

Ms Heather Shearer  
6 Mountain Close  
Mountain Creek, 4557, Qld  
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**Committee Secretary**  
**Parliamentary Joint Committee on Corporations and Financial Services**  
**Department of the Senate**  
**PO Box 6100**  
**Parliament House**  
**Canberra ACT 2600**  
**Australia**

**Inquiry into franchising and code of conduct**

I respectfully make the following submission to your enquiry:

The vast majority of franchisees are part of the Small to Medium business sector; which comprises 95% of companies in Australia; earns an estimated \$80 billion pa, and employs more than 600,000 Australians<sup>1</sup>. Franchising is thus a large and significant part of the Australian economy; however, under the current legislative regime, small franchisees are virtually powerless against large franchisors, and powerful franchisor lobby groups, which even attempt to stop enquiries such as this.

My husband and I are ex franchisees of a large company in the automotive industry; and because of a number of unresolved issues (such as high fees, lack of spending on advertising, lack of training, etc) we, and many other franchisees, had been in dispute with the company for a lengthy period. Indeed, after some 18 months, due to the high costs of legal action and lack of action by the ACCC, we eventually “walked away from” the business; which cost us a significant amount of money and left us in serious debt.

However, I must emphasize that we are strong supporters of franchising, and my husband, has subsequently opened a new franchised business (with a different franchisor in the same industry) and we have only praise this new company’s professionalism, business expertise and ongoing support for its franchisees.

However, when a franchisor does not have the best interests of its franchisees at heart; franchisees are left in a very different situation, and have little recourse to any legislative authority to help them, or even to investigate their complaints. During our own dispute with the franchisor, and ongoing legal action proving increasingly expensive, with little result; I attempted to redress some of the issues by contacting the appropriate legislative body, the Australian Competition and Consumer Commission (ACCC), given their role in administering the Franchising Code of Conduct under the *Trade Practices Act, 1974*.

I sent a lengthy, referenced submission to the ACCC, with a request for the ACCC to investigate the franchisor. Despite a comprehensive list of complaints, and well documented letter, including petitions for action signed by many franchisees, the ACCC responded as follows:

*On the basis of all the information available, I do not propose recommending that the ACCC pursue this matter any further at this time. I understand you may be disappointed with my decision. However, the Trade*

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<sup>1</sup> Bailey, F. Final days to have your say on franchising.  
<http://www.minister.industry.gov.au/index.cfm?event=object.showContent&objectID=F08371CB-ACEF-0A67-AC0803BB65BC514F>

*Practices Act does provide a private right of action and the Code provides a structured and focussed mechanism for alternative dispute resolution.*<sup>2</sup>

We were well aware of the alternative dispute mechanism (mediation) available under the Trade Practices Act, as well as our putative ability to take private action against the franchisor. However, in this, and apparently in many other cases, some franchisors consistently refuse to enter into any mediation process in good faith, and this franchisor was particularly well known for refusing to honour any agreements made under mediation. For example;

*The ACCC always rely on the Mediation processes afforded to franchisees and franchisors within the Franchising Code of Conduct. It is a good process when the parties involved act in good faith. Rogue franchisors do not act in good faith. The process is abused as an opportunity to add cost to the franchisees complaint. Agreements made through mediation are not binding...*<sup>3</sup>

Further, with reference to taking further legal action against franchisors; a lack of profitability (due to excessive royalty and other compulsory payments to franchisors; as well as a general lack of support and training for franchisees) is often the fundamental reason for the majority of complaints. Given that many franchisees are in a parlous financial situation, they have virtually no recourse to private action against a large company. And in many cases, when a franchisee has commenced suit; the large franchisor practises delaying tactics until the franchisee can no longer afford the legal fees, and in some unfortunate cases, has had to sell their property and even declare bankruptcy.

In addition, asking franchisees (most of whom have virtually no legal knowledge) to prove that a franchisor has acted unconscionably—a term debated even by legal professionals—is virtually impossible. In addition, the response from the ACCC stated that the investigation consisted of raising “*issues directly with “the company” and have received a written response and supporting documentation that allays my concern in respect of the allegations.*” Obviously, a company is not going to **admit** to the regulator that they engaged in unconscionable conduct, or misused franchisee marketing funds.

