or are financially unable to take any legal actions for breaches under the code.

Government Inquiries

Over the years there have been many inquiries into the industry, the most recent in WA and SA. The majority of these inquiries have failed to address the fundamental issues affecting the industry because the Franchise Council of Australia and other vested interest have successfully lobbied politicians and governments departments to discourage any meaningful changes that would protect the unaware and benefit the long term viability of the franchise industry and the Australian economy.

Politicians need to understand the franchisee is a business owner paying taxes, investor, employer and provider to dependants. Maybe this would help them not to be reluctant as in the past but to legislate the recommendations from Western Australia and South Australia. In this way, the current inquiry can achieve what has not been achieved in the past: the provision of security for the honest franchisor and franchisee/investor and enhanced confidence in the industry.

Franchisor

To establish a franchise business a franchisor is currently only required to register with State or federal bodies like ASIC or NSW Consumer Affairs as a legal entity or business name. In most instances they are already registered as an existing business and are not required to be licensed or provide a franchise prospectus. By contrast, franchisees are asked by franchisors to make one of the biggest investments of their lives; this without full information or adequate, formal training in franchising.

The franchisor registers brand name, trade marks and claims to have a systems or model and industry expertise. Nevertheless, in many instances, the franchisor creates the business systems/marketing long after they have sold the franchises to the detriment of the franchisee.

Franchisors may have a good idea or an existing business that they have operated successfully and decide that by franchising and creating brand awareness they can leverage their income through franchising fees, royalties, advertising levies, all this with minimal financial risk to them through practices like churning.

The franchise carried the majority of the expenses not the franchisor [REDACTED].

Franchisor Training

The question always asked is: what is the franchisee's experience? An equivalently pertinent question is: what formal training does a franchisor have in managing franchises,

site location, premise fit outs, marketing. Many franchisors lack formal training and the skill base to manage up to 100 franchisees (SME's) as distinct from employees.

This can result in situations where a franchisor uses existing employees from the organization who are trained in a corporate culture with no appropriate franchising experience or formal training in property management as franchise area managers, state franchise managers who continue to treat franchisees as if they were employees.

The need to expand the brand rapidly for shareholders and managements benefit can be disastrous for franchisees when the management experience does not match the growth – disconnect that may involve executive ego, share options and the need to increase the share price.

Unfair? Ask franchisees who have experienced the consequences of fast growth, no system, inexperienced management and the need to expand to meet board and market expectations.

Industry Representation

The Franchise Council of Australia promotes itself as an organisation representing the Franchisor and Franchisee. Membership is said to include Franchisors, Franchisees, Lawyers and accountants. FCA on its web site includes the benefits of membership include:

Government Lobbying

'The Franchise Council co-ordinates member feedback for the compilation and representation of submissions to government on relevant franchising issues, providing a strong voice for the sector to promote legislation and policy favourable to a strong and growing franchise sector. Members save time, energy and money making representation to government by channelling their issues through the FCA'.

In its submission to the SA Inquiry, the Franchise Council of Australia (FCA) asserted:

Industry statistics confirm that franchising continues to prosper throughout Australia, including South Australia. The FCA does not believe there are any endemic problems in franchising, a view confirmed by the recent Federal review of the Franchising Code of Conduct [...] All participants in the franchise sector acknowledge that the current Federal regulatory framework is working well. [...] The FCA believes the current regulatory environment creates a fair balance between the need for effective regulation supported by a strong and well resourced regulator, and the importance of minimising compliance costs for this entrepreneurial sector. [...] The FCA does not believe that current laws disadvantage franchisees. Indeed the laws provide strong protection for franchisees. Australia has

*the most comprehensive franchise laws regulatory framework in the world.*²²

²²Submission by Franchise Council of Australia, 21 January 2008, p3.

In the same submission, the FCA acknowledged there were views to the contrary but characterised them as in the main emanating from a minority of industry participants seeking to lay blame for their failures on flaws in the Code.

A majority of franchisees who contributed to the inquiry, and most industry academics, expressed their dissatisfaction with the current regulatory regime and the level of protection that was in protection given to franchisees. The FCA's praise of the system was a largely isolated view.

- *Misrepresentation by franchisors;*
- *Hidden commissions and fees;*

The Franchise Council Australia represents a small percentage of franchisee in the industry. Many franchisees in the industry in which I was involved were not members of the association. Other franchisees from other industry I have spoken too are not members and have said they do not represent the opinions of franchisees and that submissions made by the association are not representative of franchisees and more represent of the franchisors views and opinions.

The [REDACTED] and [REDACTED] the legal firm representing the bank in disputes with ex-owner/manager franchisees of the bank are both members of the Franchise Council of Australia and have negotiated using what can be perceived as intimidation, threats and legal action .

For the FCA to say it can represent the franchisee owner-manager equally in lobbying would be like having an employer association saying it will also represent union members equally in representation or an atheist saying he will argue the case with the same conviction for a person of faith or vice-versa.

Industry Research

Currently the majority of surveys on the industry over the years has been undertaken by Griffith University, funding being provided by the FCA. Many of these surveys provide information for those interested in the industry although terms of reference are determined by the association.

To avoid possible conflict of interest and the creation of security and false sense of low failure rate in the industry for unwitting franchisees, ASIC, a government body with easy access to public records, should be responsible for providing accurate information on the true state of the economic state of the industry.

As an ex franchisee, I noted a recent article in the *Griffith News* has the following comments on a new program from Griffith University.

Stopping ex-franchisees destroying your System (Griffith News Fiona Taylor Sun 11th May, 2008).

There's a new ex and they can do even more damage than an ex-wife or husband - it's the ex-franchisee - and a new franchising centre is providing advice on how to stay protected. Centre director and leading franchising expert Professor Lorelle Fraser said the damage caused by ex-franchisees could be harmful to the system.

The seminar will explore why ex-franchisees engage in destructive behaviour and what they hope to achieve, common types of destructive activity and how to monitor it and how to develop processes to maintain positive brand engagement among ex-franchisees.

