

Senate Economics Committee

**Inquiry into the  
Statutory Definition of  
Unconscionable Conduct**

Submission from

**Ray Borradale**

13 October 2008

I would like to commend the members of this committee for taking on this critical subject.

My background is in franchising where I have been involved for more than 20 years and I have recently referred to the subject of this inquiry in a submission to the current inquiry into the Franchise Code of Conduct. I will be brief as I am not a lawyer.

The need to clearly define “unconscionable conduct” may be best understood in the context of franchising as offering worst case examples. Franchisees have had great difficulty in pursuing actions clearly deemed to be unfair, harsh and unreasonable where the most common response from lawyers approached by franchisees is along the lines of;

*“It is unconscionable conduct but few cases are pursued or won on that basis as definition of such conduct is vague and therefore time consuming and expensive to argue. It will cost a lot of money and the likelihood of a win is low. You are better off to accept the behaviour and move on. The only people who win in these cases are the lawyers.”*

The issue here is that many instances of unconscionable conduct produce terrible life-changing financial and personal consequences for the victims. To allow such conduct to go unchecked in law is to damage investor confidence in small business and therefore negatively affect our economy.

Recent franchising submissions offer a multitude of brutal examples of unconscionable conduct that could not be pursued because;

- a) the lack of definition of unconscionable conduct produced advice against pursuing justice and,
- b) the perpetrator of unconscionable conduct could better afford to sustain the legal argument.

We see this now in franchising where the reputation of franchising has undergone severe damage at the hands of a minority of rogue opportunists. Investor confidence will negatively influence this sector. It is no different when considering the wider consequences for small business and the Australian economy needs a strong and growing small business sector.

Those who oppose clearly defined laws and in this case; the definition of “unconscionable conduct”, do so because to maintain such uncertain terms is to positively influence the revenue generated from those uncertain terms. This statement does not contradict my earlier statement of *“you are better off to accept the behaviour and move on”*. Revenue from uncertain law mostly comes from the structuring of protection for those who participate in such behaviour.

Clearly defined law produces changes in behaviour that minimise such behaviour and therefore the revenue offered to rogue operators and the legal fraternity who enjoy the benefits of “unconscionable conduct”.

Clearly defining unconscionable conduct is the work of lawmakers and not the work of lawyers or judges. As it stands at the moment; it is left to lawyers and courts to avoid defining unconscionable conduct.

To define unconscionable conduct is to positively influence economic uncertainty and efficiency and every Australian citizens' right of access to legal remedy. It will change behaviour. Australia's revenue is better spent in investing in our future rather than being drained by unscrupulous operators and lawyers.

I would recommend that the committee consider contacting [Gillian Hadfield](#) at [ghadfield@law.usc.edu](mailto:ghadfield@law.usc.edu) for the pre-eminent opinion on structuring such definition.

I thank the committee for the opportunity to contribute.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ray Borradale', written in a cursive style.

Ray Borradale  
13 October 2008

## Appendix A

The following is a list of ex-Midas franchisees. They were turned over in the period March 2001 to February 2007. The list is incomplete as the rapid rate of turnover across 6 states made it difficult to keep up. This list was compiled from comparisons between Midas produced shop contact sheets and from direct contact with franchisees.

Alan Rogerson  
Alan Young  
Alexis Rech  
Alison Carr  
Alison Rudd  
Anastasia Gabriel  
Andrew Carr  
Andrew Flynn  
Andrew Jones  
Andrew Tanti  
Anna Hatzipavolis  
Anne Fuller  
Anthony Lazzaro  
Anthony Porter  
Barry Zambrano  
Bernie Rose  
Brenton Pettigrove  
Brian Barton  
Brian Menzies  
Bronwyn Mascetti  
Bruce Pitts  
Cambell Ewart  
Carolyn Cook  
Catherine Johns  
Cher Borradale  
Christopher May  
Colin Humphries  
Colin Simpson  
Constantine Papadopoulos  
Craig Missen  
Dalton Gebauer  
Dan Gallet  
Daniel Sexton  
David Atherton

