# Parliamentary Joint Committee on Corporations and Financial Services

# Inquiry into the Franchising Code of Conduct

Submission of:

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1. I am pleased to have this opportunity to make a submission to the Parliamentary Joint Committee on Corporations and Financial Services *Inquiry into the Franchising Code of Conduct*. Despite my association with UNSW, the FCA and Deacons the opinions I express in this submission are my own.

2. My credentials in relation to franchising are well established and are based on research, teaching and construction to the sector over three decades. I note in particular:

   - 200+ articles, papers and presentations on legal, commercial and developmental aspects of franchising
   - Inductee to Australian Franchising Hall of Fame
   - Honorary Dean and Visiting Professor of the International Franchise Academy of Beijing Normal University, Zhuhai China
   - Architect of the sector's national education program (currently the Diploma of Business Franchising)
   - Plenary speaker for national Franchise Association Conferences of Australia, new Zealand, China, Malaysia, Germany, US, South Africa, Vietnam
   - Founding editor of *Franchising Law and Policy Review*
   - Member of ACCC's Franchising Consultative Panel 2000-2007
   - Co-author of *Franchising Law and Practice*
   - Columnist for *Australian Franchising magazine*
   - Drafter of Vietnam's Franchising Law (effective 2006)
   - Governor of the FCA's *Franchising Academy*
   - Head of the judging panel for the National Franchising Awards 1996-current
   - Special counsel to Deacons working with the firm's franchising division
   - Member of the Small Business Development Corporation of NSW 2004-2007

3. I attach my cv which lists my franchising publications and am happy to provide copies of any material noted therein.

4. In my recent submission to the South Australia Franchising Inquiry I expressed my disappointment with the opinion of a member of the Economic and Finance Committee Conducting the Inquiry Mr JR Rau MP that in his "perfect world we would not have franchises at all because I think they are all nonsense" (Hansard 17 October 2007).

   I am also concerned that the debate on Mr Randalls motion on Franchising in the House of Representatives is characterised by generalisations, often emotive, and the absence of statistical data.

   Any instance of business failure is unfortunate – horribly so in many cases of franchisee failure where unrealistic expectations have not been met and failure has very serious financial and personal costs. But individual failure does not prove systemic failure of either the particular franchise system or the regulatory framework. A closer examination of individual cases often points to commercial / market issues rather than franchise-specific issues as the cause. A free enterprise system cannot guarantee success. While it is appropriate that the special risks in franchising due to the information and power imbalance be addressed (as indeed they have been to a greater extent than anywhere else in the world under the FCC regime supplemented by TPA misleading/unconscionable conduct provisions of general application) ordinary commercial risks must remain with the parties.

5. My overall philosophy in relation to franchising is probably best expressed in my evidence to the federal review of business conduct a decade ago which prefaced its chapter on franchising with my comment that:

> Good franchising is very good. It is undoubtedly the most efficient, effective distribution system ever invented. It is the greatest invention of Western capitalism since the invention of the corporation. Good franchising is so much better than independent small business operation but bad franchising is so much worse. (*Finding a balance: towards fair trading in Australia*, AGPS 1997 p.83.)

6. The challenge for those responsible for regulating the franchise sector is perhaps best expressed in the 1986 submission of COSBOA in relation to the draft, but later aborted, Franchise Agreements Bill:

> Entrepreneurship and business creation in free enterprise society such as ours necessarily include an element of risk and it should certainly not be the role of Government to remove it. Nevertheless, in the particular circumstances of franchising there are elements quite different to normal business development because of overriding risk for other than purely business or commercial reasons. Those special additional risks arising in part because of the balance of power in the franchising relationship should be minimised while leaving the commercial risks and decisions to be handled by the parties concerned.

7. It is no comfort to a failed franchisee that Australia's regulatory regime for franchising is the most comprehensive of the 30 countries which regulate their franchising sectors by specific franchise regulation. It may nevertheless be interesting for the Committee to note the comments of Professor Martin Mendelsohn, arguably the leading UK authority on franchising who has written that:

> the proposed new Australian regulation makes Australia the least desirable destination in the world for franchise systems…. [Franchisors] should avoid Australia until they have nowhere else to go and even then it would be a close call (*Franchise Regulation – Is the World Going Mad?* (1999) 8(1) Franchise New Zealand Magazine 49).

Mendelsohn was critical of Australia's 'lemming-like progress to regulation in response to which I pointed out that the lemmings have moved slowly to the regulatory brink and may have been comforted on their long journey by the virtually unanimous opinions of a number of reports that regulation in some form was both necessary and desirable (*Franchise Sector Regulation: The Australian Experience* [2003/2004] LAWASIA J 57).

8. The case for franchise regulation to redress the information imbalance in the franchise relationships – the role of the Prior Disclosure protocol of the FCC – is of course beyond challenge and is being increasingly embraced within the international franchising community. Refinements can, and should, be made to improve the quality of information provided to franchisees. I do not propose to address prior disclosure in detail except to point out for the committee that there comes a point when too much disclosure can be self defeating. There are two major categories of prior disclosure – disclosure of provisions of the franchise agreement and disclosure of information which does not form part of the contractual rights and obligations but which is nevertheless helpful to the franchisee in exercising due diligence and making an informed decision.

Disclosure documentation which simply repeats chunks of the contract is not particularly helpful given that franchisees are provided with a copy of the agreement anyway and are advised to – and of course should – obtain legal advice in respect of it. Disclosures relating to other "non-contract" issues are particularly important as the franchisee may have no other source of such information.

9. The case for regulation to redress the power imbalance is of course more complex. One view is that comprehensive prior disclosure obviates the need for deeper relationship regulation. This view which was the philosophy on which the First Exposure Draft of the later abandoned *Franchise Agreements Bill* in 1986 has been rejected in Australia (but not in all countries which regulate their franchise sectors). Regulation which removes risks arising from the particular. Circumstance of franchising through power imbalance – as opposed to normal commercial risks – is accepted, appropriate and necessary.

   The power imbalance can be addressed through two regulatory mechanism – general standards of conduct (such as unconscionability and "good faith" laws) or by specific responses.