FCA Chairman Will John O'Brien will launch the new Asia-Pacific Centre for franchise excellence.

Griffith University running courses like the above shows the perceived, or otherwise, conflict potential.

The funding for ASIC to survey the franchise industry could be raised through a yearly franchisor/franchisee fee which would also provide funds to investigate industry complaints for breaches of the code.

The Franchise Relationship

Intimidation applied by franchisors and their legal representatives in the industry. The following comments in the Western Australian Inquiry into Franchising as reported in the media.

Professor Andrew Terry, of the University of New South Wales, explained the notion of franchisor control:

Unequal access to information about that particular franchise system and a disparity in economic leverage makes the franchisee the more vulnerable participant of the franchise arrangement.

In what appears to be an all too common occurrence in franchising the Franchisee is indeed in a very vulnerable position in a Franchise Agreement under a hardened or well practiced Franchisor. It is undeniable that a Franchisor has considerable advantage in relation to both influence and knowledge of the franchised business, and this knowledge of the business is crucial to a franchisee making an informed decision when considering entering into a franchise agreement.

Industry Intimidation and [REDACTED]

The franchisor also uses intimidation of franchisees, including threats by franchisors not to renew franchisee agreements and churn through the continual sale of franchise out lets that are unlikely to ever turn a profit, a move that is legal under Australian law because franchisees have no automatic legal right under the franchise code.

Many [REDACTED] franchisees were funded by the bank, security being provided through a mortgage on the individual's home or other assets. I was told that the [REDACTED] franchise required my home as security, creating, through misrepresentations, an exposure for my family and an abuse of market power.

Like many franchisees I had [REDACTED] and [REDACTED] at the [REDACTED] [REDACTED]. Without [REDACTED] representatives in attendance, I organised a franchisee meeting to discuss concerns about misrepresentation by [REDACTED] representatives in negotiations about the viability of the branch franchisee business.

The [REDACTED] following the termination of my franchisee agreement, used my [REDACTED] information and approached my creditors with whom I had made arrangements to pay and instigated legal action to sell my family home knowing that during the Christmas/New Year January holiday period it would be difficult to defend.

The [REDACTED] has since used other franchisees bank account information and frozen commission against other owner managers in financial difficulties. It has also used this information in negotiations while franchisees were still operating as owner manager or after leaving the [REDACTED].

Many [REDACTED] ex and current franchisees have had threats from [REDACTED] representatives including threats for speaking to the media, the threat of the sale of family home, attempts at contempt of court legal action where no contempt of court applied. These are matters of which my family and I have had personal experience

I have since learnt that the [REDACTED] has used [REDACTED] information against other franchisees who have asked for financial assistance after telling the [REDACTED] they are encouraging [REDACTED] owner managers to trade insolvent.

The [REDACTED] used its intimidation tactic when I was served with a breach notice for talking to the media about the Work Choice legislation and the effect on borrowing money for borrowers. I sought legal advice and answered the breach notice. The [REDACTED] refused to accept my response to the breaches and repudiated the franchise agreement knowing my full financial position.

This provides the [REDACTED] with the opportunity to churn reselling the franchise for a further franchisee fee and transfer fee. The [REDACTED] in NSW has sold 50 franchises. If they charged \$80k, that equals \$4million in franchise fees. Not including other [REDACTED] fees and charges that apply monthly.

Insolvency in the franchise industry

The issue of insolvency in the franchise industry is a major area of concern for franchisees. Another is the protection available if the franchisor goes broke. Yet another is the franchisee being forced into a situation of trading while insolvent through intimidation and the financial and legal penalties the franchisee would suffer, not the franchisor.

CPA Australia

CPA Australia on its website quotes the following statistics and makes the following points about the franchise industry.

The sector turns over an estimated \$128 billion – or 14 per cent of the Australia gross domestic product (source Griffith University).

The study found the franchising sector has recorded close to 13 per cent growth between 2004 and 2006, with 960 franchise systems now operating across Australia.

A recent CPA Australia study showed that franchisees have little legal redress if a franchisor fails. The exploratory study, *When the Franchisor Fails*, conducted by the University of New South Wales, aimed to determine the effect of the franchisor failure on franchisees.

CPA Australia's Business Policy Advisor, Judy Hartcher said, 'Franchisees have no control over their future when a franchisor fails. They are often at the mercy of liquidators and administrators whose primary responsibility is to find the best outcome for creditors.

'The best price, not the best buyer, is the liquidator's main concern when selling the business. Little consideration is given to the buyer's ability to run a franchise system.'

'Franchisees are also vulnerable to the decisions made by liquidators that could affect their business viability. The study found that franchisees of failed systems had no statutory voting rights at the franchisor's creditors meeting as they are not usually recognised as creditors by the law.'

Ms Hartcher added: 'The exposed position of franchisees when a franchisor fails supports the view that they have limited legal redress under Australian insolvency laws and there may be an opportunity for review.

'CPA Australia's main concern with Part 2 of the code is motivated by the minimal recourse for franchisees under current insolvency laws when a franchisor fails.

‘Further complications for the franchisees are created by the lack of rights provided to them under insolvency laws. Franchisees at present have little or no participate through voting rights in creditor meetings as they are rarely accepted as creditors. In addition, other business arrangements including franchise agreements and premises leases for the franchisee can be terminated at the discretion of the liquidator.’

The CPA Australia study identified 40 failed franchisors in the last 15 years, affecting 1090 franchisees. According to the study, franchisees that were hardest hit by the franchiser insolvency were those that had many employees.

