



Australian
Competition &
Consumer
Commission

ACCC Submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Franchising Code of Conduct

September 2008

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Summary

This is a submission from the Australian Competition and Consumer Commission (the ACCC) to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into the Franchising Code of Conduct.

The ACCC regulates certain aspects of the franchising industry by ensuring compliance with the *Trade Practices Act 1974* (the Act) and the Franchising Code of Conduct (the code).

Based on the ACCC's experience as a regulator and its analysis of franchising-related complaints it has received, there does not appear to be endemic misconduct regarding the code or the Act by most franchisors. However, in the ACCC's view there are enough concerns in the industry to justify re-examining how the code may be improved to address stakeholder concerns.

Accordingly, the ACCC recommends the committee consider:

- Targeting the collection and publication of information about the franchising sector to assist the ACCC, other government agencies, franchisees and prospective franchisees to better understand franchising.
- Reviewing the mediation model under the code.
- Reviewing mediation costs incurred by franchisees to a dispute under the code to promote access to mediation under the code to franchisees.
- Changing the title of the Office of the Mediation Adviser to more clearly identify its role in the franchising sector and help raise its profile.
- Introducing civil pecuniary penalties for a breach of parts IVA (unconscionable conduct), IVB (breach of the code) and V (consumer protection) of the Act to improve compliance with the Act.
- Reviewing the disclosure document requirements to make the document more meaningful to franchisees and prospective franchisees.
- Empowering the ACCC to conduct risk-based audits of franchisors' records.
- Amending the code to expressly prohibit franchisors from limiting disclosure of relevant information to prospective franchisees (e.g. through the use of confidentiality agreements or clauses).
- Requiring franchisors to explicitly advise prospective franchisees about their rights to renew or extend their franchise agreement and about whether goodwill may accrue to the franchisee upon exiting the system.
- Reviewing the law to provide some protection mechanism for franchisees in circumstances where their franchisor fails.

1. Background

- 1.1. The ACCC is an independent statutory authority responsible for enforcing the Trade Practices Act. The Franchising Code is a mandatory prescribed code of conduct under s. 51AE of the Act and a breach of the code is therefore a breach of s. 51AD of the Act.
- 1.2. The Australian Government introduced the code in 1998 to regulate the conduct of participants in franchising towards each other, and to:
 - ensure franchisees are sufficiently informed about a franchise before entering into it
 - ensure franchisees have certain rights in relation to their franchise agreement (e.g. when a franchisor wants to terminate an agreement)
 - provide a cost-effective dispute resolution scheme for franchisees and franchisors to resolve any disputes (through the Office of the Mediation Adviser, the OMA).
- 1.3. The ACCC's role is to ensure compliance with the Act and the code by education, liaison and, where necessary, enforcement action. To do this, the ACCC assists franchisors and franchisees to understand their rights and obligations under the code and the Act by developing educational and compliance materials such as guidelines, articles and fact sheets, as well as giving presentations by our outreach staff in each state and territory. The ACCC considers all complaints about a breach of the code and does not hesitate to take enforcement action against anyone who fails to comply with the code or the Act.
- 1.4. In 1999 and 2001 the Australian Government made a number of amendments to the code to improve its effectiveness. Following the 2006 Matthews review of the code, the government implemented a number of further amendments to the disclosure requirements under the code to increase the transparency, quality and timeliness of disclosure to existing and prospective franchisees. These amendments became law on 1 March 2008.
- 1.5. In 2007 South Australia and Western Australia announced parliamentary inquiries into franchising. Recommendations from these inquiries included:
 - amending the requirements of the disclosure document to make it more effective
 - introducing specific penalties for a breach of the code.

1.6. On 25 June 2008 the Parliamentary Joint Committee on Corporations and Financial Services resolved to hold an inquiry into the code, with the following terms of reference:

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.

2. ACCC franchising industry complaints and compliance activities

- 2.1. Australia is the most franchised nation in the world on a per capita basis, with three times as many franchises per capita as the United States of America¹. According to the 2006 Franchising Australia survey published by Griffith University and sponsored by the Franchising Council of Australia, approximately 960 business format franchise systems were operating in Australia in 2006. (Assuming that the number of business format franchises continues to grow at 12.9 per cent, as it did between 2004 and 2006, that figure would now be closer to 1084.)
- 2.2. The survey also estimated that in 2006 there were 56 200 business-format franchised units operating in Australia together with some 5660 company-owned units. Together, it was estimated that they employed some 426 500 employees with just over half these being permanent part-time or casual.
- 2.3. The size of the franchising sector needs to be considered against the overall size of the business population in Australia. According to the Australian Bureau of Statistics, in 2007 there were approximately 2.011 million trading business enterprises in the country.²
- 2.4. The Franchising Code is the primary instrument of regulation for franchising in Australia.

ACCC compliance initiatives

- 2.5. To educate franchisors and franchisees about their rights and obligations under the code and the Act, the ACCC has published a number of educational materials to assist prospective franchisees, including:
 - *Franchising Code of Conduct compliance manual for franchisors and master franchisees*, book with CD
 - *The franchisee manual*
 - *Franchisee start-up*, checklist
 - *Resolving franchising disputes*, fact sheet
 - *Disclosure under the Franchising Code of Conduct*, fact sheet

¹ IBISWorld Industry Report 18 April 2008 Franchising in Australia: X0002, p.44

² Source: Australian Bureau of Statistics (2007), *Counts of Australian Businesses, Including Entries And Exits*, Cat. no. 8165.0, Canberra, p. 18.

- *Being smart about your new franchise: checklist before signing a lease agreement*
- *Being smart about your new franchise and your retail lease, fact sheet.*
- *Overview of the Franchising Code of Conduct, fact sheet*

2.6. The ACCC is implementing a communication strategy to increase awareness of franchisors' and franchisees' rights and responsibilities under the code. As part of this strategy, the ACCC is exploring the following initiatives:

- improving links with industry associations to coordinate initiatives targeted at prospective franchisees
- continuing our liaison with relevant state and territory government agencies, including business enterprises centres³, small business development corporations and state and regional development departments, to ensure consistent messages are conveyed to the franchising sector
- placing targeted articles in newspapers and magazines about issues in franchising
- conducting research to better understand how prospective franchisees get into franchising and where they obtain their information and advice
- giving presentations and attending franchising expos through our outreach programs in each state and territory
- placing advertisements in business opportunities classified pages in newspapers to direct prospective franchisees to further information about franchising and due diligence.

2.7. The ACCC is continuing its efforts to work with professional advisers and their respective industry associations to ensure that accountants, lawyers and business advisers who advise franchisees are familiar with franchising-specific issues that often arise for franchised businesses and are giving sound advice.

ACCC franchising complaints

2.8. The nature of franchise operations means many are small- or medium-sized enterprises whose owners often have a large share of their wealth at stake.