10. In the unconscionability laws of s51AC TPA Australia has a powerful weapon to combat conduct in business generally that offends a reasonable commercial conscience. Section 51AC is of course not franchise sector specific. Despite having been on the statute book for a decade there is nevertheless a parity of authority on s51AC. The application as s51AC has not been facilitated by the legislative not defining the key concept "unconscionable". The discretionary factors which may be considered by the courts include "good faith" and "FCC compliance" but the crucial determination – what does unconscionability means? – remains subject to debate. Despite the ACCC being funded to bring test case there is little authority and the uncertainty continues. Another possible explanation is that unconscionable conduct is not as rife in the franchise sector as populist commentary, in Parliament and the media, may suggest. The ACCC's policy statements suggest it is committed to enforcement of s51AC and will take action in appropriate cases. The well publicised *Bakers Delight* case which the ACCC rigorously investigated but found no substantiated claims and no breach, and consequently took no action, is perhaps instruction. A legislative response must be based on clear and unambiguous evidence – not on isolated instances (particularly when the facts have not been substantiated and the circumstances have not been analysed and evaluated). It is also instructive to note that the Productivity Commission's *Final Report on the Market for Retail Tenancy Leases* in Australia (27 August 2008) is unsympathetic to widespread allegations of unconscionable conduct made to it in submissions. The Overview notes that:

> hard bargaining and varying business fortunes should not be confused with market failure warranting government intervention to set lease terms and conditions pxxv.

11. The possible introduction of a "good faith" obligation to the FCC has recently gained popular support as the holy grail of franchise relationship reform. It is in my view a more complex exercise. The experience at common law with the implication of a good faith covenant is far from certain. Although the implications of the term has gained traction in NSW it has less support in other jurisdictions. "Good faith" is a concept of uncertain meaning which can means "different things to different people in different moods at different times and in different places" (Bridge (1984) 9 Can Bus

LR 385). In a recent NSW decision (*Insight Oceania Pty Ltd v Philips Electronics Australia Ltd* [2008] NSWSC 710 Bergin J noted that the meagre Australian case law includes both the "adventurous approach" and the "cautious approach". Generalisation of universal application may seem appealing but the experience with s51AC "unconscionability" illustrates the problem. If a "good faith" obligations were to be there is a need to legislatively define the concept. An express good faith obligation demands rigorous definition. Without a definition uncertainly and disputation are inevitable and the franchisor/franchised relationship will be placed under stress.

12. If particular problems are identified and substantiated the more appropriate response is a specific and targeted response rather than relying on broad generalisation at uncertain application.

13. The attached opinion pieces clearly address my strong view of the role of education in protecting franchisees:

> Regulation has a vital and acknowledged role in protecting franchisees but it cannot remove commercial risk. It cannot remove the possibility of failure or guarantee success. Ultimately a prospective franchisee's best protection against failure is educated, informed and conscientious due diligence.

I have struggled, in a range of capacities, with the question of how to educate franchisees. I have devoted my professional life to education, with franchise sector education being my particular passion. But, prospective franchisees – who desperately need education – are a notoriously difficult group to engage. This is a "small business" problem generally. During my tenure with the Small Business Development Corporation of NSW the enduring issue was how to bring prospective business entrepreneurs in contact with the wealth of good material available.

The Committee would have to be bold to embrace the driver's licence analogy. But the stakes are so high that any initiative which promotes awareness of the risks and realities of franchising is worthy of real consideration. At the very least, attendance at a short education program as a prerequisite to contracting is not an unreasonable initiative.

I noted that the Productivity Commission's *Retail Tenancy Report* noted in relation to that sector (which in terms of information and power imbalance has similarities to the franchise sector) that:

> In this environment it is unlikely that market tensions will be resolved or eliminated by government intervention into contracts through retail tenancy or other regulation. Regulation is not a good substitute for due diligence, the appropriate use of commercial lease advisory services and lease information – and sound business judgment (xxx).

The Commission concluded that "there is room to improve the regulatory framework and market information, and some change is warranted. Change should be focussed on:

- improving, where practicable and cost effective, education, information and dispute resolution procedures;
- moving more towards self regulation rather than continued reliance on government legislation (pxxvi).

14. The establishment of a Franchise sector *Ombudsman* who could intervene in a dispute at an early stage is worthy of consideration.

15. Consideration could be given to the establishment of a specialist *Franchise Tribunal* – which has jurisdiction after a failed mediation (which is one of the greatest strengths of the *Franchising Code of Conduct*) with (limited) appeal rights to the court system.

16. The Committee would in my opinion provide a great service to Australian franchising by recommending that all franchisors be required to lodge their disclosure documents with a central registry which would facilitate research and comparison. I have argued this on several occasions – most recently in a letter to the Australian Financial Review published in March 2006 which in part states that:

> The current debate on bolstering protection for franchisees, a catalyst for which was what the AFR has intemperately described as a "damning" report from CPA Australia ("ACCC weighs up franchisee's need" March 10), is handicapped by a dearth of information. ASIC comments that there is "no regulatory or legislative requirement for any company that went into any form of external administration to notify ASIC of the franchisees affected by a failure ("Federal Plan to Protect Franchisees, March 13)
>
> There is an easy solution to the information void. Australia's franchisees operate within the world's most protective regime – legislative scheme comprising the Franchising Code of Conduct and prohibitions on misleading and unconscionable conduct. The Code requires franchisors to make comprehensive prior disclosure to intending franchisees. Over 200 separate items of information must be provided. Currently there is no requirement for disclosure documents to be lodged which makes it impossible for researchers to mine the rich vein of information contained therein. A lodging requirement could easily be implanted by amending the regulations which enshrine the Code and would ensure that any debate is an informed one. Such as amendment would not have to incorporate a registration and audit protocol as in the 15 US states on which our prior disclosure requirements are based.

Andrew Terry
12 September 2008

# Curriculum Vitae
# September 2008

## ANDREW LLEWELLYN TERRY


**Position**:

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**Academic Qualifications**:

LLB Hons (Cant NZ), 1972
LLM Hons (Cant NZ), 1974

**Professional Qualifications**:

Barrister & Solicitor (NZ), Solicitor (NSW)

**Consultancy**:

Special Counsel, Deacons

**Awards**:

Australian Franchise Hall of Fame: inducted in recognition of “significant contribution to Australian franchising”, September 2003.

Best Applied Research Paper in Franchising Award, International Franchise Association, 2001

Best Paper Awards, International Society of Franchising, 2001, 1996.

Franchise Council of Australia Special Award for "Outstanding Contribution to Franchising", 1999.

Erskine Fellowship, University of Canterbury NZ 1999.

Honorary Membership, Franchise Council of Australia (awarded for contribution to "knowledge, education and development of franchising"), 1990.

**Appointments:**

Honorary Dean and Visiting Professor, International Franchise Academy of Beijing Normal University, Zhuhai China 2004 – current

Governor, Franchise Council of Australia Franchise Academy 2003 – current

Member, Small Business Development Corporation of New South Wales 2004-2007

Director, Franchise Council of Australia 1998-2000

Director, Centre for Franchise Studies, UNSW 1995-2001

Member, ACCC Franchise Consultative Panel, 2002-2007.