Jenny Buchan, a commercial lawyer with 20 years experience in private practice and now an academic at the University of New South Wales, makes the point in her report on Australian franchising and insolvency that there is significant statistical, market related information available about the sector, which has proved invaluable for her report. She cited the following comments and quotes from the Frazer and Weaven report:

- In 2004, there were about 850 franchisors in Australia.
- There were 50,600 business-format, franchised units operating (about 42,800 franchisees – some have more than one outlet (Question D10 Frazer and Weaven).
- The average age of the franchise systems was 11 years.
- The average total start-up cost of a new franchised unit (excluding GST) was \$120,000 (range: \$ 2,500 to \$ 870,000).
- The average number of franchised units in a system was 26 (range 0 to 3,700).
- The average number of employees per franchised unit was 310 (including permanent full-time, permanent part-time and casual).
- Sixty-nine per cent of franchised systems operated from specific premises; and thus often had lease-related obligations.
- Franchising contributed about 10 per cent of Australia’s GDP (source: Franchise Council of Australia).

Jenny Buchan further comment that in 1991, the Federal Government commissioned Franchising Task Force Report (Beddall Report) made the following recommendations. She also goes on to emphasise that further legislation changes are required to protect the franchisee where the franchisor is insolvent.

Franchising should only be embarked upon by successful businesses. The myth that franchisors do not fail has been perpetuated in Australian annual surveys of franchising which describe growth in number of franchise systems in successive years without referring to the number of exits.

The NatWest 2004 United Kingdom Franchise Survey provides a more balanced picture of franchising in the UK. The net increase in the number of franchise systems (to an estimated 695 in 2004) masks the fact that that as always there have been a number of withdrawals as well as additions. Many of the withdrawals are the result of companies

deciding to discontinue franchising as a means of expansion, or companies new to franchising.

The criteria used for inclusion is extremely strict, so each year some companies are no longer considered appropriate for inclusion. Many brand names may therefore continue to trade successfully (most likely with company-owned outlets), but are no longer judged to be actively involved in franchising.

This notion of a proven, and by implication infallible, business model, is perpetuated by the Franchise Council of Australia. In his message introducing the July/August 2005 edition of *Franchising Magazine*, the chairman of the Franchise Council of Australia, Stephen Giles, cites a reason for the current high level of credibility of the franchising model of business development in Australia. Australia has a regulatory framework that provides strong protection to franchisees.

The Beddall Report in Recommendation 1.19 proposed that the Bureau of Statistics should be required to collect on an annual basis the statistical information in relation to franchising in Australia including the Number of outlets that have ceased trading (among other things).

Insolvency Law in Franchising

Point 2.9 of the report states that franchisees are clearly vulnerable to the collapse of the franchisor .

The report made the observation that some disappear and have not necessarily failed as a business. The franchisor may buy back franchised outlets from franchisees after deciding to move away from the franchise model.

The Beddall Report was intended to reduce future franchisor/franchisee failure rates. But not all the report's recommendations have been implemented either because of industry lobbying or for political reasons and the effects can still be seen.

The image of franchising has been damaged with the recent collapse of [REDACTED] and media reports of disputes between the franchisor and franchisees of [REDACTED] [REDACTED] [REDACTED] and [REDACTED].

The collapse of [REDACTED] according to media reports, meant 100 employees being made redundant, 130 franchisee store closures, franchise owners financially ruined, emotionally devastated and families destroyed adding to the financial burden on the tax payers for their welfare and that of their employees made redundant because the franchisor became insolvent.

The [REDACTED] collapse once again shows that previous inquiries have failed to address the franchise industry's fundamental problems as focused by the recommendations of the WA/SA inquiries. The current federal inquiry will surely take account of these recommendations and implement them to reduce the risk of another industry failure.

Franchisees are included in the class of unsecured creditors, having, as they do, an employee-like relationship with the insolvent franchisor. Under the current law, they typically have no specific legal rights that a liquidator would be required to recognize. They must rely on contractual rights a very difficult situation when all assets have been lost.

Identifying Failed Franchisee Systems

No government department is responsible for collating industry statistics. It is difficult, therefore, to identify and find current contact details for individual former franchisees. Only franchisors records would contain complete records of franchisees.

Litigation Records

The lack of reported court cases about franchising also limited attempts to discover information about the inner workings of franchise systems from court records. The Franchising Code of Conduct mandates mediation as the compulsory method of attempting to resolve franchise disputes before proceeding to litigation. As mediation is a process of confidential dispute resolution, no system specific details are published.

In addition, anecdotal evidence from the Franchisees Association of Australia indicates that many franchisees choose not to become involved in litigation against their franchisor, even when they feel they have a strong case, because they fear that if the franchisor is negatively affected their own business will be similarly affected. This has definitely proved to be the case with the [REDACTED] Franchisees.

Franchisees Personal Assets

The franchisees assets usually consist of real estate property, personal assets such as vehicles, cash in the bank or shares in public companies. If the franchisee is a husband and wife team or siblings, more than one individual may own the assets. Where a franchisee uses personal loans or guarantees from family members, these can be at risk. Some franchisees who went into a [REDACTED] used their home and other assets as security to fund the franchise purchase on the recommendation of the bank with the latter as mortgagee.

Advantages of becoming a [REDACTED] franchisee

The major advantage for a [REDACTED] franchisee was its expertise, franchise model. In the early NSW start-ups, the [REDACTED] existing [REDACTED] appeared to guarantee success for national roll out to green field sites in NSW, the [REDACTED] income trail covered the operational expenses of rent, staff wages and bank computer system cost.

In NSW franchisees who went into [REDACTED] Greenfield sites (excluding the original 2004 franchises who received the trail income from the [REDACTED] existing [REDACTED]

██████████ in one case up to \$20k pm and not disclosed at time of due diligence) are in legal dispute with the bank are financially ruined as Peter Switzer so put detailed in his article title which highlighted the industry problems:

Dead men walking as competition watchdog turns a blind eye

Peter Switzer *The Australian June 17, 2008*

AS the franchise industry fights in the High Court to ensure its agreements are not rendered null and void, disputes in well-known franchise systems underline simmering problems in the industry.

One franchisee thinks his ██████████ colleagues are dead men walking.

Another, from the ██████████ group, who thought the Australian Competition and Consumer Commission erred in their investigation, was told that her request for all relevant information under Freedom of Information was to be denied because of the cost to the ACCC.

Many reasonable thinking Australians might conclude that someone in the ACCC has taken insensitivity and hubris to a new, obnoxious level.