David Betts  
David Dring  
David Reid  
David Turner  
David Wallis  
David West-McInnes  
Debbie West-McInnes  
Derek West  
Derek West  
Dianne Porter  
Donna Morton  
Eric Groszman  
Frank Hoe  
Gai Mitchell-Hoare  
Gang Li  
Garrick Hora  
Gary Rigg  
Geoff Dowdell  
Geoff Trewin  
Geoffrey Lowrey  
Geoffrey Rech  
George Bushney  
George Hatzipavolis  
Gerrard Allen  
Gina Tanti  
Graeme Downes  
Graeme Giles  
Graham Hocking  
Han Xiong  
Heather Shearer  
Hussein Sukkarieh  
Ian Hansen  
Ian Hersey  
James Lamb  
Janet Groszman  
Jean Ball  
Jennifer Lauricella  
Jim Lolas  
Jocelyn Hawkins  
Jodie Ewart  
John Cook  
John Hawkins  
John Kamolins  
John Martel  
John Theore  
John Weatherall  
Judith Lamb  
Julie Gallet

Julie Higham  
Juliet Van Rooyan  
Karen Kelly  
Keith Prout  
Ken Papadopoulos  
Kennith Rooyan  
Kevin Condon  
Kevin Hoare  
Kim Henshaw  
Kurian John  
Laurie Stevens  
Lawrie Eagers  
Leone Jones  
Li-Min Huang  
Leonie Stevens  
Linda Prout  
Lloyd Anderson  
Malcolm Mackellar  
Mark Roberts  
Mark Sands  
Mark Smart  
Maro Sands  
Martin Dring  
Mary Cutler  
Mathew Crossan  
Maurice Carmeni  
Melinda Zanetich  
Michael Higham  
Michelle Sexton  
Mike McKeown  
Mike Taylor  
Mona Saigh  
Naider Taleb  
Narelle Betts  
Neil Jones  
Neville Miller  
Nicole Atherton  
Norm Adams  
Paul Zambrano  
Pauline Gebauer  
Penelope Mayne  
Peter Adams  
Peter Dal Santo  
Peter Fowles  
Peter Mascetti  
Peter Stanley  
Peter Whiting  
Philomena Barton

Ray Borradale  
Ray Miller  
Rebecca Star  
Richard Pratt  
Richard Rust  
Robert Lauricella  
Robert Piciocco  
Robert Piscioneri  
Roderick Fleming  
Roger Stevens  
Ron Utoyo  
Rosslyn Simpson  
Russell Curran  
Sadhana Deshmanya  
Sam Ball  
Scott Bennett  
Scott Walker  
Shane Waters  
Sharon Crossan  
Shaun Rudd  
Stacey-Lee Menzies  
Steve Irish  
Steven Hall  
Steven Kilgariff  
Stuart Curran  
Sue Eagers  
Tim Noar  
Todd Adams  
Tony Flamank  
Tony French  
Tony Johns  
Tony Martin  
Tracey Reid  
Tracie Hall  
Vaughan Coburn  
Wendy Hooper  
William Geyser  
William Treglown  
Yifan Xiong

This list of 169 franchisees mostly occurred over 84 months and is incomplete; there were more but Midas made it simply too difficult to track. Many of these franchisees were in partnerships and many had multiple franchises.

They all had families.

The ACCC never effectively pursued Midas in regard to any complaints over more than 6 years of absolute carnage, except where in early 2008 the ACCC advised Midas that they were not to advertise Midas franchising as a successful and growing network with 25% more shops than actually existed. ACCC knew of Midas franchisee turnover for 4 years and did nothing.

## Appendix B

The following is the format referred to in this submission section 8(iii) [page 30]. It is put forward to simply prompt ideas for better due diligence and evaluation of disclosure information. Better law and regulation would also be cause to review such a template.

# Your Franchise Due Diligence

Performing an effective Due Diligence of a prospective franchise business venture is often replaced by emotional decisions kindled by those selling the franchise and an unrealistic assumption that franchising offers automatic success. Buying a franchise typically carries a financial burden where you may well be placing your home and savings at risk if the venture fails.

It is critical that a franchise venture is investigated thoughtfully, thoroughly and unemotionally. Here you pursue an investigation through prompts designed to assist you to determine the likely success of the venture and the relationship you will have with your proposed franchisor.