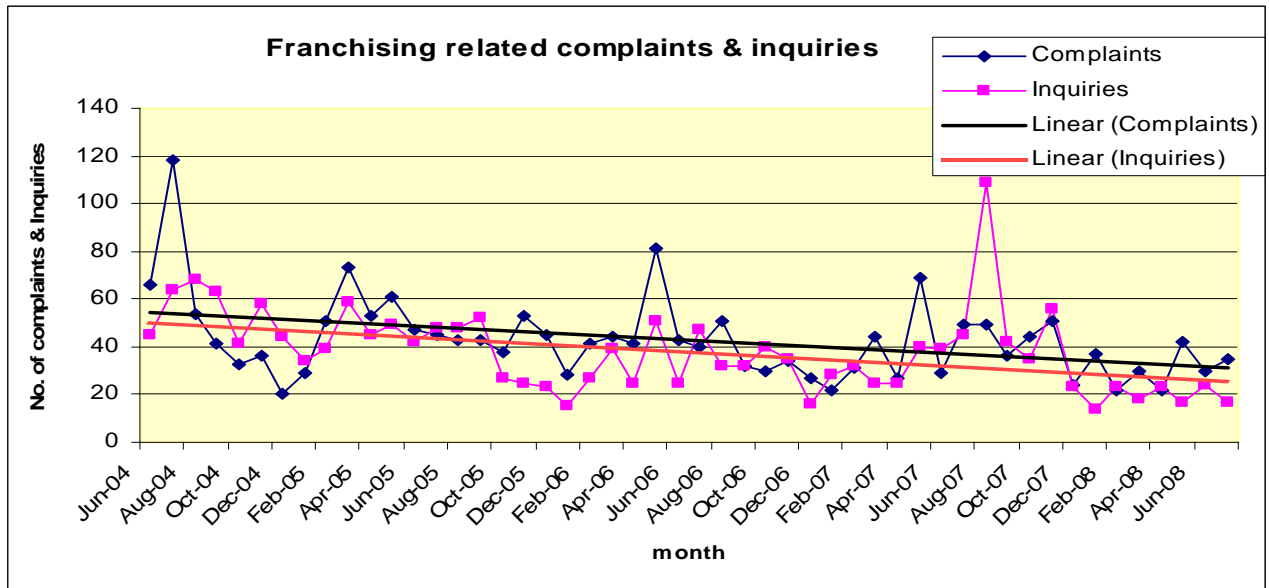
2.9. When a franchise fails to live up to the franchisees' expectations, the perception sometimes is that this failure was caused by unfair or unreasonable conduct by the franchisor. However, an examination of franchising-related complaints received by the ACCC indicates that few franchise systems receive complaints

³ Sometimes also known as 'small business centres' in certain states.

from more than one or two franchisees. This suggests that there is no widespread misconduct regarding the code or the Act by most franchisors (see figure 2).

2.10. Between 1 June 2004 and 31 July 2008 the ACCC received an average 474 inquiries and 534 complaints annually in relation to franchising (see figure 1). Franchising-related calls represented around 1 per cent of calls to the ACCC during this period.

Figure 1

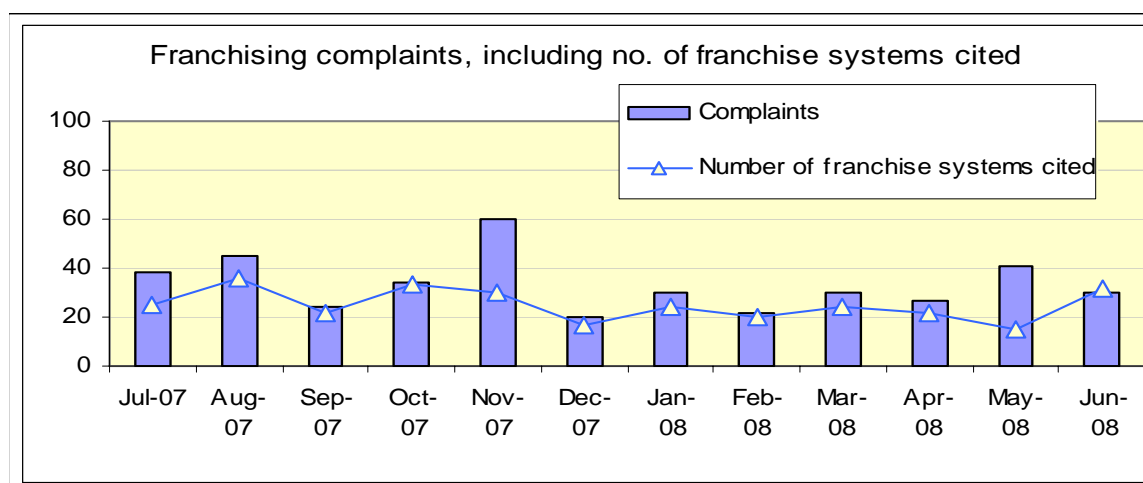


2.11. The number of franchising-related complaints and inquiries received by the ACCC has generally declined during this period. However, significant spikes in the number of franchising complaints to the ACCC occurred in July 2004, May 2006 and in May, August and November 2007 (see figure 1). These spikes can be explained as follows:

- The spike in July 2004 can be attributed to the operations of, and ACCC investigation into, 'Little Joe Snacks'. (Following ACCC action, Mr Bon Levi, who promoted a range of systems under the Little Joe and Joey's brands, was found to have engaged in misleading and deceptive conduct as well as breaches of the code by declaration in the Federal Court in February 2005).
- Spikes in May 2006 and May 2007 can be attributed to investigations the ACCC was undertaking at these times.
- The August 2007 spike can be attributed to the release of the ACCC publication *The franchisee manual* that month (516 copies were requested) and the number of letters of support received by the ACCC for one particular franchisor being investigated by the ACCC at this time.
- The spike in complaints in November 2007 is explained by a number of complaints to the ACCC about one franchise system (see figure 2).

- The spike in complaints in May 2008 is also explained by a number of complaints to the ACCC about one franchise system (see figure 2).

Figure 2



2.12. Between 1 January and 31 July 2008 the subject matters of franchising complaints to the ACCC were⁴:

Complaint	Number of complaints	Percentage of complaints
Franchisor making misleading or deceptive representations	81	22.44
Contractual dispute	56	15.51
Franchisor not complying with the disclosure requirements of the code	48	13.30
Dispute resolution (including referral to Office of Mediation Adviser and failure to attend mediation)	44	12.19
Franchisor engaging in unconscionable conduct	40	11.08
Franchisor terminating franchise agreement	28	7.76
Franchisor not complying with the conditions required in a franchise agreement under the code	19	5.26
Franchisor not allowing the franchisee to transfer their franchise agreement	16	4.43
Other	13	3.60
Exclusive dealings (suppliers)	11	3.05
Application of code	5	1.39
TOTAL	361	100

⁴ Some complaints in Table 1 have been included in more than one category of complaint. The actual number of complaints received during the period was 215.

