



Inquiry into the Franchising Code of Conduct

**Submission to the Standing Committee on
Legal and Constitutional Affairs**

September 2008

The Law Society

— OF WESTERN AUSTRALIA —

Inquiry into the Franchising Code of Conduct

A Law Society of Western Australia submission to the Senate Parliamentary Joint Committee on Legal and Constitutional Affairs

The Committee is to inquire and report on the operation of the Franchising Code of Conduct, and to identify, where justified, improvements to the Code, with particular reference to:

1. the nature of the franchising industry, including the rights of both franchisors and franchisees;
2. whether an obligation for franchisors, franchisees and prospective franchisees to act in good faith should be explicitly incorporated into the Code (having regard to its presence as an element in paragraph 51AC(4)(k) of the *Trade Practices Act 1974*);
3. interaction between the Code and Part IVA and Part V Division 1 of the *Trade Practices Act 1974*, particularly with regard to the obligations in section 51AC of the Act;
4. the operation of the dispute resolution provisions under Part 4 of the Code; and
5. any other related matters.

It is noted that changes were made to the Franchising Code of Conduct last year which came into effect on 1 March 2008 and that these changes mainly dealt with a duty of disclosure, but also included an obligation to mediate in good faith.

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

It is the Society's view that the main problem has always been the onerous nature of many franchise agreements. In many franchise agreements there is an inherent imbalance of power in favour of the franchisor giving rise to unconscionability.

It is anticipated that the relationship between franchisor and franchisee will be more level as a result of the disclosure amendments.

Any franchisee who does not perform due diligence is inviting trouble, although nothing can prevent many people from over-estimating their business skills.

Nevertheless, it is submitted that there needs to be more support for small business from government agencies and the Franchisees' Association of Australia. It is accepted that some prospective franchisees will not listen to advice but prevention and care at the commencement of a transaction is still better than a cure.

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

It should not be necessary to legislate for this. Good faith is generally implied in contract law and since a franchise agreement contains an implied duty of cooperation, each party will normally be expected to act in good faith towards the other.

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

The Society does not see any particular issue with the TPA.

There have been no court decisions on the application of Part IV to franchising and the ACCC has not issued guidelines on the matter.

Part IV is not generally breached by reason of the fact that one party is in a stronger bargaining position than the other, but may be invoked in cases of horizontal or vertical anti-competitive conduct.

There have been a number of cases about misleading conduct in the context of business opportunities (Part V, Div 1), but the pre-contractual obligations of the franchisor are covered by the Franchising Code (and the recent amendments).

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

The Society is not aware of any issues with this aspect of the Franchising Code.



Dudley Stow
President