

**Parliamentary Joint Committee on
Corporations and Financial Services**

**INQUIRY INTO
FRANCHISING CODE OF CONDUCT
& OTHER RELATED MATTERS**

Submission by

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1. Introduction

I thank you for the opportunity to make this submission to the Inquiry into franchising. It is encouraging that the issues my family and I faced as franchisees of [REDACTED] can be discussed without fear of retribution in this forum that can strengthen the legislation and ensure that our experience does not have to be repeated.

Our story is about misrepresentation. [REDACTED] made representations to us that induced us to buy a franchise from them. They gave us a surety that they would purchase the franchise back from us if the store proved unprofitable. [REDACTED] made the same representations to our bank.

When the franchise never achieved the levels of turnover that [REDACTED] represented it would, they refused our requests for them to repurchase it.

We got legal advice and our lawyer advised us that whilst we had a good case against [REDACTED] for misleading and deceptive conduct, there would come at a cost. These costs were both financial and emotional; and we could afford neither. Due to my experience with [REDACTED] I was suffering severe depression, and financially we were in dire straits. To try and raise at least \$250,000.00 to try and recover our losses was just not feasible. As a result, we walked away from taking any action.

My wife and I believe that the Franchising Code of Conduct is not effective in its current form. We believe that the Trade Practices Act needs clarification around the 'unconscionable conduct' provision, and we believe that the ACCC is not capable of regulating the franchising industry. The financial cost of getting justice is prohibitive. In effect, franchisees have no protection from predatory behaviour.

These are our personal opinions, based on our own experiences.

2. Our [REDACTED] Experience

My name is Graeme Brown. My wife and I are successful business people, running a profitable business within the milk industry for a number of years. We are also successful property investors. When it comes to business and investments, we do our due diligence. We did not, nor could we have, expected the treatment or conduct that we experienced at the hands of [REDACTED].

In January 2001, my wife, Anne, and I decided to look into opening another business. Due to strong advertising in WA at the time, we decided to investigate becoming franchisees of [REDACTED].

On the 5th February 2001, my wife and I attended a seminar held by [REDACTED]. At this seminar the Regional Manager of [REDACTED] (WA Branch), told the group that in the event that a [REDACTED] store did not make the forecasted profit levels as represented by [REDACTED], or began to make a continual loss, [REDACTED] would buy back the underperforming store from the franchisee.

In early May of 2001 we looked into purchasing a news franchised bakery in North Perth. [REDACTED] constructed and fitted out the store, at our expense, for us to operate under the name of [REDACTED] North Perth.

[REDACTED] represented to us that the North Perth franchise would make a minimum level of weekly turnover and would be profitable. [REDACTED] also represented to us that if this proved not to be the case, they would repurchase the North Perth franchise immediately from my wife and I, as was their standard policy.

The North Perth [REDACTED] franchise never made the levels of turnover that [REDACTED] represented it would, and was unprofitable. [REDACTED] refused to repurchase the franchise, despite their representations, when it became clear it was commercially unviable.

My wife and I would never have purchased this franchise had we ever suspected it would have had such poor turnover levels, and profitability. It was on the basis of representations made to us by representatives of [REDACTED] that we bought the North Perth franchise and entered into a franchise agreement with them. But everything [REDACTED] represented to us was false.

2.1 Initial Investigation of Store Sites

Prior- to purchasing the North Perth Site, my wife and I investigated what other alternative store sites were available.

My wife and I first entertained the idea of operating a bakery on Saturday, 27th January 2001, whilst talking to a Real Estate Agent in Busselton, who informed us that Busselton needed a well run bakery such as [REDACTED], or coffee lounge such as [REDACTED]. However, we resisted the temptation to set up shop in Busselton.

On Sunday, 28th January 2001, I spoke to [REDACTED], an employee of the [REDACTED] [REDACTED] Head Office in Melbourne, and daughter-in-law of a cousin of mine, [REDACTED]. Ms [REDACTED] informed me that there was a viable store site available in Margaret River, and that it was to be advertised in the 27th January 2001 Long Weekend edition of the Western Australian Newspaper. My wife and I applied for this site.