People who have lost a decision made by the commission, and who next could lose their home, should be entitled to see why they have lost out.

Leicester Ramsey, a former owner manager of the ██████████ branch at Campbelltown, is the man who thinks the owner-manager network of the ██████████ NSW branches are "dead men walking".

"I regularly receive phone calls from existing owner managers who say they are going broke financially and suffering stress owning a ██████████ branch while the ██████████ announces record profits," he says.

Ramsey says some franchisees have said that the ██████████ has funded further loans to keep them afloat, which in normal circumstances they would not be able to borrow because they would be considered insolvent.

"One owner manager said he had needed to sell his investment property, had no equity left in his house and now had a debt of \$80,000 on his credit cards."

Ramsey has taken legal action in the Federal Court alleging misrepresentations and unconscionable conduct under the Trade Practices Act.

"The [REDACTED] had said \$4 million in loans a month was achievable and these figures were reported to the ASX," he says.

"With all my efforts I was not able to achieve \$4 million a month and the majority of owner managers have consistently been unable to achieve that figure and, because of this, the branches are financially unviable."

Ramsey nominates nine branches in NSW where the owner managers said they could not make it work. In an ironic twist, someone like Ramsay, who went into franchising to [REDACTED], looks set to lose his.

He will be in court later this month seeking an historic injunction to stop the [REDACTED] from selling his home, arguing that he would not be in his current financial position but for the [REDACTED] actions.

The outcome of this case will hold a lot of interest for other franchisees in dispute and fearing that they might lose their homes.

Deanne de Leeuw is a franchisee who has asked for help following a rejection from the ACCC after the body cleared [REDACTED] of unconscionable conduct. De Leeuw can't even access the information on the case through the Freedom of Information Act because the commission says it would be too costly.

"This decision has again highlighted fundamental problems within the ACCC, and I would question their investigators understanding of the Trade Practices Act," she says.

"It appears that the ACCC has conducted a 'he-said, she-said' investigation, and once again the highly paid lawyers of the franchisor have managed to make the issue contractual, rather than looking at the conduct."

The commission's view is substantially different.

"Having conducted an in-depth investigation, including analysing a large amount of documentary evidence and conducting a number of detailed interviews with various witnesses, the ACCC has decided not to take any further action," it reports.

It concludes that [REDACTED] did not engage in unconscionable conduct or breach the franchising code.

Claims made by franchisees were sometimes unsubstantiated and even contradictory with the evidence, it says.

"It should not be assumed that where there is smoke there is always fire," ACCC chairman Graeme Samuel says.

"The ACCC is experienced in testing matters raised with it and often its investigations lead it to the conclusion that those matters cannot be substantiated."

"De Leeuw is flabbergasted, as are many franchisees who have learnt that there is no safety in numbers before the ACCC. "I know the quality of the evidence that we personally gave the ACCC," she says.

"I know that over 20 complainants from around Australia who have never met and yet have experienced the same treatment that has resulted in everyone losing everything they owned."

She thinks the reasons given by the ACCC as to why they would not proceed any further were couched in "contract" speak.

Samuel and his team aren't heartless bastards but they have to be able to see that if they run a legal case, there is a good chance the ACCC will win. A new resolution system, like the consumer and building disputes tribunals, which excludes the lawyers, is needed. And a franchise ombudsman is needed to identify the bad franchisors and the hopeless; whingeing franchisees, but politicians don't give a toss.

I don't know if the [REDACTED] or [REDACTED] have cases to answer, and they are innocent until proved otherwise, but I do believe where there is smoke there is fire.

Maybe franchisees need a compulsory education program before they jump into franchising.

Whatever it is, someone in the federal Government, such as Small Business Minister Craig Emerson, should show some interest in small business owners who are losing their homes.

Peter Switzer is a founding director of Switzer Business Coaching, www.switzer.com.au

Without exception, franchisees lose family home, money when the franchisor fails or they have been misleading through misrepresentations from the franchisor.

Many factors can influence the financial viability of franchisee business including the economy, poor management, franchisor systems or employee's some may be causes of the franchisee others may be the economic cycle or decisions of the franchisor.

Earlier this year, a report by Liam Walsh in *The Courier Mail*, Brisbane gives an example of the decisions made by a franchisor that effect the financial viability of a franchisee.

[REDACTED] has fuelled complaints among its franchise operators by altering a payments system.

The change could squeeze their margins. The [REDACTED] blamed the credit crunch for the change, affecting operators already upset about the cost of problems with computer systems and customer correspondence.

"Forgive me if I find it a little a hard to swallow that the bank has taken the decision to reduce the margin on our [REDACTED] because of recent events," one Queensland branch manager wrote in an email to [REDACTED] executive and his franchise peers nationwide.

Almost 200 franchise operators comprise [REDACTED] owner-managed branch (OMD) model.

[REDACTED] has previously painted the model as a growth driver and some franchise operators praised the system.

However [REDACTED] yesterday only issued a short statement, saying that the complaint email was, "two months old and we have addressed these issues in consultation with all stakeholders".

The model has come under fire from some NSW franchise operators and resulted in legal disputes.

Some have complained of being unable to [REDACTED] and poor marketing support.

While this might be linked to NSW's weaker economy, the email indicated frustration elsewhere.

Franchise operators secure loans and deposits.

They earn a margin from [REDACTED] based on [REDACTED]

In May, [REDACTED]

That was a 0.15 per cent rise from 0.3 per cent.

"This...will increase margins [REDACTED] and reduce margins [REDACTED]" [REDACTED] group executive [REDACTED] wrote to franchise operators.

He said this would return [REDACTED] positions back to [REDACTED] levels.

Sources said the net effect would be a squeeze as the [REDACTED] model focuses on [REDACTED] more than [REDACTED]

[REDACTED] has also moved to boost rewards to franchise operators with a six-month additional [REDACTED] incentive payment".