## Franchise Background

### 1) Contact(s)

[Provide the name(s) for the business operator(s)]

[Provide the entity name for the business.]

[Provide the telephone numbers for the business operator(s)]

[Provide email address(s) for the business operator(s)]

### 2) Business address

[Provide the address for the proposed/existing franchise.]

### 3) Business/Franchise name

[Provide the name for the Franchise and the location i.e. suburb, town or branch name.]

[[Select/Type Existing or New] Franchise business.]

### 4) Location

[Explain why you have chosen this location.]

## Due Diligence

### 5) Franchisor(s) name(s) & experience

1. [Provide the name for the franchisor and his/her industry and franchising experience]



- |  |
|--|
| 2. [Provide the name for the franchisor and his/her industry and franchising experience] |
| 3. [Provide the name for the franchisor and his/her industry and franchising experience] |

**6) Key franchise support people & experience**

- |  |
|--|
| 1. [Provide the name for the support person and his/her industry and franchising experience] |
| 2. [Provide the name for the support person and his/her industry and franchising experience] |
| 3. [Provide the name for the support person and his/her industry and franchising experience] |
| 4. [Provide the name for the support person and his/her industry and franchising experience] |

**7) Franchisee obligations and compliance**

- |   |
|---|
| [Describe your understanding of the franchise relationship.]                    |
| [Describe your understanding of franchisee obligations to the franchise brand.] |
| [Best describe how you can add your "style" to the success of the franchise.]   |
| [Best describe your responsibility to the success of the franchise.]            |

**8) Existing/past franchisee contacts**

List 10 past and 6 existing franchisees and contact them to gain an insight into the success of the franchise. Most existing franchisees are reluctant to criticise their franchise system for various reasons even when a criticism is legitimate so it is important to contact at least the recommended number of past franchisees. Enthusiastic and positive responses usually indicate a content franchisee.

Contacts should be randomly selected by you and not prompted or offered by the franchisor or existing franchisees. If the franchise network is large (80 plus), it is recommended that at least 20 contacts be made.

It is crucial that you record and are satisfied with answers to the following questions:

|  |
|--|
| <b>1. [Franchisee name, telephone number and status (existing/past franchisee)]</b>                            |
| [Franchisee response - How would you describe the format and frequency of franchise network <b>meetings</b> ?  |
| [Franchisee response - What type of <b>advertising</b> is provided?]   |
| [Franchisee response - What is the format of reporting for <b>advertising funds</b> ?                          |
| [Franchisee response - What level of <b>local advertising</b> expenditure would be normal?]                    |
| [Franchisee response - How would you describe initial <b>training</b> and ongoing training?]                   |
| [Franchisee response - How would you describe initial and ongoing <b>support</b> ?                             |
| [Franchisee response - What level of supplier <b>rebates</b> does the franchisor receive?]                     |
| [Franchisee response - What level and type of product is <b>purchased</b> from the Franchisor?]                |
| [Franchisee response - Where do you experience the greatest <b>buying power</b> benefits?]                     |
| [Franchisee response - How would you describe costs relating to a <b>lease</b> ?]                              |
| [Franchisee response - How would you define the franchise <b>territory</b> ?                                   |
| [Franchisee response - What unforeseen <b>costs</b> should be expected?]                                       |
| [Franchisee response - How much <b>time</b> would be spent in the business in an average week?]                |
| [Franchisee response - How would you describe the average franchise annual <b>net profit</b> ?                 |
| [Franchisee response - How does the franchisor support the <b>sale</b> of existing franchises?]                |
| [Franchisee response - How would you describe the levels of franchises <b>sold</b> and long-term franchisees?] |
| [Franchisee response - How would you describe the type and level of franchisee <b>complaints</b> ?             |

**9) Franchise Internet research**

- |  |
|--|
| [What information was found through Internet searches at the ACCC and legal websites (Austlii)?] |
|--|

[What were the outcomes of Internet and media searches?]

#### 10) **Financial model**

**[Provide the name(s) and telephone number(s) of your accountant and/or business advisor.]**

[Are you and your accountant satisfied with your Cash Flow and Profit/Loss projections for the franchise?]