2.2 Suitability Assessment and Training

In light of this, on 13th February 2001, my wife and I lodged an application to become [REDACTED] franchisees, following which I did a two-day orientation at [REDACTED] store in Joondalup.

On the 20th February 2001, my wife and I undertook an assessment by a recruitment and human capital management company in Subiaco, namely [REDACTED] Group Human Capital Solutions, to determine if we were suitable to become [REDACTED] franchisees.

We were officially notified of our acceptance into the [REDACTED] system on Tuesday, 6th March 2001.

My wife and I then signed agreements prior to starting training, and paid \$8,200.00 for induction and insurance including GST.

Following this, we met with [REDACTED], the franchisee at [REDACTED] Dianella on Monday, 13th March 2001, where our training was to take place. This store did not have the Point of Sale registers or back office systems, so we did not receive the full training we had paid for.

It was during our training that my wife and I resolved that we were not prepared to leave the metropolitan area to operate a [REDACTED] store, without good reason, unless it was in Margaret River.

It was early on in our training, in mid March of 2001, that we discovered the Margaret River site had been awarded to [REDACTED]. I was advised by my brother in Brisbane, who has a unit next door to the people who do the [REDACTED] Fit Outs Australia wide. Denis was talking to the owner who mentioned in passing that he was doing the Fit Out for Margaret River. When I told [REDACTED] ([REDACTED] Property Manager) he denied for several weeks that it could have happened.

2.3 [REDACTED] Offer of the Beaumaris, Mullaloo and North Perth Store Sites

Subsequently, my wife and I were offered the [REDACTED] franchise in the suburb of Eaton, in late March of 2001, but declined to take it. Additionally, my wife and I with the Business Development and Property Manager for [REDACTED] in Western Australia, [REDACTED], examined another store site in the suburb of Merriwa that was to become available. My wife and I rejected the Merriwa site because we did not think it would be commercially viable. My wife and I discussed, with [REDACTED], the demographics and decided that the population was not sufficient to support a store.

In April of 2001, ██████████ showed us the Mullaloo, Beaumaris and North Perth Sites. He stated, of his own volition, that ██████████ were prepared to pay \$600,000.00 for the North Perth Site, if it had an operating bakery, and that they had first right of refusal regarding it.

Following this, in late April of 2001, my wife and I considered obtaining a site outside the Dewsons (now IGA) supermarket in Mindarie. The site was owned by Foodland (now IGA) Glendalough, and ██████████ led us to believe that it could be made available to us if we wanted it. However, ██████████ did not investigate the actual details of how or when such a site may become available, and ultimately he deemed the site unsuitable.

Ultimately an odds and ends shop took up this site. It would have been ideal. Discussions then commenced between my wife, ██████████ (representative of ██████████ Head Office (WA Branch) then in Subiaco), and I, in late April of 2001, with a view to potentially taking the North Perth Site.

Taking the North Perth Site at this point in time, seemed like the most viable option, even though our training store, Dianella, was on the market. This was because the Dianella store was only trading six days a week and had a turnover of approximately \$10,000.00 - \$11,000.00 per week.

2.4 False Representations made by ██████████ that induced our purchase of the North Perth Franchise

In discussions with ██████████ and ██████████ prior to purchase of the North Perth Site, representations were made regarding both:

- a. the expected turnover of the North Perth Store, and;
- b. the actions that ██████████ would take in repurchasing the North Perth franchise should it not make the estimated levels of turnover and thus not be profitable.

2.4.1 False Representations of Turnover Levels

On three separate occasions ██████████ represented that the North Perth Store would turnover at least \$15,000.00 per week.

First, in early May of 2001, prior to the finishing of the bakery training of my wife and I, ██████████ unequivocally represented that the weekly turnover for the North Perth Store would be at least \$15,000 .00 per week.

The second time was also in May 2001, a month prior to the cessation of training, a further representation was made during discussions regarding the possible purchase of the North Perth franchise. Whilst talking to my wife and I out the back of the Dianella Store, ██████████ stated that the North Perth Store would turnover \$15,000.00 per week but we would, if operating it, have to produce as if it were going to turnover \$20,000 .00 per week, in accordance with the ██████████ Wastage Policy. ██████████ also stated that if he were financially able, he would buy the North Perth franchise himself.