Due to such issues, and a general lack of action against rogue franchisors, by the ACCC, many franchisees have increasingly come to believe that the legislation (*Trade Practices Act 1974*) and the legislative body (the ACCC) aimed to protect small business owners such as themselves, has failed them. Despite seven years of complaints against some franchisors, nothing has been resolved. As quoted in the Australian on 4 July 2007, “*Cases of bad franchisors...screwing contractors are too numerous to ignore. Sure, we can't have protection for all against bad business luck but we should have effective processes to deal with unconscionable bullying and exploitation.*”<sup>4</sup>

Considering the importance of the franchising sector to the economy, it is essential that the “Aussie battlers” who make up the bulk of franchisees, have recourse to strong legislation and the political will to protect them against the avarice and unequal power of some big business. These practices are rife throughout the franchising industry; for example, franchisees of a retail chicken outlet have accused the franchisor of

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<sup>2</sup> Weymouth, Bob. 26 June 2007. Regional Director, Victoria. Australian Competition and Consumer Commission. [REDACTED]

<sup>3</sup> Borradaile, Cher. 2 July 2007. Howard's ACCC responsible for franchising victims. <http://www.blognow.com.au/acccfranchising>. Internet website.

<sup>4</sup> Switzer, P. 4 July 2007. ACCC's response fails to quell a protracted car-care war. <http://www.theaustralian.news.com.au/story/0,20867,22013368-643,00.html> The Australian.

unconscionable conduct and franchisee “churning”<sup>5</sup>. To quote Minister Randall, *“essentially, they get them in...and then they fail to assist in any training, in any business management. Many of these people who come in are simply people off the street or who have been in other professions and who think they are going to make a business out of a franchise. They do not receive any business or training help, or what is provided is limited.”*<sup>6</sup>

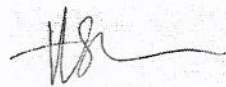
Further, the situation with another large baked goods franchise, appears much the same, Federal Member Joanna Gash quoted in Hansard as saying; *“Whilst it appears that there have been serious breaches of the Trade Practices Act, particularly with regard to the unconscionable practices, I would also suggest that grounds exist where there may have been breaches of criminal law.”*<sup>78</sup>

In addition, the Chair of the ACCC, Mr Graeme Samuel is on record as saying, *“We are changing our focus to take a much more aggressive attitude to pursuing unconscionable conduct, and this means pushing to get more matters before the courts.”*<sup>9 10</sup>

Therefore, I submit to this enquiry that the ACCC *“...begin a concerted effort to take unconscionable cases forward”*<sup>11</sup> and to strengthen the Franchising Code of Conduct to deal with this issue; as it has been repeatedly proved inadequate in its ability to protect franchisees, who are key constituents of the Australian economy. In addition, it is essential that the ACCC make use of the search and seizure provisions given to the ACCC in the Trade Practices Legislation Amendment Bill (No. 1) 2007 (the Bill) to comprehensively investigate franchising complaints.

In addition, strengthening the bankruptcy provisions to the franchising sector is also essential. Whilst the Franchising Code of Conduct gives the franchisor the right to terminate a franchise agreement if the franchisee becomes insolvent, it does not protect the franchisee if the franchisor becomes insolvent or goes into liquidation. The only recourse a franchisee has is their franchise agreement, but most such agreements do not deal at all with franchisor insolvency. Further, the provisions in franchise agreements are readily overridden by specific statutory provisions as most franchisees have no specific statutory rights. Therefore, if a franchisor becomes insolvent, the franchisee may be a debtor or unsecured creditor, and ranks equally with all other unsecured creditors, behind secured creditors and employees of the franchisor<sup>12</sup>.

Yours sincerely



Heather Shearer

BA (Hons); M Environmental Management.

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<sup>5</sup> Randall, D. 21 June 2007. Trade Practices: Franchising. Hansard. <http://www.donrandallmp.com/news/default.asp?action=article&ID=569>

<sup>6</sup> Randall, D. *Op cit*.

<sup>7</sup> Bakers Delight in Parliament. Website <http://sydney.indymedia.org.au/node/50510>

<sup>8</sup> Gash, J. Adjournment Bakers Delight. Hansard

[http://parlinfoweb.aph.gov.au/piweb/view\\_document.aspx?id=2684333&table=HANSARDR](http://parlinfoweb.aph.gov.au/piweb/view_document.aspx?id=2684333&table=HANSARDR)

<sup>9</sup> The Briefing. Smart Company Website. 4 July 2007. <http://www.smartcompany.com.au/Free-Articles/The-Briefing.html>

<sup>10</sup> Switzer, P. 4 July 2007. Watchdog to crack down on big bullies. The Australian. <http://www.theaustralian.news.com.au/story/0,20867,22013366-643,00.html>

<sup>11</sup> Smart Company. *Op cit*.

<sup>12</sup> Gutnick, E. Protecting Yourself if the Franchise Fails. <http://www.mybusiness.com.au/index.php?id=283>