[What information was provided on the financial effects of rent and future rent projections?]

[What information was gathered on the financial effects of achievable costs of goods?]

[What information was gathered on the financial effects of product purchased from the franchisor?]

[What information was gathered on the financial effects of staffing costs?]

#### 11) **Franchise agreement**

**[Provide the name(s) and telephone number(s) of your legal advisor.]**

[Is your lawyer satisfied that the franchise agreement meets legal requirements?]

[What questions, if any, were raised when the Lease was examined?]

[What questions, if any, were raised regarding end of term effects to goodwill?]

[What clauses, if any, to the franchise agreement require more explanation and why?]

#### 12) **Lease**

[You have read and have a copy of the head lease; what questions are raised for you?]

#### 13) **Finance**

[What issues were raised for you when you compared levels of interest and payments?]

#### 14) **Franchising Legal Requirements**

[You have read the relevant legal requirements for franchising; what questions are raised for you?]

[You have read the relevant legal requirements for franchising; which clauses hold significance and why?]

[Who provided you with any clarification of legal requirements?]

#### 15) **Future franchise prospects**

[What research outcomes performed by you indicates a long-term future for the Franchise Model?]

#### 16) **Franchisor obligations**

[Describe the key obligations of the franchisor to the franchisee.]

#### 17) **Franchise Information - General**

[Was there any information provided to you that was found to be inaccurate? - provide details.]

[List any other information you believe is required to support a decision to accept this franchise offering.]

## Appendix C

This list contains the names of recent franchise networks with reported network complaints or serious disputes. The information was gained through direct contact or basic research. There would obviously be many more.

|                                  |                                  |
|----------------------------------|----------------------------------|
| 4WD Systems Pty Ltd              | Mars / Venus Consulting          |
| A.1 Mobile Radiator Repairs      | Master of Education Services     |
| Allphones                        | Michels Patisserie               |
| Arnolds Ribs & Pizza             | Midas Car Care                   |
| Australian Billboard Connections | Millennium Diagnostics           |
| Australia Post                   | Mobile Computer Cleaning         |
| Bakers Delight                   | Mortgage Choice                  |
| Banjo's Bake House               | Nightowl Convenience Store       |
| Bank of Queensland               | Noodle Box                       |
| Baskin Robbins                   | Office Support Services          |
| Bartercard                       | Peregrine Corporation,           |
| Cheap As Chips                   | Photo Safe Australia             |
| Chaste Weight Loss               | Pizza Hut                        |
| Civic Video                      | Polar Krush                      |
| Clark Rubber                     | Quiznos                          |
| ContractPlus Group               | Raine & Horne                    |
| Dreamy DoNuts                    | RAMS                             |
| Europark                         | Refund Home Loans                |
| Flaschengeist                    | Retravision                      |
| Forte School of Music            | Scotty's Premium Pet Foods       |
| Gloria Jean's Coffee             | Seal-A Fridge                    |
| Goldseal Australia               | Shell Company of Australia       |
| Goodyear                         | Simply No-Knead                  |
| Great Australian Ice Creamery    | SportsCo                         |
| Hertz Car Rentals                | SupaNews                         |
| Howard's Storage                 | Synergy in Business              |
| Hungry Jacks                     | TACA                             |
| Il Giann Fornao                  | The Cheesecake Shop              |
| Imagine Essential Services       | The Falafel Kitchen              |
| Isoldit                          | The Furniture Wizard             |
| Jesters                          | The Original Mama's Pizza & Ribs |
| Jim's [various]                  | Timberland Furniture             |
| JV Mobile Pty Ltd                | Top Snack Foods                  |
| KFC                              | Video Ezy                        |
| Kleins Jewellery                 | VIP Home Services                |
| Kwix Fix                         | Volvo                            |
| Lawson's Trading Co              | Wild Gear Pty Ltd                |
| Lenards Chicken                  | Will Writers Guild Pty Ltd       |
| Little Joe [Joey's]              | Wizard                           |

Maintenance Franchise Services

You Can Bake It

These franchise numbers offer a clear indication that existing legislation and the regulation needs reform that produces better than compromise.