ACCC complaints-handling process

- 2.13. The ACCC investigates a large number of potential breaches of the Act each year. Most matters are discontinued at the initial investigation stage because of insufficient evidence, no breach, complaint withdrawal or failure by the complainant to respond to the ACCC requests for supporting information. A number of these initial investigations proceed to the in-depth investigation stage, at the end of which—if the evidentiary requirements are satisfied—the ACCC may commence court proceedings. However, the ACCC is not limited to litigation in its choice of effective enforcement actions.⁵
- 2.14. Alleged misconduct in the franchising sector maintains a relatively high profile because of publicity generated about allegations against a small number of franchise systems. The ACCC has rigorously investigated the allegations made against these systems and notes that many of these allegations have not been substantiated.
- 2.15. The ACCC has increasingly taken a system-wide approach with high profile matters to ensure that any endemic issues are quickly and appropriately addressed and resolved. The use of this system-wide approach has confirmed that in most of these high profile cases there was no evidence of an endemic system failure and many of these matters were resolved without litigation.
- 2.16. In the interests of transparency, the ACCC has instituted a process of providing information about the outcome of these investigations on the ACCC website where it considers it is in the public interest to do so.

ACCC investigation process

- 2.17. As discussed, the ACCC investigation process can be divided into three broad categories through which matters may progress:
- initial assessment
 - initial investigation
 - in-depth investigation.

Stage 1—Initial assessment

- 2.18. At this stage preliminary assessment of the complaint is made by the ACCC Infocentre staff, ACCC investigators or the ACCC unit specialising in the conduct. The assessment may include the initial interview with the complainant to verify some general data (such as the contact details and name of trader) and the initial analysis of the conduct. If the complaint is assessed as valid, it is progressed to the next stage.

⁵ See Annexure 1 for details on how the ACCC has resolved franchising matters.

- 2.19. In some instances the complaint cannot be progressed to investigation because the complainant is reluctant to have the matter escalated; so the complaint is withdrawn; or, after discussion with the complainant, it is concluded that the matter will be best addressed through dispute resolution. The ACCC recommends mediation as a first step in most disputes where the ongoing relationship is of value to the parties.

Stage 2—Initial investigation

- 2.20. At this stage the ACCC seeks information from the complainant and any other relevant persons/traders to substantiate the claim and establish a precise sequence of events. This information-gathering may include conducting thorough interviews, obtaining and examining documents pertaining to the alleged conduct and careful application of the law to the known facts.
- 2.21. If at this stage the investigators fail to uncover sufficient corroborating evidence to support the claims, the investigation is discontinued for lack of evidence. The complainants are then either referred to a more appropriate agency or advised to seek private resolution.⁶
- 2.22. If the initial investigation process is successful at collecting supporting information and the complainant has not withdrawn the allegation, the matter is progressed to the next investigation stage.

Stage 3—In-depth investigation

- 2.23. At this stage additional evidence is collected and all the existing information is reviewed and analysed by ACCC senior enforcement staff. If it is agreed the allegation/s is/are substantiated and reliable evidence exists to support that/those allegation/s, the matter will generally be referred to the ACCC's Enforcement Committee for consideration. The committee will then decide how the matter should be most appropriately pursued, having regard to the impact the action may have on the ongoing business relationship and the national market. The committee may elect to pursue the matter through litigation or to resolve it either by administrative resolution or by means of an enforceable undertaking.
- 2.24. In deciding how a matter may be most appropriately pursued, the ACCC considers *inter alia* the relief available to the complainant and any other persons affected by the conduct. This may necessitate a more efficient and timely resolution than litigation. Furthermore, the ACCC also considers the deterrent effect and precedent value of litigation against other alternatives.

⁶ All complainants are advised that if any new corroborating evidence becomes available, it can be provided to the ACCC for review. If new information is received, the investigation is re-commenced.

3. ACCC enforcement outcomes

- 3.1. In the decade since the code was introduced the ACCC has taken 15 franchising-related matters to court. Of these, five were contested and ten were settled by consent. The ACCC has also obtained undertakings in five franchising-related matters during this period which are court enforceable.
- 3.2. Annexure 1 contains details of the franchising-related cases the ACCC has pursued over the last 10 years.
- 3.3. The ACCC has addressed conduct in the franchising sector by enforcing the provisions of the code as well as the broader provisions under the Act, which prohibit both misleading or deceptive conduct and unconscionable conduct.
- 3.4. Factors such as the capacity to secure timely outcomes, to stop unlawful conduct and deter others, and clarification of the law are considered by the ACCC when litigating matters before the courts.
- 3.5. The ACCC has therefore litigated certain matters as conduct that may be misleading and deceptive rather than unconscionable.

4. Provisions of the Trade Practices Act pertinent to conduct in the franchising industry

- 4.1. The Trade Practices Act provides for a number of remedies for breaches of parts IVA (unconscionable conduct), IVB (industry codes) and V (consumer protection) such as injunctions, compensation orders, damages, setting aside or varying contracts and corrective advertising orders.
- 4.2. Two broader provisions of the Act of particular relevance to franchising are s. 51AC (unconscionable conduct) and s. 52 (misleading or deceptive conduct). The relationship between these provisions and franchising is discussed below.

Unconscionable conduct (s. 51AC of the Act)

- 4.3. Section 51AC of the Act prohibits unconscionable conduct in small business transactions, having regard to all the circumstances and a number of factors that a court may consider. These factors include:
 - the relative strength of the bargaining positions—ss. 51AC(3)(a) and (4)(a)
 - the imposition of unnecessary conditions—ss. 51AC(3)(b) and (4)(b)
 - whether the small business was able to understand the documents—ss. 51AC(3)(c) and (4)(c)
 - whether any undue influence, pressure or unfair tactics were used—ss. 51AC(3)(d) and (4)(d)
 - availability and price comparison of goods elsewhere—ss. 51AC(3)(e)
 - whether the conduct was consistent with other dealings—ss. 51AC (3)(f) and (4)(f)
 - whether the requirements of an applicable industry code were met (i.e. the Franchising Code)—ss. 51AC (3)(g) and (4)(g)
 - an unreasonable failure to disclose intended conduct—ss. 51AC (3)(i) and (4)(i)
 - whether the stronger party was willing to negotiate—ss. 51AC (3)(j) and (4)(j)
 - whether the stronger party had the power to unilaterally vary a term or a condition of a contract between the parties for the supply of goods or services—ss. 51AC (3)(ja) and (4)(ja)

- the extent to which the parties act in good faith—ss. 51AC(3)(k) and 4(k).
- 4.4 Following the introduction of s. 51AC in 1998, there has been a period of active clarification of the new law and its application to business reality. As the national regulator and administrator of the Act, the ACCC has been active in carrying out this work.
- 4.5 The ACCC has progressed 15 unconscionable conduct cases to court since s. 51AC was introduced into the Act in 1998. Of these, two were successfully litigated, two were unsuccessful and 11 were settled by consent. Details of these cases are in Annexure 2.
- 4.6 The ACCC is currently pursuing allegations of unconscionable conduct against two franchisors:
- **Allphones**—the ACCC has commenced proceedings in the Federal Court alleging that Allphones Retail Pty Ltd engaged in conduct that was, in all circumstances, unconscionable, including:
 - implementing policies targeting classes of franchisees
 - forcing franchisees to acquiesce to Allphones’ will by threatening or engaging in a pattern of harsh conduct
 - failing to disclose or pay certain income to franchisees
 - failing to act in good faith towards its franchisees.
 - **Seal-A-Fridge**—the ACCC has commenced proceedings in the Federal Court in Brisbane alleging that Seal-A-Fridge Pty Ltd engaged in conduct that was, in all the circumstances, unconscionable, including:
 - unreasonably withholding consent to the transfer of franchises
 - unilaterally increasing the fees associated with the national Seal-A-Fridge telephone number contrary to franchise agreements
 - disconnecting franchisees from the national Seal-A-Fridge telephone number to procure agreement to the increased fees
 - failing to act in good faith towards its franchisees.