The charges came as the [REDACTED] lift costs for [REDACTED] – particularly regional's – to tap [REDACTED]

[REDACTED] have compensated by increasing [REDACTED]

"These increases have effectively passed on some of the [REDACTED] cost of [REDACTED] to our customers," Mr Hines said.

"However they have not been applied to our [REDACTED] cost in relation to the calculation of our [REDACTED]."

However one Queensland branch manager, in an email seen by the Courier-Mail, complained about the [REDACTED] change.

He said many operators had seen problems like an "unacceptable IT platform, product defects, poor customer correspondence, process and procedures".

These had "resulted in the [REDACTED] continually absorbing additional costs".

This absorption has gone on for five years "so forgive me if I find it a little hard to swallow" that recent events had triggered the decision to "reduce the margin on our [REDACTED]", he wrote.

He declined to talk to the Courier-Mail.

Another example of a franchisee too frightened to talk publicly.

Julian Dowing makes the point that investing in an franchise business should be treated like investing in any other business and come under the scrutiny of the corporate watchdog, the Australian Securities and Investment Commission, a franchise lobby group says.

David Beddell, a former Small Business Minister under the Hawke and Keating Governments who heads up the lobby group on a pro-bono basis believes his plan would stop the duplication that goes on for each franchisee in investigating agreements separately through advisors, but will highlight common pitfalls.

Mr Beddall wrote about the mass due diligence required (and sometimes lack of it), in an earlier submission to the South Australian government enquiry: "It's as every stock market investor had to do his own 'prospectus' because an ASIC body did not exist".

"A large portfolio of the problems stem from unfair and inappropriate franchise agreements signed by trusting, uninformed or unwary investors".

He said one such trap for regional players is where there is a multi-national franchise, which mainly sells into regional cities; has a subtle clause in addendum (not the agreement itself), which gives the franchisor the power to increase turnover fee by as much as they like and whenever.

However, this is a contravention of the Franchising Code, which says a franchisee is entitled to fairly know the costs that will be levied by his franchisor.

“Yet the franchises keep getting solid – and the regional lawyers, accountants and business advisors, mostly inexperienced in franchising, keep missing this ‘legal’ clause, as well as others”.

Mr Beddall told Mysmallbusiness: “We think a franchisor document should be lodged with ASIC and there should be more rigour.

If the professional adviser in law and accounting miss the issues what hope has the uneducated franchisee against the industry.

This raises the question how you get unbiased advice with in the current regulatory system.

In West Australian angry franchisees have called on the Government to independently pass state legislation that works to tighten the Franchise Code of Conduct because of bullying by franchisors, intimidation, including threats by franchisors not to renew franchise agreements, and franchise churn – the repeated sale of franchise outlets that are unlikely to ever turn profits – at yesterday’s public hearing in Perth.

[REDACTED] is refusing to renew licences for all of Competitive Food’s outlets, a move that is legal under Australian law because franchisees have no automatic right to license renewal under the Franchise Code of Conduct – the industry’s body of regulation, which is given the force of law under the Trade Practices Act. Forty staff in WA has already lost their jobs because of the dispute.

The anecdotal evidence suggests these types of practice are either applied or threatened by franchisors in Australia continually.

Jenny Buchan: Lecturer – Business Law and Taxation, Australian School of Business, UNSW.

Legal Rights Accorded to Franchisees of Solvent Franchisors.

In recognizing the potential vulnerability of franchisees as consumers, many countries have enacted legislation and pre-contractual disclosure obligations to provide some pre – contractual procedural protection for indenting franchisees.

A growing number of jurisdictions provide for pre-contract franchise disclosure. This may take the form of disclosure mandated in legislation, or practices developed through

the general law of the jurisdiction or a voluntary code supported by the national franchise association. Countries have variously categorized franchisees as business consumers, entrepreneurs and business entities.

Even where specific disclosure laws have not been enacted, many countries have adopted laws to regulate franchising. These include Albania, Barbados, Belarus, Croatia, Estonia, Georgia, Kyrgyzstan, Macau, Moldavia, Saudi Arabia, South Korea, Ukraine and Venezuela.

In all jurisdictions where government regulators seek to provide a level of protection to franchisees, the message needs to be objectively and fully conveyed. In the USA, implicit in the title of the FTC publication, *A Consumer's Guide to Buying A Franchise*, is recognition that the majority view is that franchise purchases are non-consumer transactions is not accurate. Tens of thousands of consumers purchase franchises, and for these non-commercial purchasers, the statements of a government agency are influential.

The Australian franchise regulator, the ACCC, is similarly guilty. In its 2007 response to the 2006 Review of Disclosure Provisions of the Franchising Code of Conduct, the Australian Federal Government agreed in principle to the review's recommendation 'that franchisors should be required to provide to future franchisees a Risk Statement. This, together with the ACCC's educational material, should clearly describe the risks and consequences associated with franchisor failure'.

The government rejected the need for the franchisor to supply a Risk Statement to incoming franchisees in favour of recommending that, 'the ACCC address the importance of considering the consequences of franchisor failure in its educational material'. The ACCC's response was to publish a pamphlet called, *Being Smart about your New Franchise and Your Retail Lease*. It does not mention franchisor failure. Greater care must be taken by regulators to provide accurate information.

While countries categorize franchisees differently, they essentially recognize the same vulnerabilities and provide the same rights to address the vulnerabilities for the franchise pre-contractually. The disclosure is a snapshot of the current status of the franchise network, focusing on the financial and legal fitness of the entity called the franchisor. Even in jurisdictions where the franchisees have a recurrent right to receive updated disclosure documents, this will not enable a franchisee to predict the franchisor's future solvency, or insolvency plans.

As comprehensive as the disclosure provisions are, there are situations when it is extremely difficult for prospective franchisees to make a fully informed franchise purchase choice. According to the 2006 Franchising Australia Survey, 'more than two thirds of franchisors are organised as private (proprietary) companies. Fourteen percent operate as public companies and a further 10 per cent are organised as trusts'. A franchisee conducting due diligence to verify information disclosed by the franchisor is potentially confronted with three problems.