We purchased the franchise on 28.06.2001. Despite requests, we were never provided with a reconciliation that included invoices and proof of how [REDACTED] spent our money. We believe that [REDACTED] may have acted fraudulently in regard to the set-up of our North Perth store, and so are refusing to supply this documentation.

Thirdly, a few days before the opening of the North Perth franchise, [REDACTED] called me from a wedding he was attending in Queensland, to discuss store operation, and stated again that production needed to be at a level such that \$20,000.00 turnover could be made per week.

2.4.2 Representation that [REDACTED] would buy back the North Perth Store should forecast turnover levels prove to be unobtainable.

At a seminar held by [REDACTED] on 5th February 2001 [REDACTED], the Regional Manager of [REDACTED] WA Branch, told the group that attended, that in the event that a [REDACTED] store did not make the forecast profit levels as represented by [REDACTED], or began to make a continual loss, [REDACTED] would buy back the underperforming store from the franchisee.

2.5 Agreement to purchase the North Perth franchise

It was on the strength of [REDACTED] representations about the value of the North Perth Site in April 2001, and [REDACTED] representation about turnover and store repurchase in May of 2001, that my wife and I decided to purchase the North Perth Site, and the North Perth Store which we were to operate on it. We notified [REDACTED] of such intention.

When we purchased the North Perth franchise, my wife and I paid the landlord \$30,000.00 to take over the lease. We have since discovered that the previous lessee was bankrupt, which raises grave doubts about the level of turnover that he could have been making whilst operation in North Perth.

Over the next 12 weeks, [REDACTED] undertook a full fit out of the North Perth Site. We ordered uniforms, and interviewed and hired staff in order to get the North Perth Store up and running.

2.6 Representations made by [REDACTED] to [REDACTED] (now [REDACTED]) and the [REDACTED]

On deciding to purchase the North Perth franchise we applied for Finance with our Business Banking Relationship Manager at the [REDACTED], [REDACTED].

As the [REDACTED] Bank had never financed a [REDACTED] store before we were told there was going to be a lengthy delay in obtaining finance approval.

After a period of a few weeks, [REDACTED] put considerable pressure on us to approach [REDACTED] ([REDACTED]) for Finance. [REDACTED] Bank was itself put under

pressure from [REDACTED] to approve any such applications, as they had to date done the majority of [REDACTED] banking work. Finance was approved in principle on the same day we went to see [REDACTED] Bank. Finance approval from the [REDACTED] Bank also arrived later on that same day, which was 4th May 2001.

[REDACTED] provided financial information regarding the projected turnover of the North Perth Store to [REDACTED].

This information indicated that the North Perth Store would turnover at least \$14,000.00 per week, and that if it failed to do so, [REDACTED] would, as they had done in the past with the Warwick and Wanneroo stores, buy it back from the franchisees.

Although the finance application was never actually taken up with the [REDACTED], [REDACTED] in assessing the commercial viability of the North Perth Store as a business, indicated to my wife and I, that to repay a potential loan and breakeven (excluding the wages we were each to be paid), a minimum turnover of \$9,500.00 per week would need to be made.

With such representations having been made, my wife and I went for an interview with [REDACTED] at the [REDACTED] Bank located on the corner of [REDACTED] ([REDACTED]) and [REDACTED] Street in Perth. This interview started at 2:00pm and by 3:15pm we had conditional approval that was to be confirmed by a later facsimile.

Such approval was achieved in part due to a business template that [REDACTED] had prepared and provided us with to give to [REDACTED] Bank. This template included a partially complete business plan, and allowed predicated sales figures to be input into it to generate predicted future turnover levels, and thus our loan repayment ability.

Based on the predicted sales figures used the template indicated that at least \$15,000.00 per week could be generated. This suggested to [REDACTED] Bank that we would easily be able to repay the money that we were requesting they loan us. Accordingly, loan repayment terms were set at \$12,984.00 per month, for the first 6 months, to be reduced to \$7,200 .00 per month thereafter.