- 4.7. The ACCC also notes that in the period between the introduction of s. 51AC in 1998 and November 2007, at least 90 private actions pleading s. 51AC were brought before various courts. Unconscionable conduct was successfully argued in three of these cases:
- *Coggin v. Telstar Finance State Company (Q) Pty Ltd* (2006) FCA 191.
 - *Boral Formwork v. Action Makers* (2003) NSWSC 713.
 - *Automasters Australia Pty Ltd v. Bruness Pty Ltd* (2002) WASC 286.
- 4.8. Recently, there has also been one further successful private action alleging unconscionable conduct. In this case an Allphones franchisee successfully argued that the franchisor had engaged in conduct that was in all the circumstances, unconscionable.⁷ As noted in paragraph 4.6 above, the ACCC has also commenced proceedings against Allphones for breaches of the Act, including unconscionable conduct.
- 4.9. The jurisprudence highlights that there is a difference between unfair and unconscionable conduct and that s. 51AC is not intended to prohibit conduct that is merely unfair. Instead, s. 51AC recognises there may be an inequality of bargaining position in arrangements between small business and larger, more powerful organisations (such as large franchisors), and aims to afford small businesses protection from exploitation from a stronger party. This exploitation, however, must go beyond normal hard commercial dealings to be unconscionable conduct.
- 4.10. Small businesses such as franchisees are therefore afforded protection when they acquire goods or services from corporations in a superior bargaining position. The ACCC's experience is that unconscionable conduct may be found to exist where franchisors have, in all the circumstances, acted in a harsh and oppressive manner towards their franchisees, taking advantage of their stronger position for other than legitimate business reasons.

Misleading or deceptive conduct (s. 52 of the Act)

- 4.11. A significant number of franchising-related complaints made to the ACCC involve allegations of misleading or deceptive conduct. The ACCC has taken a number of franchisors to court for misleading or deceptive conduct, for example⁸:
- *ACCC v Global Prepaid Communications Pty Ltd* (ACN 095 154 108) (in liquidation) NSD 328/2003.
 - *Imagine Essential Services Limited* (2008) (settled by consent).

⁷ *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd (No. 2)* [2008] FCA 810.

⁸ Details of these cases are in Annexure 1.

- Photo Safe Australia Pty Ltd, Data Vault Services Pty Ltd and Networks Pty Ltd (2006) (settled by consent).
- Maintenance Franchise Service Services Pty Ltd (2006) (settled by consent).
- Office Support Services International (2005) (settled by consent).
- Little Joe and Joey's (2005) (settled by consent).

5. Statistical information on the franchising sector

- 5.1. Despite the importance of franchising to the Australian economy, relevant information about the franchising sector is limited. While certain information about the sector is produced by Griffith University and sponsored by the Franchising Council of Australia through their survey of franchisors and franchisees every two years, there remains a question of whether more comprehensive data about the sector would better inform prospective franchisees.
- 5.2. In the interest of gaining a more thorough understanding of the franchising sector, the collection of more targeted and comprehensive information about the franchising sector would be useful in assisting the ACCC and others to improve the focus of compliance and education activities.
- 5.3. The lack of officially collected and publicly available data on the franchising sector contrasts with the level of information available about general business demography in Australia (see, for example, the Australian Bureau of Statistics publications *Australian Small Business Operators—Findings From The 2005 and 2006 Characteristics of Small Business Surveys*, Cat. no. 8127.0 and *Counts of Australian Businesses, Including Entries And Exits*, Cat. no. 8165.0). This lack of data is a key impediment to a better understanding of the dynamics of the franchising sector and the issues it faces.
- 5.4. If this information were available, it would paint a more accurate picture of the franchising sector, which would allow the ACCC to put our complaints data in context and more accurately understand issues facing the sector. Regular and reliable statistical information about the sector would assist the ACCC to focus our education, liaison and enforcement work more effectively. The provision of regular statistics on the sector may also help to better inform public debate about franchising.
- 5.5. Statistical information about the franchising sector may also provide prospective franchisees with valuable information about franchising, enabling them to make an informed assessment about which franchise might suit them best. This kind of information is also likely to result in increased competition.
- 5.6. Statistical information that may be useful to the ACCC and prospective franchisees includes information describing the demographics and psychographics of the franchising sector.

Recommendation: *The committee consider the targeted collection and publication of information about the franchising sector to assist the ACCC, other government agencies, franchisees and prospective franchisees to better understand franchising.*

6. Good faith

- 6.1. The ACCC recognises the Parliamentary Joint Committee on Corporations and Financial Services may be considering a proposal by some industry participants that a general obligation to act in good faith be imposed under the Franchising Code.
- 6.2. If a general provision of good faith were inserted into the code as a separate cause of action, the ACCC would have concerns about the practical implications such a clause could have on the operation of the code and the work of the ACCC.
- 6.3. Specifically, we note there is a degree of uncertainty about the meaning of a statutory obligation to act in good faith. The ACCC's view is that good faith is difficult to define independently or reduce to a rigid rule, and if an obligation to act in good faith were included in the code, the meaning of good faith would have to be considered separately in each case depending on its particular facts. This may introduce ambiguity and confusion about the rights and responsibilities of franchisors and franchisees, and potentially increase disputes and conflict among franchising participants.
- 6.4. As such, our view is that a general obligation to act in good faith should not be included in the code. However, we also note that the parties to a franchise agreement have the power to negotiate an obligation to act in good faith in their agreement.