- If the franchise is owned by a public company, there will be very little information that is specific to the wholly owned franchisor subsidiary in the published annual returns of the public company.

Franchisor Failure in Australia – Impact on Franchisees and Potential Solutions.
Jenny Buchan: Lecturer – Business Law and Taxation, Australian School of Business, UNSW.

Common Law and contract principles

Franchisees are encouraged to read the Franchise Agreement and to ask questions, but, depending on the franchise system, any requests by an incoming franchisee for changes to the system's standard franchise agreement are strenuously opposed by the franchisor. The franchisees in the best position to negotiate non-standard terms into their franchise agreement will be the first franchisees of a new system or the first one in a new State. The franchisor has a legitimate interest in wanting to keep all franchise agreements standard from an administration point of view.

Causes of Franchisor Failure

Three years after the Franchising Task Force had filed its report in Australia, Stanworth, Purdy and Price reported identification of some causes of SME (small and medium-sized enterprise) failure as being "generic" which should actually be remedied or reduced by franchising (Cross 1994, pp2-4). These are:

- Undercapitalization
- Absence of economies of scale, lack of business acumen
- Inability to survive intense competition in sectors (such as retailing) where barriers to entry are low.

"Failure as a result of "franchising-related" factors, are seen by Cross as falling essentially into five key categories:

1. Business fraud
2. Intra-system competition, involving franchise outlets being located too close
3. Insufficient support of franchisees
4. Poor franchisee screening
5. Persistent franchisor-franchisee conflict"

Franchising is likened to a marriage. As with matrimonial property, a franchisee's assets originate from two sources – those owned prior to franchising and franchisee related assets. Before buying the franchise business, a franchisee often owns assets as an individual. On buying into a franchise system, they acquire assets in the business. The franchisee may secure the purchase of the franchise business with personal assets such as real estate, thus putting those assets at risk. While the need to use real estate as security for debt is a commercial reality, there seems to be some imbalance as the franchisee loses assets due to franchisor's failure.

Comments from the SA inquiry are timely and informative to those considering a franchisee:

Due Diligence

Regulation has a vital and acknowledged role in protecting franchisees, but it cannot remove commercial risk. It cannot remove the possibility of failure or a guarantee success. Ultimately, a prospective franchisee's best protection against failure is educated, informed and conscientious due diligence.

As the last point implies, the Code strongly encourages advice be sought but does not mandate it. The Committee noted the possibility of making the advice process mandatory under the Code, a suggestion rejected by the FCA:

The only choice action that would be likely to improve the situation would be to require professional advice to be a mandatory pre-condition to signing a franchise agreement. However this would impose additional costs upon those prospective franchisees who are capable of making an informed decision. It would also appear to run a contrary to fundamental principles of freedom of choice. The FCA is not aware of any similar pre-condition even in relation to consumer transactions involving mortgages and guarantees. There is certainly no precedent for such a requirement in franchise legislation anywhere in the world.

Registration of Disclosure Documents

In addition, registration increases transparency in regulatory process. In a sense, registration enables disclosure to begin to address imbalances of power in the relationship, because it makes the information available to franchisees collectively, rather parsed to individual franchisees just days prior to signing the contract.

In the SA inquiry Professor Terry in support of endorsement of registration:

I believe that there is a case for a registration system for franchise disclosure documents. By that, I am not suggesting a full audit system, but I think there should be a mechanism where disclosure documents are filed and that way we will know how many systems we have in Australia, which we really do not at the moment. We can have best guesses. As you realise, there are about 250 individual items of information in the disclosure document and, if that information were available to franchise researchers that mass of fantastic information could be of benefit to government, franchisors and prospective franchisees. In America, this information is available commercially. Disclosure is compulsory in the United States under federal law, but 15 states require registration and auditing of those disclosure documents and, from those 15 states, there is a mine of information which is mined and made available to prospective franchisees, who can make comparisons more readily between competing systems, so I think it is worthy of

Terms of Franchise Agreement

The FAAI point out that the average duration of franchise contract terms is five years and explained further:

The average cost of a franchise is probably \$250 [000] and more, which means that the franchisee has to return \$50,000 a year profit to just pay off the capital investment. Most people do not take that into account. They do not amortise the cost of the franchise over the period to see whether it is profitable, and that is when they get into a lot of trouble.

The new agreement was, in the franchisee's view, grossly unjust as it jeopardised his prospects of recovering the investment made at the initial agreement; by contract the original agreement stipulated automatic renewal for five years on the same terms and conditions provided the licensee was not in breach of those terms and conditions. Despite being aware of the risks that the new agreement imposed as a direct result of commercial pressure the franchisee accepted the new agreement.

We now see such agreement rapidly approaching the 5 year term, which not only gives the franchisor any direct benefits of the franchisee's goodwill but, also with the rising cost of fit-out, gives insufficient time for the franchisee to fully depreciate his capital investment.

This would certainly be the case with the [REDACTED] business model.

Termination

The most controversial aspect of goodwill in franchising revolves around entitlement. Conventionally goodwill in its entirety belongs to the franchisor as the owner of the business, while the franchisee is seen as being only involved in that business for the period of time defined in the franchise contract. A contract may stipulate the extent of a franchisee's entitlement to accumulated goodwill but it has generally been understood that "[i]n the absence of a contractual provision providing for compensation for goodwill on expiry or termination the franchisee forfeits the goodwill". Consequently, it is rare for the franchise agreement to spell out the franchisee's entitlement to goodwill on the expiry or termination of the contract.

Churning

Most franchisors operate in an honest ethical manner, but there are a number of business models based on selling franchises, rather than running a successful franchise business. As you are aware, the costs of these can be a capital cost of up to \$250 [000] for a license fee. You only have to sell 10 of these to make \$2.5 million a year, and none of these has to be profitable for the franchisor to make that money. In some cases, there have been allegations, which I am sure you have heard, where the word 'churning' is used

continuously, where franchisors, just the sake of getting new franchisors, put enormous pressure on their current franchisees to get them to leave their business so that they can resell the franchise.