Co-chair, LawAsia Franchising Committee 2005 – current

Conference Chair, International Society of Franchising 2006

Conference Chair, China International Franchise Summit, 2006, 2008

Deputy Chair, LawAsia Business Law Section, 2007 – current

**Employment History*:***

University of Canterbury, New Zealand
Faculty of Law

| | |
|---|---|
| Teaching Fellow | 1973 |
| Assistant Lecturer | 1974 – July 1975 |

University of New South Wales
Australian School of Business
School of Business Law and Taxation

| | |
|---|---|
| Lecturer | July 1975 |
| Senior Lecturer | July 1982 |
| Associate Professor | May 1990 |
| Professor | March 2000 |
| Head of School | July 1994 – current |

## Published Works

### Books

- *Business and the Law*, 4th edn 2005, Thomson 938 pages (with Des Giugni). (1st edn 1993, 2nd edn 1997, 3rd edn 2003) (5th edn in press)
- *Franchising Law and Practice*, 1998 with 3-monthly updates, Butterworths looseleaf service (with Stephen Giles and Michael Redfern) (1600 pages).
- *The Challenge of Technological Change*, 1998, McGraw-Hill, (with Des Giugni) (178 pages).
- *Misleading or Deceptive Conduct*, 1991, (CCH) Australia, (with Deborah Healey) (450 pages)
- *The Law in Action* 3rd edn 1990 CCH (366 pages) (1st edn 1982, 2nd edn, 1985) (with others)
- *The Motor vehicle, Society and the Law*, 1983 CCH (155 pages).

Note: *Franchising for Dummies* (Australian edn) in draft for publication in 2009.
*International Franchising in Asia* in preparation to publication in 2009.

**Chapters**

- *Franchising Law*, Chpt 16 of Blazey and Chan (editors), *Chinese Commercial Law and the Legal System*, Thomson Legal 2008 (with Zhiqiong Wang).
- *Legal Issues, in CCH Management Manual 1994, CCH International (text and quarterly updating materials 1994-1997) pp 70.001-70.902 (with Des Giugni).*
- *The Cloning of Australian Business, Chapter 1 of Business Format Franchising in Australia, 1990, Legal Books and Franchisors Association of Australasia.*
- *Capital Gains Tax and Indirect Taxes, in Australian Investment Planning Guide 1986, CCH Australia, (with John Taylor).*

**Legal Encyclopaedia**

- ***The Laws of Australia***, The Law Book Company, 1993. Co-author of three Sub-Titles (17 chapters) in Title 35, *Unfair Dealing*:

35.1 *Misleading or Deceptive Conduct* (with Professor Philip Clarke)

*Chapter 1* *Introduction*
*Chapter 2* *Parties*
*Chapter 3* *Conduct*
*Chapter 4* *In Trade or Commerce*
*Chapter 5* *Misleading or Deceptive*
*Chapter 6* *Defences*
*Chapter 7* *Proof*
*Chapter 8* *Examples*
*Chapter 9* *Relationship with Other Doctrines*

35.3 *Improper Business Practices* (with Professor Warren Pengilley)

*Chapter 1* *Introduction*
*Chapter 2* *Elements Common to All Improper Business Practices*
*Chapter 3* *Particular False or Misleading Representations or Conduct*
*Chapter 4* *Unlawful Sales Techniques*
*Chapter 5* *Evidence and Defences*

35.4 *Remedies* (with Professor Philip Clarke)

*Chapter 1* *Introduction*
*Chapter 2* *Misleading or Deceptive Conduct*
*Chapter 3* *Improper Business Practices*

At its launch in August 1993 the Honorary Editor in Chief, Sir Zelman Cowen, described *The Laws of Australia* as “a great and distinctive work of the profession for the profession”. Authors were commissioned to write “only after an exhaustive selection process had been undertaken involving all levels of the profession throughout Australia. Each had to be able to bring to the work the most current viewpoint, analysis and commentary….”

## Refereed Journal Articles

- *Asia's Next Franchising Frontier: Good Morning Vietnam* (2008). Under review.
- *The Development of China's Regulatory Regime for Foreign Franchisors* (2008) (with Zhiqiong Wang). Under review.
- *Where's the Beef? Why Burger King is Hungry Jacks in Australia and other complications in building a global franchise brand* (2008) 28 Northwestern Journal of International Law and Business 171-214 (with Heather Forrest).
- *The Development of Franchising in China* (2008) 15 Journal of Marketing Channels (with Zhiqiong Wang and Mingxia Zhu), in press.
- *China's Long March to a Franchise Law: The 2007 Franchise Regulation* [2007] LAWASIA Journal 79 (with Zhiqiong Wang).
- *Comparison of Finnish, American and New Zealand Franchisee Satisfaction* (2006) 5 International Business & Economics Research Journal 25 (with Frank Wadsworth, Doug Haines, John Paynter, and Mika Tuunanen).
- *Franchising, Relational Contracts and the Vibe* (2005) 33 Australian Business Law Review 289.
- *Franchise Sector Regulation: The Australian Experience [2004]* LAWASIA Journal 57.
- *When a Computersation Project Goes Wrong: Legal Liability for Defective IT Systems under s52 of the Trade Practices Act,* (2002) 16(4) Commercial Law Quarterly 3 (with Leif Gamertsfelder).
- *Factors Affecting Franchise Agreement Termination: Lessons for the Franchising Sector* (2002) 13 Journal of Small Business Strategy 105 (with Dr Lorelle Frazer).
- *The e-business Challenge to Franchising (2002) 30 Australian Business Law Review 227.*
- *Franchising, the Internet and the Emerging Issue of Encroachment,* Singapore Law Gazette, July 2001, 24.
- *Unfairness and Adfund Expenditure,* (2000) 2 Franchising Law and Policy Review 61.
- *The New Unconscionability Regime,* Yuridika, No 3 & 4 Tahun X111, Mei-Agustus 1998, 30.
- *The Background to the New Deal: Fair Deal Reform Package for Franchising* (1998) 1 Franchising Law and Policy Review 3 (with Des Giugni).
- *…. Continued Flouting of the System Will Put Your Franchise in Jeopardy …* (1998), Franchising Law and Policy Review 9 (with Des Giugni and Prudence Smith).
- *Franchisor's Representations in the Course of the Continuing Relationship: The Mobil Litigation* (1998) 1 Franchising Law and Policy Review 11 (with Des Giugni).
- *Uncertainty, Unfairness and Unconscionability: Another Chapter in the Cut Price Deli Saga* (1998) 1 Franchising Law and Policy Review 61.
- *A Self-Regulatory Regime for Franchising: the Australian Experience* (1997) 2 Franchising Research: An International Journal 123.
- *Freedom of Contract, Business Format Franchising and the Problem of Goodwill* (1995) 23 Australian Business Law Review 241 (with Des Giugni).
- *The Distribution of Goods and Services Through Business Format Franchising* Part 1 (1993) 1 Current Commercial Law 18; Part 2 (1993) 1 Current Commercial Law 60-65.