7. Dispute resolution provisions under Part 4 of the Franchising Code

- 7.1. The Franchising Code provides for mediation through the Office of the Mediation Adviser (OMA) to resolve disputes between parties to a franchise agreement. The ACCC may only become involved in a franchising dispute where there is a breach of the code or the Trade Practices Act. However, most franchising disputes relate to a breach of the franchise agreement, not a breach of the code or the Act.
- 7.2. The nature of franchising means many are small- or medium-sized enterprises where owners have a large share of their wealth at stake. In particular, to have the funds necessary to start operating a franchise business, a franchisee will sometimes have taken out a loan that may be secured by a mortgage on the family home. Consequently, franchisees involved in disputes with their franchisors sometimes stand to lose (or have already lost) a significant share of their personal assets and may not be able to afford litigation.
- 7.3. Serious franchising disputes can escalate quickly and a franchisee may feel forced to accept whatever settlement the franchisor proposes because they have limited financial resources and do not see any alternative.
- 7.4. The ACCC notes that between 1 October 1998 and 21 August 2008, the OMA:
- received 3123 inquiries
 - appointed a mediator in 940 matters
 - achieved an average settlement rate of 75 to 76 per cent.
- 7.5. The OMA settlement success rate between January and June 2008 was 73 per cent.
- 7.6. Nevertheless some franchisees and industry associations do not believe that mediation alone can always deliver a just outcome because of the franchisees' relative lack of bargaining power. In addition, the practice by some franchisors of offering settlements on a 'take-it-or-leave-it' basis can result in ongoing systemic dissatisfaction within the relevant franchise system.
- 7.7. Given the level of public concern, we feel an evaluation of the current mediation model is warranted. In particular, the ACCC's view is that strengthening the mediator's role could be an alternative worth exploring.
- 7.8. Although some stakeholders advocate an arbitration model, the ACCC's view is that such a model may be necessary for only a minority of difficult cases.

Recommendation: *The committee consider reviewing the mediation model under the code.*

A cost-effective dispute resolution system

- 7.9. The ACCC's view is that dispute resolution for franchising disputes must be timely, accessible and cost-effective. This is because many franchisees cannot afford to pay large legal fees to help resolve their disputes and some franchisees face significant personal losses if their disputes are not resolved quickly (e.g. they may lose their house, savings, relationships, etc.).
- 7.10. The OMA offers specialised mediation services for franchisees and franchisors in dispute. The OMA was established in 1998 by the federal Office of Small Business to help franchisors and franchisees resolve their problems without going to court.
- 7.11. A written request to the OMA initiates the procedure for accessing mediation services; within 14 days of receiving the letter, the OMA appoints a mediator to administer the mediation.
- 7.12. The maximum fee for a mediator is \$275 an hour (GST-inclusive), with a maximum of three hours for preparation. According to the OMA, the average mediation costs each party about \$1400. The parties pay these fees directly to the mediator, and no fee is payable to the OMA. The parties might share additional expenses such as the cost of room hire and any necessary travel expenses of the mediator. The parties also pay their own expenses for any preparation for, or representation at, the mediation—such as legal, financial or other advice.
- 7.13. We note that anecdotal evidence suggests that the cost of the code's dispute resolution scheme may be a disincentive to some franchisees.
- 7.14. Dispute resolution for businesses is also sometimes subsidised by the Australian Government and by some state governments. For example, the Office of the Victorian Small Business Commissioner (VSBC) offers such a mediation service in franchise disputes.
- 7.15. To access this mediation service, the business submits an application detailing the issues and parties involved. When all parties agree to mediation, the Commissioner appoints a mediator and the VSBC arranges the date, time and venue. The venue can be in a regional location.
- 7.16. The person selected from the Panel of Dispute Resolution in respect of a particular matter will receive the \$390 per session payment from the parties (the cost is shared between the parties); they also invoice the VSBC for \$310 per session (GST-inclusive) for the mediation or alternative dispute resolution. Furthermore, the capped cost of mediation per party is \$195 per session. Most mediations are concluded in a single session.
- 7.17. According to the VSBC, the number of business owners with mainstream contractual and franchise disagreements seeking mediation has increased noticeably in the past 18 months. The VSBC noted the requests for mediation during that period have increased from around 2 per cent to around 15 per cent.

- 7.18. The VSBC also notes that the lower costs associated with mediation have contributed to the jump in franchisees seeking mediation for disputes.
- 7.19. The ACCC notes that there has been some focus on the OMA's profile in the franchise community. The ACCC believes there is merit in considering whether a title that more clearly identifies the OMA's role to the franchising sector could help raise its profile.

Recommendation: *Mediation costs incurred by the franchisees to a dispute under the code should be reviewed to promote access to mediation under the code to franchisees.*

Recommendation: *The committee consider whether a title that more clearly identifies the OMA's role to the franchising sector could help raise its profile.*

8. Other related matters

Drawing on our experience as the national regulator of the franchising sector and in consideration of our franchising-related complaints data, the ACCC has a number of other observations and comments about the Franchising Code's operation for consideration by the Parliamentary Joint Committee on Corporations and Financial Services.

8.1. Prescribing specific pecuniary penalties for breaches of the code

- a) The ACCC notes that provisions within parts IVA (unconscionable conduct), IVB (industry codes) and V (consumer protection) of the Trade Practices Act are all relevant to conduct within the franchising sector. Each part provides the ACCC, subject to the facts of a matter, with alternative enforcement tools. The Act provides a number of remedies for breaches of these parts, including injunctions, compensation orders, damages, the setting aside or varying of contracts, and corrective advertising orders.
- b) However, in the ACCC's view these remedies do not provide as effective a deterrent against a breach of the code as would pecuniary penalties. For example, Bon Levi (who sold various distributorships under the Little Joe and Joey's brands) has repeatedly come to the attention of the ACCC as having breached the code (and engaging in misleading or deceptive conduct) despite the ACCC's previous action against him.
- c) The ACCC's view is that civil pecuniary penalties would provide greater assistance in deterring illegal conduct than the current remedies noted above. In its submission to the Productivity Commission's review of Australia's consumer policy framework, the ACCC recommended the introduction of civil pecuniary penalties for contravention of Part V of the Act. The ACCC notes that the Productivity Commission subsequently recommended the introduction of civil pecuniary penalties as an additional enforcement tool under Part V of the Act.⁹
- d) The ACCC also recommends that the committee consider whether civil penalties should be introduced for breaches of parts IVA and IVB of the Act. Further, we consider that the ability to obtain civil pecuniary penalties, declarations and injunctive relief, and other measures such as corrective advertising within a single action, would significantly enhance the ability of the ACCC to obtain effective outcomes.

⁹ See Recommendation 10.1 of the Productivity Commission's report, *Review of Australia's Consumer Policy Framework*, vol. 2, p. 251.

- e) Further, if the ACCC were able to conduct risk-based audits of franchisors' records (e.g. disclosure documents), this could enhance compliance with the Franchising Code. The ACCC is aware of reports that franchisees will sometimes not make a complaint to the ACCC for fear of retribution by the franchisor. If the ACCC were to be given the power to conduct audits of franchisor records, this would enable the ACCC to investigate matters raised confidentially or anonymously.