Following this my wife and I signed off from training (which was a prerequisite to operate the North Perth Store), and then signed a franchise agreement. [REDACTED] held the head lease, and we signed a licence Agreement to sub-lease the site from them. We then opened the North Perth Store on 28 June 2001.

2.7 Production levels at the North Perth Store

The first week the North Perth franchise turned over \$8,200.00 and this soon, dropped back to just over \$5,000.00. This was a long way short of the represented \$15,000.00.

2.8 Affects on my health

The turnover levels of the North Perth Store never reached anywhere near \$15,000.00 per week. Due to the stress caused by this, my health began to suffer. This resulted in me collapsing twice in the bakery on Saturday the 21st July 2001, firstly into the mixing bowl during the day, and then into the rubbish bin later that night.

In the ensuing few weeks I collapsed several more times, and my doctor diagnosed me with severe depression resulting from the poor performance of the North Perth store. My doctor told me to sell the store or I would die in the shop.

My wife and I met with [REDACTED], Regional Manager of [REDACTED] in Western Australia, on 27th August 2001, to discuss the sale of the North Perth Store.

2.9 The Sale Process

[REDACTED] refused to re-purchase the North Perth franchise from us, but agreed to help us sell it.

Two months later, on 28th October 2001 we received an offer from another franchisee for \$250,000.00. Noting that we had setup the store just 4 months before, paying \$409,934.83, we had to refuse so we could cover the debt we now had from the bank. We struggled on, suffering staggering financial losses.

The next offer did not come until 22nd December 2003; from a purchaser who was introduced to us by [REDACTED], and offered to purchase the North Perth store for \$260,000.00. Due to our financial situation and my deteriorating health we could not refuse. Settlement occurred on 4th March 2004.

The North Perth Store never turned over close to \$15,000 .00 per week in the entire time my wife and I ran it, as there simply was insufficient demand in the North Perth area at the time to achieve such turnover figures.

Accordingly, it became was never profitable. As [REDACTED] reneged on their agreement to re-purchase the franchise, we had to keep it open for 139 weeks and 1 day waiting for [REDACTED] to approve a new franchisee to purchase it.

3. The ACCC

In April 2007 our complaint was included in the group of former [REDACTED] franchisee complaints forwarded to the ACCC by the Honourable Joanna Gash, MP. In October 2007 our complaint progressed to the 'in-depth' stage of the investigation.

My wife and I met with the investigators on two occasions. Graeme met first with the ACCC in their Canberra offices in June 2007 and Anne in their Perth offices in July 2007. We provided them with a large amount of documentation and evidence backing up our complaint of misleading and deceptive conduct (breaches of the Trade Practice Act). Including the name of the bank manager to whom [REDACTED] made the same misrepresentations.

We were led to believe by the ACCC that they had made a case against [REDACTED], and were devastated when the ACCC decided to take no action against them.

We now believe that the ACCC did not conduct an in-depth investigation at all, and are themselves misleading the public about how they conducted the investigation into [REDACTED]. The ACCC did not contact our bank manager to discuss the [REDACTED]

issue; instead it seems that the ACCC simply took our complaints to [REDACTED] and have accepted their version of events. This is not an 'in-depth' investigation.

My wife and I believe that the ACCC are not capable of administering the Franchising Code of Conduct or the Trade Practices Act in regard to franchisees. We believe they do not understand what 'unconscionable conduct' means and are in fact, in the words of John Farrell from the NFIB (National Federation of Independent Business) "commercial children".

4. Recommendations

We make the following recommendations for your consideration:

1. Penalties be introduced for breaching the Code;
2. A Franchising Ombudsman be set up;
3. A low cost/no cost arbitrary body be set up to allow franchisees access to affordable dispute resolution;
4. Good Faith and provisions be included in the Code;
5. 'Unconscionable Conduct' to be better defined within the Trade Practices Act;
6. Clause that allows for retrospective claims be introduced into current legislation.

5. Final Word

It is our belief that the Code does protect franchisees in its current form. The Trade Practices Act is not an accessible solution to franchisee issues due to the cost of litigation. It is our hope that you will introduce a system that allows for quick resolution to franchise issues that is affordable to franchisees in distress.

We thank for taking the time to read our story. We are available to answer any questions you may have regarding this submission.