- *Policy Issues in Franchise Regulation: The Australian Experience* [1991] Journal of International Franchising and Distribution Law 77.
- *The Unauthorised Use of Celebrity Photographs in Advertising*, (1991) 65 Australian Law Journal 587.
- *Made in Australia, Almost: False Representations, Place of Origin and the Reasonable Reliance Defence* [1990] Commercial Law Quarterly 23.
- *Image Filching and Passing Off: Misrepresentation or Misappropriation* (1990) 12 European Intellectual Property Review 219.
- *Proprietary Rights in Character Merchandising Marks* (1990) 18 Australian Business Law Review 229-253.
- *Exploiting Celebrity: Character Merchandising and Unfair Trading* (1989) 12 University of New South Wales Law Journal 204.
- *Franchise Exploitation: Realities and Remedies* [1988] Commercial Law Quarterly 19.
- *Unfair Competition and the Misappropriation of a Competitor's Trade Values* (1988) 51 Modern Law Review 296.
- *Misleading or Deceptive Conduct in Commercial Negotiations* (1988) 16 Australian Business Law Review 189.
- *Consumer Protection for Business Interests: The Application of s52 Trade Practices Act to Commercial Negotiations* (1987) University of New South Wales Law Journal 260.
- *Disclaimers and Deceptive Conduct* (1986) 14 Australian Business Law Review 478.
- *Franchising and Small Business* (1983) 11 Australian Business Law Review 159, (with P.W. Gallagher).
- *Unconscionable Contracts in New South Wales: The Contracts Review Act 1980* (1982) 10 Australian Business Law Review 311.
- *Consumer Protection Conspicuously Absent* [1976] New Zealand Law Journal 18.
- *Freedom from Freedom of Contract* [1975] New Zealand Law Journal 197.

## Refereed Academic Conference Papers (Published in Proceedings)

- *Asia's Next Franchising Frontier: Good Morning Vietnam!* 22nd International Society of Franchising Conference St Malo, France, June 2008.
- *A Census of Franchise Regulation Internationally,* 21st International Society of Franchising Conference, Las Vegas US, February 2007.
- *Regulating Franchising Internationally,* 2006 China Franchise International Summit, Zhuhai China, November 2006.
- *From Mao to Maccas: Economic, Legal and Political Influences on the Development of Franchising in China,* 2006 Macromarketing Conference, Queenstown, New Zealand, June 2006 (with Zhiqiong Wang).
- *International Branding Issues in International Franchising,* 20th International Society of Franchising Conference, Palm Springs, US February 2006.
- *The Development of Franchising in China,* International Society of Franchising Conference, Palm Spring US (with Zhiqiong Wang and Mingxia Zhu), February 2006.

- *Comparison of Finnish,* American and New Zealand Franchisee Satisfaction 2005 International Business & Economics Research Conference, Las Vegas, October 2005 (with others Frank Wadsworth, Doug Haines, John Paynter and Mika Tuunanen).
- *Franchising in the New China: The Regulatory Environment for Foreign Franchisors,* 19tth International Society of Franchising Conference, London, May 2005 (with Zhiqiong Wang).
- *Franchising, Relational Contracts and the Vibe,* 18th International Society of Franchising Conference, Las Vegas, March 2004.
- *Franchise Sector Regulation: The Australian Experience,* EMNet Conference on Economics and Management of Franchising Networks, Vienna, June 2003.
- *Gaps in Franchisee and Franchisor Expectations,* 16th International Society of Franchising Conference, Orlando, February 2002 (with John Paynter).
- *Franchising New Zealand: Survey of Franchising Practices and Performance,* 16th International Society of Franchising Conference, Orlando February 2002, (with John Paynter and Lorelle Fraser).
- *A Comparative Analysis of Franchise Regulation in Asia,* 16th International Society of Franchising Conference, Orlando February 2002.
- *The E-Business Challenge to Franchising*, International Society of Franchising 15th Annual Conference, Las Vegas, February 2001.
- *Franchise Terminations: A Study of the Australian Experience,* (with Lorelle Frazer). International Society of Franchising, 14th Annual Conference, San Diego, February 2000.
- *Factors in Franchise Failure: Lessons from the Cut Price Deli Litigation*, 12th Society of Franchising Conference, Las Vegas, USA, March 1998 (with Des Giugni).
- *Franchise Regulation in Australia: Reviews, Roundabouts and Realpolitik*, 10th Society of Franchising Conference, Honolulu, USA, February 1996.
- *Small Business, Service Exports and the Role of Business Format Franchising*. Academy of International Business, Southeast Asia Regional Conference, Perth, June 1995.
- *Goodwill in Franchised Distribution Systems*, Australasian Law Teachers' Association Conference, Christchurch New Zealand, September 1993 (with Des Giugni).
- *Alternative Dispute Resolution in Franchising*, 7th Society of Franchising Conference, San Francisco USA, February 1993.
- *The Distribution of Goods and Services Through Business Format Franchising*, 6th New Zealand Marketing Educators' Conference, Dunedin NZ, November 1992.
- *Franchising in Australia: Prospects and Problems*, 6th Society of Franchising Conference, Palm Springs USA, February 1992 (with Des Giugni).
- *Misleading or Deceptive Conduct as a Business Remedy*, Accounting Association of Australia and New Zealand Conference, Auckland, New Zealand, August 1987.
- *Franchising Regulation: An Appraisal of the Proposed Reforms*, Accounting Association of Australia and New Zealand Conference, Adelaide, August 1986.
- *Franchising: The Need for Regulation*, Accounting Association of Australia and New Zealand Conference, Wellington, New Zealand, August 1982, (with P.W. Gallagher).
- *Legal Aspects of Franchising*, Australasian Universities Law Schools Association Conference, Sydney, August 1975.

## Government Reports

- *Comparative Review of Administrative and Promotional Mechanisms for Franchise Sectors: China, Vietnam, Australia and the US, PR China Ministry of Commerce, February 2008 (with Zhiqiong Wang and Paul Jones).*
- *Various unpublished reports on comparative international franchise regulation for the Vietnamese Ministry of Trade as part of the AusAid Project for Improving the Commercial Law in the Integration Project, November 2004, October 2005.*
- *Drafts of a Franchise Law for Vietnam as part of the AusAid project referred to above November 2004, October 2005.*
- *Briefing Papers prepared for the NSW Small Business Development Corporation 2005-2007:*
    - *Bankruptcy Reforms*
    - *Australia US Free Trade Agreement*
    - *Codes of Practice*
    - *Who is the Controller of Premises for OH&S purposes?*
    - *Red tape and regulation reform*
- *The Legal Environment for Business Development Services in Vietnam,* January 2004 (with Internation Expert on STZ SME Project).
- *Legislative Initiatives Relating to Franchising by the Commonwealth and State Governments*, in McCosker and Frazer, *Franchising Industry Strategy Report for the Queensland Government*, November 1999.