Recommendation: *The committee consider whether:*

- *the introduction of civil pecuniary penalties for a breach of parts IVA (unconscionable conduct), IVB (breach of the code), and V (consumer protection) of the Act would improve compliance with the Act*
- *the ACCC should be given powers to facilitate the conduct of risk-based audits of franchisors' records.*

8.2. Reviewing the disclosure document to make it more meaningful to franchisees

- a) It is the ACCC's view that the disclosure requirements of the code should:
- deter franchisors from engaging in conduct where prospective franchisees are led to believe that a franchise will be successful when there is little chance that this will occur
 - ensure prospective franchisees are well informed about all the factors that they should consider before entering into a franchise.
- b) We note the recent franchising inquiries in South Australia and Western Australia recommended greater disclosure under the code, although contributors to both inquiries also:
- acknowledged that more disclosure is not necessarily better
 - expressed concerns that prospective franchisees may not be reading or understanding the disclosure they currently receive.
- c) To increase the effectiveness of the code's disclosure requirements, it is our view the code should be amended so that franchisors' disclosure documents are more clear and relevant so they can be readily understood by franchisees and prospective franchisees.
- d) It is our view this could be achieved by:

i. Reviewing the statement on the front page of the disclosure document

The statement on the front page of the disclosure document may be able to be amended to make it shorter and more easily understood.

Specifically, it may be useful to include the following information in the statement:

- a general warning that all franchise agreements carry risks
- the franchisee should obtain legal, accounting and business advice before entering into a franchise agreement
- a franchise agreement is legally binding on the franchisee and the franchisee should seek independent legal advice to ensure that they understand and agree with all their obligations under the franchise agreement as well as any other agreement they have to sign (i.e. a lease) before signing
- the franchisee should contact as many current and past franchisees as possible before entering the franchise
- the franchisee should work with their own accountant and/or business adviser to prepare a business plan before signing the franchise agreement
- the franchisee should check their franchise agreement for what will happen at the end of the franchise agreement, including whether they will be entitled to any goodwill
- the franchisee should be aware that if the franchise fails, the franchisee may still owe obligations under any other agreement they have signed (i.e. the lease).

ii. Reviewing the substantive part of the disclosure document

It is also our view that the substantive part of the disclosure document should be changed and reordered to make it shorter, more relevant and easily understood by franchisees and prospective franchisees. (See the Productivity Commission's Review of Australia's Consumer Policy Framework.)

The disclosure document could be improved by:

- grouping together related information and ordering the disclosure document according to how important the information is to the viability of the franchise
- considering limiting information that simply references clauses in the franchise agreement (i.e. items 15, 16 and 17 of annexure 1 of the code)
- removing or improving the provision of information that is too vague to be helpful (e.g. we have seen disclosure documents that state that

‘the franchisee must supply the goods specified by the franchisor from time to time’)

- providing more tables and headings to break up the document and make it easier to scan for relevant information
- providing information in point form wherever possible
- removing requirements to provide information which does not assist prospective franchisees in assessing the viability of the business, for example, the payments to agents for the recruitment of the franchisee.

Recommendation: *The committee consider reviewing the requirements of the disclosure document to make it more meaningful to franchisees and prospective franchisees.*

8.3. Amending the code to expressly prohibit franchisors from limiting the disclosure of relevant information to prospective franchisees

- a) The ACCC notes the code prohibits a franchisor from inducing a franchisee not to associate with other franchisees or prospective franchisees for a lawful purpose. However, we are also aware that some franchise agreements contain a confidentiality clause that may prevent important information from being disclosed to existing franchisees or prospective franchisees.
- b) These kinds of clauses can circumvent the purpose of the code’s prohibition against a franchisor inducing franchisees and prospective franchisees not to associate. In particular, a prospective franchisee may be unable to receive full relevant information on whether they should purchase a franchise from a past or current franchisee because of a confidentiality restraint imposed by the franchisor.
- c) Prospective franchisees need access to all relevant information about the franchisor—particularly information from past and current franchisees—to make an informed decision about whether they should purchase the franchise. At a minimum, they should also have the capacity to provide this information to their own professional business advisers (such as their accountant or lawyer) so that the franchisee can make a more informed decision about whether to invest in a franchise system.
- d) The ACCC notes the recent South Australian inquiry into franchising found some franchisors have used confidentiality agreements to prevent current or former franchisees from giving information to the prospective franchisees about the franchise system they are proposing to enter into.
- e) In particular, the ACCC notes the finding of the South Australian inquiry that the use of confidentiality agreements to protect information about past business operations appears to be a clear attempt to defeat the purpose of the disclosure provisions in items 6.4 and 6.5 of the code.

Recommendation: *The committee consider whether the code should expressly prohibit franchisors from limiting the disclosure of relevant information to prospective franchisees, for example through the use of confidentiality agreements or clauses.*

8.4. End of franchise agreement

The ACCC notes that the Franchising Code currently focuses on issues of the pre-contractual disclosure, dispute resolution and procedures for termination. The ACCC recognises that as franchising systems mature, it will be appropriate to consider how franchisees exit those systems or renew their commercial relationship.

Issues for consideration might include clarification of:

(i) *Renewal of franchise agreements*

- a) The ACCC notes that some parties in the franchising industry have raised questions about franchisee rights at the expiry of franchise agreements.

While it is ultimately in the power of the parties to negotiate what will happen at the end of their agreement, in the interests of greater transparency the committee should consider a requirement that franchisors explicitly advise prospective franchisees about their rights to renew or extend their franchise agreement and about whether goodwill may accrue to the franchisee upon exiting the system.

(ii) *Franchisee exit in the event of franchisor failure*

- a) The ACCC notes that franchisees often lose their business and their livelihood when their franchise system fails. The recent failure of the Kleins Jewellers franchise system has highlighted this issue.
- b) Clause 23 of the code allows a franchisor to terminate the agreement if the franchisee goes into liquidation or administration, although there is no corresponding clause that would enable franchisees to terminate the agreement when their franchise system is liquidated or goes into administration.
- c) Under clause 18(2)(g) of the code, the franchisor must give written notice to a franchisee or prospective franchisee when the franchisor becomes an externally administered body corporate, within a reasonable time (but not more than 14 days) after the franchisor becomes aware of it.
- d) However, the appointment of an administrator for a franchise system under Part 5.3A of the *Corporations Act 2001* does not, of itself, terminate or constitute a repudiation of the franchise agreement.¹⁰

¹⁰ *Smith v FCT* (1997) 71 FCR 150.

- e) Corporations law also dictates that secured creditors are the first priority when a company fails, followed by unsecured creditors and shareholders. Other parties such as franchisees have few rights and as such, when a franchisor fails:
- franchisees are often terminated with little prospect of compensation or ability to continue trading and suffer significant financial losses as a result
 - although franchisees are no longer receiving any support or services from the franchisor, they may still be required to pay franchise fees (including royalty payments) and advertising levies to the liquidator until the franchisor is wound up.