ALTA Conference 2008 – James Cook University, Cairns: Jenny Buchan

[REDACTED]

[REDACTED]

[REDACTED]

Membership of the Franchise Council of Australia is voluntary, and is open to any company or individual involved in the franchise sector, including franchisees, franchisors, lawyers, accountants, banks, consultants, academics and publishers.

The organisation is accountable only to its members, and vice versa. An industry lobby group is not like a professional body that is regulated by legislation and has fairly robust and somewhat transparent and effective complaints handling procedures.

1. The prospective franchisee may find it difficult to assess the quality of the franchisor. This factor must be weighed very carefully by the potential franchisee for it can affect the franchisee in two ways.
 - a. Firstly, the franchisor's offer of a business-format package may not amount to what it appears to be on the surface.
 - b. Secondly, the franchisor maybe unable to maintain the continuing services which the franchisee is likely to need in order to sustain their business.
2. The franchisor's policies may affect the franchisee's profitability. For example, the franchisor may wish to see his franchisee build up to a higher turnover from which he gets his continuing franchisee fee, while the franchisee may be more concerned with increasing his profitability, which does not always necessarily follow from increased turnover.
3. The franchisor may make mistakes in their policies. They may arrive at decisions, relating to innovations in the business, which turns out to be unsuccessful and detrimental to the franchisee.
4. The good name of the franchised business and its brand image may become less reputable for reasons beyond their own control."

The FCA website also states;

'...the nature of the franchise relationship was open to exploitation prior to 1998 in Australia when franchising operated in a de-regulated environment. As a consequence the public perception of franchising was tarnished by several high profile franchise failures and a somewhat cavalier attitude by some franchisors to the franchise relationship. Behaviour in the sector was not universally appropriate, and franchisees had far less investment security. Since 1998, the sector has not

only grown, but matured and developed into one of the primary engines for economic growth in Australia.'

Finances

The franchisee knows very little about the franchisor's financial situation. Some information is contained in the disclosure document. When the franchisee is a division of a public company, the information contained in the annual reports is scanty. If the franchisor is not a corporation, no information can be obtained from the public record to supplement or verify that contained in the disclosure.

The franchisor, on the other hand, knows everything about the franchisee's finances and its assets as the franchisee was obliged to complete extensive financial disclosure to the FCA. The FCA has been a strong opponent of any open debate about franchisor insolvency. Thinking logically, this opposition is misplaced. If there is a weakness in the model it would only enhance the reputation of the FCA in the eyes of its franchisee members if it were to accept the existence of the weakness and use its significant lobbying power to move for the problem to be addressed by regulatory change. Once a franchisor is insolvent, like ██████, is no longer a member of the FCA, and no longer a corporate entity, it is difficult to understand the FCA's blind spot on the issue of franchisors failure. A series of franchisee lobbying organisations have been created in Australia.

Conclusion

Do all franchisees accept the view of the franchisor lobbyists and approach franchising as if it is a perfect model, once embarked on, beyond failure? In theory, no, but in practice this does seem to be the approach. The Government sources of information do not put them on notice, nor do the regulators, not the financiers, nor their legal advisers.

'Laws and regulation should create incentives for people to behave in a desirable way'.

In addition, there is no commercial pressure to disclose this risk. In fact, a franchisor admitting to the possibility of failure could find itself most unpopular with other franchisors.

█████ Writes Off Franchise Loans: Report – Business Spectator 14th July 2008

Many ██████ ██████ franchise operators in Sydney are leading well below target levels and are unable to meet debts owed to the franchisor. *The Sheet* reports.

The outlet said that many owners have opted to walk away from their businesses rather than face ongoing losses, but that ██████ appears increasingly willing to take control of the branches, rehire the franchisees as managers and write off their outstanding loans.

Owners who were not given that option, may join group actions in the NSW Industrial Court against the ██████

Earlier this year, ██████ declared impaired assets of \$ 16 million.

████████████████████. The Sheet – 14th July 2008

Of 55 owner-managed branches in New South Wales for ██████, most have been trading for only three years or less. More than three-quarters of the ██████ franchises set up in Sydney over the last three years are failing to meet business targets.

The bulk of these branches are producing new ██████ volumes of less than \$2 million a month, which is half the target set under each franchise's business plan, and perhaps a third of the ██████ required to produce viable income for the owner.

Reasons for the poor performance include the weak state of demand for ██████ in Sydney; declining ██████ prices in many areas; and a lack of marketing support for a little-known brand. Franchise owners also complained about the cost of fitouts, with work often undertaken by preferred contractors from Brisbane rather than through local carpenters. (A practice continued by ██████ in opening outlets in Melbourne as well.) One consequence of this that apart from the disappointing increment to new business from the Sydney expansion strategy for ██████, the experiment is turning into a ██████ quality problem for the ██████.

Taking into account the cost of a branch fitout and the licence fee (almost always 100 per cent financed by ██████), ██████, ██████ and lines of ██████ under ██████ ██████ the typical owner of a struggling ██████ franchise in Sydney would have aggregate loans to the bank of in excess of \$1 million.

A rough estimate – worked out by talking to current and former owner of ██████ franchisees rather than ██████ – suggests that many of these loans must be impaired.

██████ also appeared to have already written off some of these loans.

Owners of ██████ outlets in Sydney often walk away from their businesses. The owners of the Kellyville and Rhodes franchises are two that have done so in the last two weeks.

When an owner of a franchise opts to walk away from the business (and its continuing losses) ██████ invariably employs the staff directly in order to keep the branch open.

In a number of cases ██████ has also hired the former franchisee as a branch manager, a situation that appears to include relief from at least some of their liabilities to the bank as part of a package deal.

Current and former owners of franchises believe that some of their numbers have negotiated the write-off by ██████ of the bulk of their ██████.

Some owners of franchises are attempting to join actions in the NSW Industrial Court brought by the former owners of several Sydney franchises; owners who decided to walk away early rather than incur steady losses.