## Other Conference Papers – (since 1988)

- *Franchise Regulation in Asia: Developments and Trends* 21st LAWASIA conference Kuala Lumpur, Malaysia (forthcoming 29 October – 1 November 2008).
- *Franchise Regulation Internationally: Are there Lessons for New Zealand?* Franchise Association of New Zealand national Conference Rotorua New Zealand 14 June 2008.
- *Structuring a Franchise Plan: Keys to Building a Franchise Model*, Franchise India 2007, New Delhi, 11 December 2007.
- *Understanding Regulation and Compliance, Franchise India 2007,* New Delhi, 12 December 2007.
- *Franchise Regulation Internationally,* International Symposium, National Franchise and Small Business Convention, Melbourne 11 October 2007.
- *Franchise Regulation and Risk Management,* Legal Symposium, National Franchise and Small Business Convention, Melbourne, 10 October 2007.
- *Franchise Regulation in the APEC Region,* World Franchise Council Symposium, Melbourne, 9 October 2007.
- *Franchising in Vietnam,* 20th Annual LAWASIA Conference 5-8 June 2007, Hong Kong.
- *Regulating Franchising Internationally,* 2006 China Franchise International Summit, Zhuhai China, November 2006.
- *Franchising a Business Concept,* LexisNexis Hot Topics in Franchising Law, Brisbane, Qld, 27 September 2006.

- *Franchise Development and Regulation in China,* 7th LAWASIA Business Law Conference and China Law Society Conference, Hohhot Inner Mongolia Autonomous Region, China, 10-15 July 2006.
- *Developing Entrepreneurship, Perhadanan Nasional Berhad,* Kuala Lumpur, 19 June 2006.
- *Innovation in the Booming Market for Franchising in China,* 20th Annual International Society of Franchising Conference, Palm Springs Los Angeles, 24 February 2006 (with Liu, Kong, Wang, Hou Wang and Tang).
- *The Inside Story of the Lenards Case: Why did the Chicken Cross the Road?* Australian National Franchise Convention, Canberra, 30 October 2005.
- *How to Co-operate with Foreign Franchisors in China,* China International Franchise Forum, Shanghai, 7 September 2005.
- *Co-branding,* Malaysia International Franchise Conference, Kuala Lumpur, 11 August 2005.
- *The Framework for Franchising in China,* German Franchise Conference Cologne, 24 May 2005.
- *Franchise Development in Vietnam and Regulatory Options: Lessons from Australia,* Vietnam Franchise Forum, Hanoi, November 2004
- *New Concepts, Ideas, Directions and Laws in Global Franchising*, China International Franchise Forum, Shanghai, 19 October 2004.
- *Determining whether your Business Arrangements are Caught by the Franchise Code of Conduct and the Trade Practices Act, Institute for International Research,* Trade Practices and Competition Law Conference, Sydney, June 2004.
- *The Franchisor/Franchisee Relationship and the Franchise Agreement: Key Issues for Developing Countries,* South Africa National Franchise Conference, Johannesburg, 4 May 2004.
- *Doing Business in Australia: The Legal Environment,* Union Internationale des Avocats, Franchising Program, Sydney October 2002.
- *A Comparative Analysis of Franchising Regulation in the Asia-Pacific Region*, 17th LAWASIA Biennial Conference, October 2001, Christchurch.
- *Unconscionable Conduct,* UNSW CLE Consumer Protection Law Seminar, February 2001, Sydney.
- *Franchising, the Internet and the Challenge of e-Business*, China Centre for Small and Medium Sized Enterprises Development, Guangzha School of Management Peking University, Beijing, June 2001.
- *Franchising, the Internet and the Challenge of e-Business*, 3rd China Franchise Conference, June 2001, Beijing.
- *The Franchise Opportunity for Chinese Business Enterprises, China Franchise* Conference, Beijing, July 2001.
- *A Comparative Analysis of Franchising Regulation in Asia,* LAWASIA Business Law Conference, Christchurch, NZ, October 2001.
- *Franchising, E-Business and Territorial Encroachment*, LAWASIA Business Law Conference, Singapore, November 2000.
- *International Franchising and the New Global Economy*, International Franchising Symposium, Melbourne, October 2000.

- *Key Issues in Overseas Expansion*, International Franchising Symposium, Melbourne, October 2000 (with Colin McCosker and Rajiv Chadda).
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    - *Walk the Talk,* Sept/Oct 2008
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    - *But what's the bottom line?* May/June 2008
    - *Franchises are all nonsense!!,* March/Apr 2008
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    - *I have Seen the Future and it's Franchised,* Jan/Feb 2005
    - *What if Australia had not Adopted the Franchising Code of Conduct?,* Nov/Dec 2004

- **PWC Excellence in Franchising Awards Booklet**
    - *Judges' Comments,* 2007
    - *The Franchising Year in Review,* 2007
    - *Judges' Comments* ,2006
    - *Some thoughts on Franchise Regulation, 2006*

- **The Franchise Advantage**
  - *Franchising Code of Conduct Amended*, October 2007
  - *Let the advertiser beware*, September 2007
  - *Is to copy right?,* August 2007
  - *Retail Tenancy Inquiry: Your Opportunity to be heard*, July 2007

- **Deacons Legal Updates 2006/2007**
  - *Determining the monetary threshold for unconscionability claims*
  - *The efficacy of "direct supervision" provisions in franchise agreements*
  - *"Owners drawings" and misleading wages information*
  - *What is a franchisee acquiring: business system or business potential?*
  - *Filling in the blanks in supply agreements*
  - *Harsh remedies for defective disclosure in Canada*
  - *Advertising puffery or misleading conduct*
  - *Varying commercial contracts*
  - *Implication of terms by custom or usage in the market*
  - *Manufacturing on an "atmosphere of crisis": when commercial pressure goes to far*
  - *Due diligence and complex commercial arrangements*
  - *"I'm going to make you a very rich man": Puffery in commercial negotiations*
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## Law Reform Submissions

- Parliament of South Australia, Economic and Finance Committee Inquiry into Franchising, "Reform Proposals", March 2008.
- Productivity Commission, Inquiry into the Market for Retail Tenancy Leases in Australia, *"Destruction and Appropriation of Goodwill: the Problem of Non-Renewal*", August 2007.
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- Submission to the House of Representatives Standing Committee on Industry Science and Technology, *Inquiry into Fair Trading*, September 1996.
- Submission to Australian Taxation Office on *Pre-Ruling Consultative Document No.8, Goodwill*, February 1996. (with CJ Taylor and T Johnson)
- Submission to Franchising Code Council, *Inquiry into Franchising Sector Disputes*, January 1996.