Recommendation: *The ACCC recommends the committee consider whether:*

- *to require franchisors to explicitly advise prospective franchisees about their rights to renew or extend their franchise agreement and about whether goodwill may accrue to the franchisee upon exiting the system*
- *some measure might be warranted to protect franchisees in circumstances where their franchisor fails—for example, granting them the right to exit the franchise agreement.*

Annexure 1

ACCC litigation in relation to franchising related matters

- ***ACCC v Simply No Knead (Franchising) (2000) FCA 1365***: in this case the court found that the refusal by the franchisor to supply products to franchisees unless they agreed with unreasonable terms was an exertion of undue pressure. This and the use of unfair tactics against the franchisees amounted to unconscionable conduct in breach of s. 51AC of the Act.
- ***ACCC v Global Prepaid Communications Pty Ltd (ACN 095 154 108) (in liquidation) NSD 328/2003; Nicholas Yates v. ACCC (appeal) NSD 573/2006 and NSD574/2006***: the ACCC alleged that Global Prepaid and In-Touch had misled businesses about the profitability and operations of pre-paid phone card and vending machine distributorships. Justice Gyles found that Global Prepaid, In-Touch and a number of named individuals repeatedly engaged in misleading or deceptive conduct.
- ***ACCC v 4WD Systems Pty Ltd (2003) FCA 850 (13 August 2003)***: the ACCC alleged 4WD Systems engaged in unconscionable conduct by refusing to deliver stock ordered by franchisees, supplying poor quality/damaged stock to franchisees, refusing to provide refunds for these products, refusing to provide copies of the franchise agreement, refusing to provide disclosure documents, refusing to negotiate with franchisees in relation to the franchise agreements and competing directly with the franchisees.

The court held that this conduct was not unconscionable, even if all the allegations were considered cumulatively. The court held that s. 51AC was not a general catch-all provision and that it was necessary to show the conduct was so unacceptable that it could properly be described as unconscionable.

- ***ACCC v Chaste Corporation (2005) FCA 1212***: on 2 September 2005 the ACCC obtained record penalties for resale price maintenance of more than \$1 million against weight loss venture Chaste. Allegations of misleading or deceptive conduct and breaches of the code were also made. In his judgement, Justice Lander said it was clear that the business opportunities presented by Chaste were not genuine.
- ***ACCC v Kyløe Pty Ltd (2007) FCA 1522 (18 October 2007)***: the ACCC alleged that Kyløe and Impact Design Accessories Pty Ltd had contravened the code and s. 51AD of the Act. However, Justice Tracey dismissed the ACCC's application because she found the Polar Krush ice drink business conducted by Kyløe and Impact did not constitute a franchise agreement as defined by the code. Justice Tracey noted that had a franchise agreement existed, to which the code applied, both Kyløe and Impact would have

contravened the code. This case has further clarified the meaning of a franchise agreement under the code and the circumstances where the code applies.

- **Arnolds Ribs and Pizza (Australia) Pty Ltd:** in 2004 the ACCC alleged that the Arnolds Ribs and Pizza franchisor had engaged in misleading, deceptive or unconscionable conduct in promotion of its franchised fast food business in breach of ss. 52, 59(2) and 51AC of the Act. The court declared, by consent, that the Arnolds franchisor had engaged in unconscionable conduct and ordered Arnolds to pay \$200 000 to affected franchisees.
- **Cheap as Chips Pty Ltd:** in 2003 the ACCC obtained consent orders that the franchisor had engaged in unconscionable conduct towards its franchisees. The ACCC alleged that Cheap as Chips had terminated franchise agreements, imposed new and unreasonable conditions and threatened to suspend franchisees from work or cancel franchises when imposing these conditions. It was also alleged that Cheap as Chips had contravened the code by inducing a franchisee not to associate with other franchisees and not following the dispute resolution or termination procedures set out in the code.
- **Contact Plus Group Pty Ltd (in liquidation):** in February 2006 the ACCC obtained consent orders that ‘licence agreements’ marketed by Contact Plus and its director were in fact franchise agreements.
- **Imagine Essential Services Limited:** on 4 March 2008 the ACCC obtained orders by consent in the Federal Court against Imagine Essential Services Limited for engaging in misleading or deceptive conduct in connection with the sale of licences to operate a system relating to the supply of essential services such as telephony and electricity. The alleged false, misleading or deceptive representations related to the profitability of the Imagine licensing system and the number of customers to whom Imagine would give licensees through the system.
- **‘Little Joe and ‘Joey’s’:** on 28 March 2005 the ACCC obtained declarations in the Federal Court that the promoter of the Little Joe and Joey’s franchises, Mr Bon Levi (aka Ron Frederick) had breached the code and engaged in misleading or deceptive conduct. On the application of the ACCC, Justice Keifel also made an order restraining Mr Bon Levi from offering and entering into franchise agreements in respect of a number of businesses associated with Mr Levi.

On 13 June 2007 the ACCC commenced proceedings in the Federal Court for contempt of court for breaching the orders made by Justice Keifel. In particular, the ACCC alleges that between December 2005 and September 2006 Mr Levi sold five business opportunities to people located in Sydney, Melbourne and Perth without complying with the orders. The business opportunities involved photographic, gas conversion and Little Joe snack food distribution businesses.

- **Maintenance Franchise Services Pty Ltd:** in March 2006 the ACCC obtained consent orders in the Federal Court that Maintenance Franchise Services and its managing director had engaged in misleading or deceptive conduct by making a number of representations without reasonable grounds. These representations included that franchisees would, or could, earn high incomes from repeat business and did not have to engage in selling activities in order to successfully operate a franchise. In a separate private action brokered by the ACCC, it was agreed that 11 of the affected former franchisees would also receive agreed amounts of compensation from the franchisor's insurer.
- **Office Support Services International:** in May 2005 the ACCC obtained consent orders (including declarations) in the Federal Court that Office Support Services International and its director had breached the code and engaged in misleading or deceptive conduct in their dealings with prospective franchisees.
- **Photo Safe Australia Pty Ltd, Data Vault Services Pty Ltd and ie Networks Pty Ltd:** in April 2006, following ACCC action, the Federal Court declared the managing director of Photo Safe, Data Vault and ie Networks (all in liquidation) had misled and deceived 37 small business investors in a series of scams that offered prospective franchisees high returns that never materialised.
- **Suffolke Parke Pty Ltd (Cheesecake Shop master franchisee) (2002):** the court issued consent orders that the franchisor, Suffolke Parke (Cheesecake Shop), and its director, Mr Gregory George Bradshaw, had acted unconscionably toward its tenant. The court has also declared that the company and Mr Bradshaw had breached the code by refusing to attend mediation.
- **Synergy in Business Pty Ltd (in liquidation):** on 28 January 2004 the ACCC obtained consent orders (including declarations) in the Federal Court in Sydney that licence deals sold by Newcastle-based Synergy in Business were in fact franchise agreements and that Synergy and its directors had contravened the code and therefore s. 51AD of the Act.

Court enforceable undertakings in franchising related matters

- **JV Mobile:** in April 2007 the ACCC accepted court enforceable undertakings from JV Mobile after the ACCC raised concerns that JV Mobile had promoted and advertised its business network as a franchise, and had sought and/or received payments pertaining to a franchise business from JV Mobile retailers without giving them all the safeguards available under the code.

