

# COMPETITIVE FOODS AUSTRALIA PTY LIMITED

(Incorporated in Queensland)

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23 October 2008

Committee Secretary  
Senate Economics Committee  
Department of the Senate  
Parliament House  
Canberra ACT 2600

Dear Secretary

## **Unconscionable Conduct Inquiry**

There is currently a serious deficiency in relation to the interpretation given to the meaning of unconscionable conduct in s. 51AA of the Trade Practices Act 1974, which we believe would impact the interpretation of s.51AC in particular.

This deficiency is a result of the decision of the High Court in *ACCC v CG Berbatis Holdings Pty Ltd* [2003] HCA 18. In that case the High Court held that a decision by a landlord to impose extraneous conditions on the renewal of a lease did not constitute “unconscionable conduct” but was simply “hard bargaining” – this is because the tenant had no “right of renewal”. Thus, it would not appear to matter what benefits the landlord sought to extract from the tenant as the price of renewal, it would never constitute “unconscionable conduct”, even though the tenant was beholden to the landlord to renew the lease so that the tenant could sell its business to a third party.

The problem of opportunistic conduct by a landlord is equally applicable to franchisors in relation to renewals of existing agreements. In fact, because of the different business models between retail tenancy and franchising, the impact of opportunistic conduct can be particularly harsh for franchisees. This is because franchisees not only lose their entire business if the franchise agreement is not renewed, but are typically subject to contractual restraints of trade that limit their future business opportunities.

The logical conclusion of the High Court’s decision in *Berbatis* is that a similar limitation on the meaning of “unconscionable conduct” will apply to s.51AC, even though s.51AC is not defined in terms of the “unwritten law”. Whether or not this is the case will need to be determined by the High Court unless there is legislative clarification of the issue. There are strong practical reasons for such clarification – it would take at least 3-5 years and a significant cost consequence simply to have an appropriate case reach the High Court to achieve this clarification, which could be avoided by appropriate legislative clarification.

Based on work we have done in the context of submissions that we have made to numerous inquiries in the last 12 months, we have developed some model amendments for s.51AC to resolve the current uncertainty. These amendments, together with an Explanatory Note, are attached.

We have also been advised by Mr Alan Robertson SC, a leading administrative and constitutional counsel, that the amendments we have proposed would be valid laws of the Commonwealth. In

particular, these laws would not be “retrospective” but would apply to future *conduct* in relation to renewal decisions.

Our detailed arguments which analyse the current situation facing franchisees have been set out in detail in our submissions to the Franchising Inquiry being conducted by the Joint Parliamentary Committee on Corporations and Financial Services, and in particular Part I and Part II paras 36-43. Those submissions can be found at [http://www.aph.gov.au/senate/committee/corporations\\_ctte/franchising/submissions/sub22.pdf](http://www.aph.gov.au/senate/committee/corporations_ctte/franchising/submissions/sub22.pdf). In view of the time constraints, we respectfully request that the Committee accept those submissions as part of our present submission to this Committee.

We would like an opportunity if possible to present our arguments to the Committee in person, and understand that the Committee may be holding a hearing on this matter in Sydney on 3 November 2008. I would be available to attend that hearing at any time prior to 10.30 or after 4.30 on that day, if that were to meet the Committee’s schedule.

Please let me know if you have any questions, or if I can be of assistance in any other way.

Yours sincerely

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

*Tim Castle*

General Manager-Business Development  
General Counsel