- Submission to the Department of Industry Science and Technology on a discussion paper, *Better Business Conduct*, August 1995.
- Submission to the Department of Industry, Science and Technology on the *Review of the Franchising Code of Practice*, 1995.
- Submission to the Commonwealth Attorney-General's Department and the Ministerial Council for Company and Securities on the *Second Exposure Draft of the Franchise Agreements Bill*, March 1987.
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- Submission to the Federal Attorney-General on *Unconscionable Conduct Relating to Contracts and Proposed Contracts* (the Green Paper, *The Trade Practices Act: Proposals for Change*), April 1984.
- Submission to the New South Wales "Staysafe" Committee (Standing Committee on *Road Safety* and *Random Breathtesting*), July 1982.
- Submission to the Department of Justice (New Zealand) on *The Application of the Dealing Obligations Under the Motor Dealers Act*, 1974, October 1978.
- Submission to the Minister of Justice (New Zealand) on *Small Claims Courts*, March 1974.

## Teaching and Course Development

My extensive teaching portfolio includes large undergraduate lecture and small postgraduate seminar formats and has spanned most areas of law impacting on business. I am an experienced, enthusiastic and conscientious teacher and enjoy an excellent reputation.

I have had wide experience in course design and development for a range of internal and external courses and programs. My commercial experience in combination with my teaching experience in most areas of business law has enabled me to develop programs of study and individual subjects which are rigorous, innovative, contemporary and relevant to the particular audience for which they are designed.

My current UNSW teaching is in the postgraduate courses:

- *Franchising*
- *Competition and Consumer Law*
- *Intellectual Property for Business*
- *Business Law in a Global Economy*

In 2008 I also developed and taught *Business Law* courses offered in the AGSM MBA program and the AGSM Hong Kong MBA program.

Other courses developed and taught for UNSW (in addition to BCom and MCom courses) include:

- *Business, Law and Technology* for the MBT
- *International Business Law* and *International Ventures Management* for the Sino-Australia MCom Program taught in Guangzhou and Beijing

Courses and programs designed and developed and taught for a range of public and private sector organisations include:

- *Franchise Management Qualification* – five distance education subjects and a three-day residential School offered by the Centre for Franchise Studies 1995-2000.
- *Accredited Franchise Executive Qualification* – education program developed for the Franchise Council of Australia.
- *Franchise Opportunities Seminar* – a one-day seminar for prospective franchisors in Kuala Lumpur for the Malaysian Ministry of Entrepreneurial Development, May 1997.
- *Franchise Management Program* – a five day course for franchise system managers and consultants in Kuala Lumpur for the Malaysian Ministry of Entrepreneurial Development, May 1997.
- *Trade Practices Compliance Program* – a six day course for the Fiji Ministry of Commerce, Industry, Trade and Public Enterprises and AusAid, September 1996.
- *Trade Practices and Fair Trading Compliance Program* – a two day seminar for Telstra, Corporate and Government Business Unit, April 1993.
- *Business Law for Bankers* – three day seminar for ANZ Bank, Business Banking Division, March 1991.

## Professional Service, Recognition and Standing

My career has been marked by significant and sustained service to the discipline and the profession in a number of roles. My main contribution, particularly over the last decade, has been to the franchising sector where my contribution has been acknowledged through:

- Honorary membership of the Franchise Council of Australia (for contribution to the "knowledge, education and development of franchising") 1990.
- Franchise Council of Australia Special Award for "Outstanding contribution to Franchising", 1999.

- Induction into the Australian Franchising Hall of Fame in 2003.
- Governor of the Franchise Academy (which oversees the Diploma of Business (Franchising) offered by the FCA through an RTO), 2004 – current.
- Appointment as Special Counsel to Deacons.
- Architect of the franchise sector's nationally, accredited and, world best practice franchise education program with responsibility as Governor of the Franchise Academy for quality control and ongoing development.
- Head of the Judging Panel for National Franchising Awards 1999 – current.
- Member of the Judging Panel for the ARP Retail Awards 2008.
- Appointment to the ACCC's Franchising Consultative Panel 2002 – 2007.
- Appointment, by the Governor of NSW, to the NSW Small Business Development Corporation (whose role it is to advise the Minister on Small Business policy) 2005 – 2007.
- Appointment as co-chair of LawAsia's Franchising section, 2006 – current.
- Election as Deputy Chair of LawAsia's Business Law Sections, 2007 – current.
- Consultation to Vietnamese Ministry of Trade responsible for briefing the Ministry on franchising and comparative international regulatory approaches and preparing a series of draft Franchising Laws, 2005 – 2006.
- Foreign expert on a Vietnamese working party changed with writing a report on the *Legal Environment for Business Development Services in Vietnam*, 2004.

I have presented, by invitation, papers to plenary sessions of National Franchise Conferences in 9 countries (Australia, China, Germany, India, Malaysia, New Zealand, South Africa, United States, Vietnam).

I am extremely proud of the following acknowledgment in Richard Evans, *The Australian Franchising Handbook*:

> **Professor Andrew Terry**: Franchising Hall of Fame inductee, published authority on Australian franchising, internationally respected authority on franchising, developer of legislation and regulations in many countries, raconteur and Professor of Law at University of New South Wales. Professor Terry is an understated expert in the development of Australian franchising education and is the intellectual reason why a mature franchise sector exists in Australia and the former robust get-rich-quick perception of the industry has been overcome.

## Indicia of Scholarship

My national and international reputation, particularly in the area of franchising, is built on sustained scholarship over a long period. My published work is routinely cited by superior courts, practitioners, academics, and parliamentary reports. I am regularly contacted for media interviews and comment, and at the request of policy makers and regulators in Australia and overseas regularly provide a range of formal and informal advice on aspects of

franchising law, development and operation. I drafted Vietnam's first franchise law which came into effect in 2006.