- **Lawson's Trading:** in February 2004 the ACCC accepted court enforceable undertakings from Lawson's Trading Co. Pty Ltd relating to alleged contraventions of the code.
- **Quiznos:** in August 2007 the former Australian master franchisee for the Quiznos sub chain of quick service restaurants gave court enforceable undertakings after the ACCC raised concerns that Quiznos may have made representations that were misleading or deceptive, or likely to mislead or deceive. The ACCC and Quiznos agreed to resolve the matter by means of an undertaking under which payments will be procured by Quiznos from an independent third party and offered to former franchisees in accordance with the undertaking.
- **Scotty's Premium Pet Foods:** in November 2006 the ACCC accepted court enforceable undertakings from Scotty's Premium Pet Foods following swift action about concerns that Scotty's may have breached the code and engaged in unconscionable conduct towards its franchisees.
- **You Can Bake-It Franchising Pty Ltd:** concerns were raised by a number of existing franchisees regarding the disclosure document provided by You Can Bake-It Franchising. The ACCC was concerned that sections of the disclosure document were ambiguous or potentially misleading. In January 2005 the ACCC obtained undertakings that You Can Bake-It would remedy the issues so they would not recur.

Annexure 2

Litigation and settled matters in relation to unconscionable conduct

- ***ACCC v Simply No Knead (Franchising) (2000) FCA 1365***: the court found that Simply No Knead had engaged in unconscionable conduct in their behaviour towards franchisees. Simply No Knead had threatened to withhold obligatory disclosure documents unless each franchisee gave written consent to renew the agreement and competed directly with the franchisees in a way that was calculated to harm their business.
- ***ACCC v 4WD Systems Pty Ltd (2003) FCA 850 (13 August 2003)***: the ACCC alleged that 4WD Systems engaged in unconscionable conduct by refusing to deliver stock ordered by franchisees, supplying poor quality/damaged stock to franchisees, refusing to provide refunds for these products, refusing to provide copies of the franchise agreement, refusing to provide disclosure documents, refusing to negotiate with franchisees in relation to the franchise agreements and competing directly with the franchisees.

The court held that this conduct was not unconscionable, even if all the allegations are considered cumulatively. The court held that s. 51AC was not a general catch all provision, and what was necessary was to show that the conduct was so unacceptable that it could properly be described as unconscionable.

- ***ACCC v Oceana Commercial Pty Ltd & Ors (2003) FCA 1516***: this case involved a number of allegations of misleading and deceptive conduct related to the marketing of investment properties on the Gold Coast, made against Oceana Commercial Pty Ltd and several other respondents including subsidiary companies and company owners. One aspect of this case was the allegation that the Commonwealth Bank had acted unconscionably in that it agreed to loans despite being aware that the fair market values of units being sold were far less than the values being touted by the sales staff and the actual sale prices.

The court found that the bank had not acted contrary to good conscience in failing to warn the complainants that they had contracted to purchase a unit at a price far above its market value.

- ***ACCC v Dataline.Net.Au Pty Ltd (2006) FCA 2010; 24 November 2006) (2006) FCA 1427 (3 November 2006)***: Justice Kiefel held that Dataline had engaged in unconscionable conduct in not permitting small ISPs to obtain legal advice before signing their contracts with Dataline, and threatening the ISPs with disconnection if they did not agree to sign further agreements with Dataline.

- **Arnolds Ribs and Pizza (Australia) Pty Ltd (2004):** the court declared, by consent, that Arnolds Ribs and Pizza franchisor had engaged in misleading, deceptive or unconscionable conduct in promotion of its franchised fast food business.
- **Australian Industries Group Pty Ltd (Half Price Shutters) (2005):** the court granted, by consent declarations that AIG had had engaged in unconscionable conduct.
- **Avanti Investments Pty Ltd (2003):** the court declared by consent that the Avanti Investments engaged in unconscionable conduct when it made farmers sign new agreements over time that significantly reduced the amount of water available to the farmers, while representing to the farmers that the new agreements were the same as their original agreements (which they were not).
- **Brambles Australia Ltd (Cleanaway) (2006):** the court declared that Cleanaway engaged in unconscionable conduct in contravention of s. 51AC of the Act in that the conduct occurred in circumstances where unfair tactics were used, and where Cleanaway did not act in good faith.
- **Cheap as Chips Pty Ltd (2003):** in 2003 the ACCC obtained consent orders that the franchisor had engaged in unconscionable conduct towards its franchisees. The ACCC alleged that Cheap as Chips had terminated franchise agreements, imposed new and unreasonable conditions and threatened to suspend franchisees from work or cancel franchises when imposing these conditions. It was also alleged that Cheap as Chips had contravened the code by inducing a franchisee not to associate with other franchisees and not following the dispute resolution or termination procedures set out in the code.
- **Daewoo Heavy Industries (2003):** the court declared, by consent, that Daewoo Australia engaged in misleading and unconscionable conduct including by entering into an agreement that led Porter Crane to believe it would be the only Queensland dealer for the term of the agreement, and would have an option to renew the initial term of the agreement although Daewoo did not intend to appoint Porter Crane as its exclusive Queensland dealer but intended to appoint a national dealer whose territory would include Queensland.
- **Kwik Fix International (2004):** this matter involved allegations of unconscionable conduct, misleading or deceptive conduct, and contraventions of the code with respect to the sale of a franchise and the course of the business relationship thereafter. Throughout Kwik Fix maintained its intention to fight all allegations. The ACCC negotiated a settlement to the matter whereby Kwik Fix would provide some relief to the complainant.
- **Leelee Pty Ltd (2000):** the court declared, by consent, that Leelee Pty Ltd had engaged in unconscionable conduct towards one of its tenants by

consenting to, or giving approval for, another tenant to infringe on the exclusive menu entitlements conferred by Leelee on one of its tenants. Leelee also specified the price at which its tenant sold their dishes in a manner which unfairly discriminated against, or inhibited, the tenant's ability to determine the prices at which its dishes were sold in competition with another tenant.

- **Moore Talk Communications Pty Ltd (2004):** this case involved allegations of misleading or deceptive conduct and unconscionable conduct. The ACCC obtained undertakings from Moore Talk that it would review its operating procedures, review their trade practices compliance program and cause an independent audit of their trade practices compliance program.
- **Suffolke Parke Pty Ltd (Cheesecake Shop master franchisee) (2002):** the court issued consent orders that the franchisor, Suffolke Parke Pty Ltd (Cheesecake Shop), and its director, Mr Gregory George Bradshaw had acted unconscionably toward its tenant. The court has also declared that the company and Mr Bradshaw had breached the code by refusing to attend mediation.
- **Westfield Indooroopilly (2004):** the ACCC began proceedings against Westfield in October 2001 alleging misleading or deceptive conduct and unconscionable conduct in breach of the Act. The matter was settled with Westfield agreeing to pay an amount to the former retail tenants of a shop at the Indooroopilly Shopping Centre in Brisbane (formerly managed by Westfield) and providing an undertaking to the Federal Court of Australia that, in future, it will use a specific release of liability clause when entering into settlement agreements with retail tenants. Westfield has provided an undertaking to the Federal Court addressing the ACCC's concerns that a condition sought through its solicitors from the former tenants during settlement of private litigation between Westfield and those tenants may have contravened s. 51AC of the Act. There was no finding made with respect to the allegations of misleading and deceptive conduct.