██████ declared impaired assets of \$16 million at February 2008. That figure looks likely to climb, with a chunk of the trouble caused by the ██████ to its own franchisees.

Appendix I

My Own Franchise Experience [REDACTED]

I am married to Kim Sue–Ellen Ramsey and we have seven children, four of whom are dependent, aged 10, 8, and 5 and 4 months. I include this information only to highlight the number of people directly affected by a bad experience with franchising. I worked for Civil & Civic for about 10 years and for about three years with the ACTU, establishing universal superannuation in NSW, QLD and the ACT.

After leaving the ACTU I worked for an AMP subsidiary and was involved in the establishment of the building industry's redundancy funds for Queensland, New South Wales, ACT and Tasmania.

When I left school I went into the building industry, qualified as a carpenter and undertook further education at the University of Technology in the NSW Entrepreneurs training Program.

I went on to establish a business consultancy providing assistance in Occupational Health & Safety and best practice advice for business and provided consultancy advice to government agencies.

In 2004, I qualified as a business broker through the University of Western Sydney.

In 2004 I looked at the [REDACTED] franchise business and they were opening branches in New South Wales was safe and regulated by the [REDACTED] and ACCC.

No mention was made that the [REDACTED] paid a referral fee to owner managers for new franchisees.

After joining the [REDACTED], I received an email that the [REDACTED] was happy to pay referral fees to franchise \$10,000 for a bona fide introduction in 2005. (This matter was referred to the ACCC for investigation for breaches of the code by registered mail on the 24/3/08 with no satisfactory answer for the breach)

The [REDACTED] also required a business plan using the \$4 million figures he said we needed to write each month. At no time did the bank provide us with the report that they had done for the Australian Stock Exchange and share market analyst.

At this point I would like to emphasise I have since received a copy of a power-point presentation and report done by the [REDACTED] at the same time I was investigating the franchise. If it had been provided to me at the time, I would not have even considered this business because it would have revealed that the information provided was misleading, deceptive and not financially viable.

The board of the [REDACTED] had decided to do away with its [REDACTED] network. It had allocated the [REDACTED] income from [REDACTED] old network of [REDACTED] to various owner managers.

After the 6 months the [REDACTED] would accept you as an experienced [REDACTED]

I was dealing with Senior Executives of the [REDACTED] at all times and there were internal reviews conducted by senior persons including a branch audit the results were similar to other franchises.

A Breach Notice was issued by the [REDACTED] on the 8 June 2005.

In the breach notice the following points were listed:

- 1) [REDACTED] agreement Experienced [REDACTED] (details & reason provided above)
- 2) Comments to media (local paper on the effect of work choices and [REDACTED])
- 3) Policy & Procedures for talking to media
- 4) Key man insurance (many [REDACTED] did not have key man insurance at the time)

The [REDACTED] used its intimidation tactic when I was served with a breach notice for talking to the media about the Work Choice legislation and the effect on [REDACTED]. I sought legal advice and answered the breach notice. The [REDACTED] refused to accept my response to the breaches and repudiated the franchise agreement knowing my full financial position.

All of the breach notices points were answered by letter by me to the [REDACTED]. As mentioned above the [REDACTED] response was the repudiation of the agreement.

Since leaving the [REDACTED] franchise, my family and I have been threatened with the sale of our home, contempt of court by the [REDACTED] solicitors [REDACTED] when, as noted, none existed and continual legal action to waste resources, time and money to prevent our legal action against the [REDACTED] getting to court.

Recommendations

The long-term economic viability of the franchisee industry is dependant on the protection of the franchisor and franchisee. The franchise industry currently contributes to the Australian economy 10% GDP, employment 388,500 and \$128 billion annually. These figures are impressive and require Parliament to have accurate independent advice to sustain the future viability of the industry and its continual growth.

To achieve this, reports presented to parliament need to be informative setting out the industry employment, economic statistics the number of prosecutions for breaches of Franchisee Code, Trade Practices ACT and the economic growth and or industry problems.

- To stop the practice of churning by franchisors it is proposed the franchise fee be paid to ACIC for 12 months period, the interest to be used to regulate the industry and at the end of this period it be released and returned to the franchisor where no dispute exist.
- All franchisors to register a prospectus and disclosure documents with ASIC which are to be available from the website to potential franchisees, Legal advisers and accountants as PDF files
- .
- The ASIC survey to be funded by the franchisee industry through an annual fee paid by franchisors/franchises funds to be available to investigate industry breaches of the code and report annually to parliament.
- Propose that the Franchise Council of Australia annually publish the number of franchisees' member of the association on its website.
- The Government to establish a web site or use the existing ASIC or ACCC sites to name and shame franchisors that breached the code.
- The names of franchisor failures to be on ASIC, ACCC and the FCA web sites.
- Mandatory franchisor business plan to be available to franchises and include, franchisor development program, anticipated growth, marketing plan , staff experience and training, system development and an independent financial viability audit report
- ACCC to confirm receiving complaint from franchisees in writing, provide reason for not proceeding with a complaint and the franchisee to have an appeals mechanism.

- Franchisees to do an initial probation training period of three months in an existing franchisee site at their cost before been selected to be a franchisee. (A practice currently carried out by some of the major successful franchisors).
- Amended legislation to recognise the value and principle of good faith developed by the franchisee which has benefited the franchisor's business.
- Amend the legislation to protect franchisees rights where a franchisor is insolvent.
- Amend the code to make it a breach where a franchisor uses threats or intimidation against a franchisee.
- The ACCC to establish a mediation service and provide financial assistance for mediation where a franchisee is financially disadvantaged and unable to proceed to mediation.
- Amend the code or legislate to stop the franchisor using access to a franchisees business and personal financial accounts using that knowledge or access to those accounts to the detriment of the franchisee in either a contract dispute negotiation or the freezing of commissions payments owed by the franchisor.
- Where a public company is the franchisor providing financial and or other commercial information to stock market analyst that may affect a franchisee the franchisor is to also provide the franchisees with that information.

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Submission Ends