My major research has been in the areas of unconscionable conduct, misleading or deceptive conduct, unfair competition and franchising and has been published in leading refereed law journals of high international standing in Australia, New Zealand, the United Kingdom and the United States and in legal texts, works of references and encyclopaedia. In the areas of misleading or deceptive conduct, unconscionable conduct and franchising my substantial publication have been at the forefront of research into these fields. My articles include the first substantial works to be published in these fields and have laid a platform on which subsequent research has been built. These articles are widely and routinely cited as authoritative in their field by Australian and overseas researchers and their contribution to the development of the law in these areas in widely acknowledged in subsequent texts and articles. My research has been influential in shaping the debate at academic, judicial and government policy/law reform levels and has been referred to in the written judgments of superior courts in state and federal jurisdictions in Australia and in other common law jurisdictions overseas.

I draw attention in particular to the following recent indicia of research scholarship:

- Honorary President and Visiting Professor, International Franchise Academy of Beijing Normal University, Zhuhai China, 2005-current.
- Conference Chair and Proceedings Editor for International Society of Franchising 2006 Conference, Palm Springs, 24-26 Feburary 2006.
- Conference Chair and Organising Committee, China International Franchise Summit, Beijing Normal University, International Franchise Academy, Zhuhai China November 2006.
- Assessor for Macquarie University and University of Newcastle RQF Trial July 2007.
- Review Committee, Department of Commercial Law, Auckland University September 2007
- Scientific Committee, EMNET 3rd International Conference on Economics and Management of Networks 2007.
- Project Advisory Committee International Centre for Promotion of Enterprises, Ljubliana, Slovenia.
- Academic Advisory Committee, National Centre for Language Training UNSW.
- Steering Committee of China Focus Group of the Australian Law Council 2008.
- Deputy Chair LAWASIA, Business Law Section 2007.
- Consultant to Vietnamese Ministry of Trade responsible for briefing the Ministry on franchising and comparative international regulatory approaches and preparing a series of draft Franchising Laws (2005-current).
- Member of research team for the ARC *Seniors Living* project.
- Sole supervisor of 4 PhD students.
- Examiner for PhD, DBA and LLM theses.
- External independent referee for senior academic appointments for 508 Universities.
- Editorial Boards of scholarly journals.

- Journal, conference paper and book reviewer for leading journals, conferences and publishers.
- Unsolicited invitations to apply for senior academic positions in Australian and Overseas universities.

PRICEWATERHOUSECOOPERS

# Insights on Franchise

By Professor Andrew Terry, UNSW and Special Counsel, Deacons

**A publication to recognise the very best in the Australian franchise sector may not seem an appropriate forum to allude to the fact that not every franchisee - or franchisor - is successful. Then again it may be. It provides the opportunity to reflect on the inevitable reality that, although franchising is a proven strategy with a markedly lower level of business failure than independent small business operation, it cannot guarantee business success in every case.**

This poses a particular challenge in determining the appropriate regulatory regime for franchising. It is the challenge currently facing tonight's Guest of Honour, the federal Minister for Small Business, the Hon Fran Bailey, who is responsible for the Franchising Code of Conduct and who will soon have the recommendations of the Matthews Committee charged with reviewing the disclosure provisions of the Code to consider.

Although the Australian franchise sector is characterised by disputation and failure rates that are admirably low measured against international benchmarks and in comparison with domestic independent small business operation, of course provides no comfort to a failed franchisee. Business failure is horrible and has high economic and social costs. Any initiatives that can be taken to reduce the possibility of failure that are consistent with the basic principles of a free enterprise economy are worthy of consideration.

The argument in a recent but less enlightened era that regulation of the franchise sector is an impediment to entrepreneurship and growth is now discredited. Such arguments were persuasive in the 1980s when a bold franchise sector was able to successfully lobby a timid government not to proceed with proposed franchise legislation, but could not be sustained in the longer term. The 1997 Fair Trading Report made a convincing case for regulation and led directly to the current Franchising Code of Conduct and the introduction of the business unconscionability provisions of the Trade Practices Act. These provisions, together the pre-existing and powerful TPA prohibition of misleading conduct, subject the Australian franchising sector to the world's most comprehensive protectionary regime for franchisees. There is wide, if not unanimous, support for this regulatory scheme which has raised the standards of franchising in Australia and has contributed to the internationally acknowledged high standards of the sector.

While acknowledging the role of regulation in protecting franchising interests the residual reality is that the law cannot, and should not, guarantee business success. Franchising, and indeed all other business operations, operate in a competitive environment which, as the High Court reminded us two decades ago in the Queensland Wire case is by its nature "deliberate and ruthless" with competitors trying to "injure" each other by taking sales away from each other: "..these injuries are the very nature of the competition the [TPA] is designed to foster". The market reality for business in Australia—franchised or not franchised—is explained clearly by Harper J in a recent Victorian Supreme Court decision:

The purchase of any small business is seldom free of risk. A business...is susceptible to the whims of the gods...While the vendor of a business clearly must not mislead the purchaser about its nature and value, life's uncertainties are such that there cannot in the absence of a carefully worded contractual term be a guarantee that the new owners will be successful.

Even then, a vendor who sought to give, and a purchaser who was minded to accept, such a guarantee would alike probably be unwise.

What then is the role of the law in protecting franchisees? In its submission on the proposed, but later abandoned, franchise reform initiatives in the 1980s COSBOA, the voice of small business, propounded an underlying philosophy of franchise regulation which is well worth repeating:

Entrepreneurship and business creation in free enterprise society such as ours necessarily include an element of risk and it should certainly not be the role of Government to remove it. Nevertheless in the particular circumstances of franchising there are elements quite different to normal business development because of overriding risk for other than purely business or commercial reasons. Those special additional risks arising in part because of the balance of power in the franchising relationship should be minimised while leaving the commercial risks and decisions to be handled by the parties concerned.

The current regulatory matrix operates consistently with this philosophy. The information imbalance inherent in the franchisor/franchisee relationship is addressed by the disclosure provisions of the Code and the power imbalance is addressed in part by the Code but also by the prohibitions on misleading and unconscionable conduct. The regulatory model can no doubt be improved—any strengthening of the disclosure provisions as a result of the Matthews Committee recommendations may provide an example—but the seductive lure of stronger and more comprehensive regulation cannot change the inevitable reality . Business involves commercial risk and regulation cannot remove such risk.

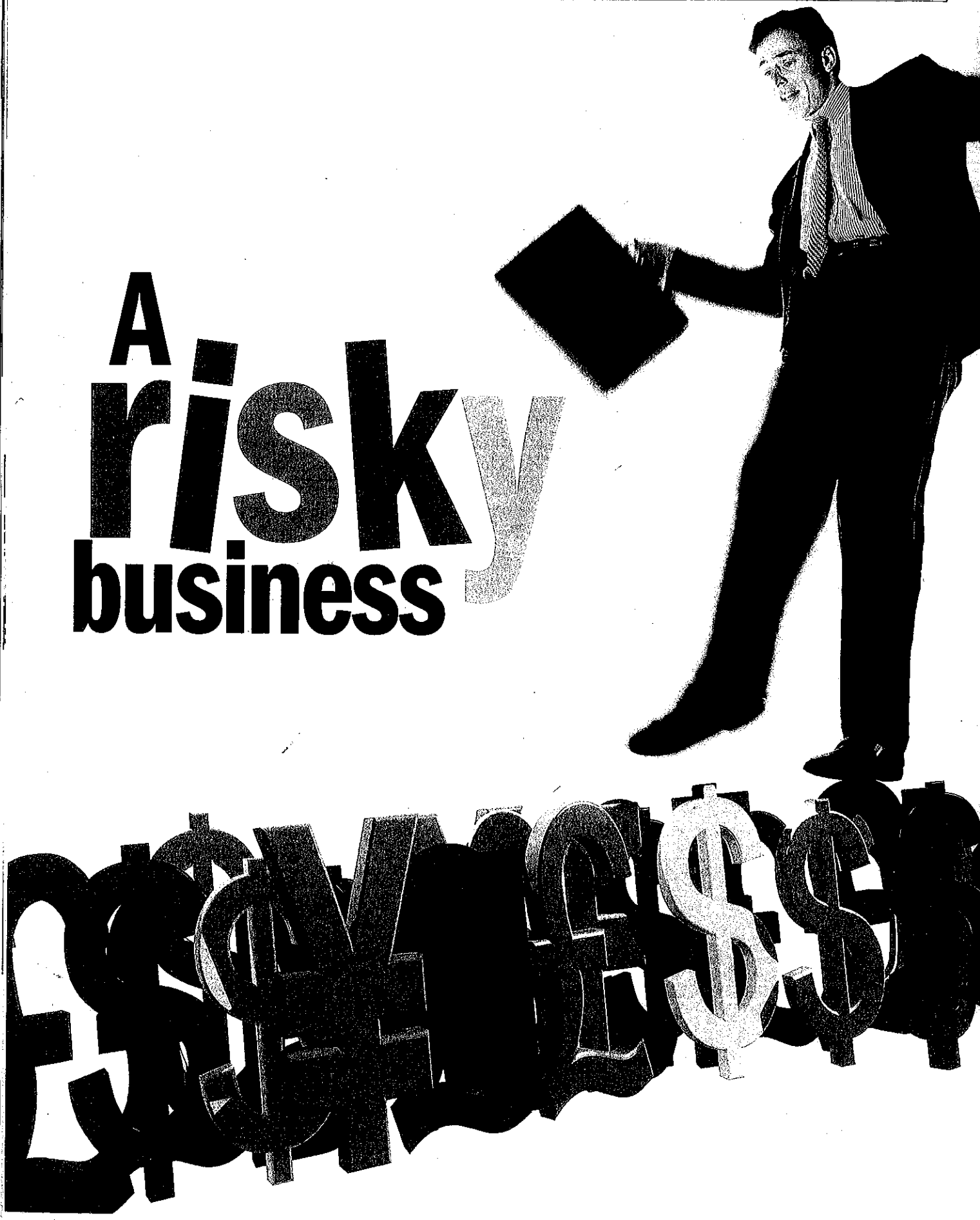
While regulation is central to a strategy to protect franchisees it is only part, albeit an integral part, of the solution. Regulation must be supported by two other pillars: education and due diligence. In a recent Federal Court decision Madgwick J. expressed his surprise at the naivety and ignorance of the purchaser of a successful business which quickly failed. The purchaser was "naive to an astonishing extent" and his ignorance and incapacity was "breath-taking". (It speaks cogently to the power of the misleading conduct provision that despite the purchaser's unpreparedness for business the vendor was nevertheless liable for failing to inform the purchaser of matters which were considered common knowledge in the industry).

While this case provides a strong endorsement for franchising over independent small business operation it nevertheless draws attention to the importance of education and due diligence for any small business person whether prospective franchisee or prospective independent business operator. Australia leads the world in franchise sector education. A range of programs at diploma and certificate level have been developed for all participants in the franchise sector (and a massive amount of information is available from state and federal government bodies as well as from the FCA itself). Unfortunately the take-up rate for education programs from prospective franchisees is regrettably low.

Regulation has a vital, and acknowledged, role in protecting franchisees but it cannot remove all commercial risk and it cannot guarantee business success. Education, conscientious due diligence and informed advice—legal, financial, commercial—are also integral elements of the protectionary matrix.

*Andrew Terry*
*Professor and Head of School of the School of Business Law and Taxation, UNSW and Special Counsel, Deacons*

# A risky business



How can a franchisee protect themselves from commercial risk? **Andrew Terry** looks at the issue of failed franchises, with some cogent advice on the nature of competition.

My interest in franchising dates from the mid-1970s – not long after the colonising US franchise systems, KFC, Pizza Hut and McDonald's, introduced not only their novel and distinctive fast food but also the business format franchise model to Australia.

In over 30 years there have been many significant events but perhaps the most defining for me was in the late 1980s when I met with former franchisees of the failed Barbara's House and Garden system.

Most readers will not remember Barbara's House and Garden. It specialised in the retail sale of decorative household goods and furnishings. Under the charismatic leadership of its founder, Barbara Slatyer, it achieved a high media profile and a significant market presence in NSW. At a formative stage in the development of Australian franchising it was a very significant system. It was a novel concept, it was home-grown, it had a high profile and was growing rapidly.

And it was founded and promoted by an entrepreneurial and charismatic woman. (This comment is not made with any sexist overtones – but simply to point out that 20 years ago this level of entrepreneurial achievement was generally the prerogative of men!) It is no exaggeration to state that the success and profile of Barbara's House and Garden was highly influential in attracting media attention to franchising, which at that time it had largely ignored, and promoting the franchising concept to the general public.

All these factors made its sudden failure all the more traumatic. The resulting litigation disclosed that the "vigorous promotion of franchises ... was portrayed as the natural expansion of an outstandingly successful business, but financial statements tendered in evidence suggest it was in fact an attempt to keep a foundering business afloat by getting in substantial franchise fees". The Federal Court commented that:

*In the circumstances, to invite persons to join the company as franchisees upon the basis that they would get the benefit of a proven concept was akin to the invitation to join in a treat which the Walrus and Carpenter extended to the oysters in "Through the Looking Glass".*

(For those readers not familiar with the writings of Lewis Carroll the picnic menu included oysters).

In another case the court commented that:

*There is little doubt that the franchisor, as well as the franchisee, hoped that the shop would be successful but this hope was based upon wishful thinking rather than any detailed market research or established trading formulae. The site and the design of the shop, and the goods sold were all strictly monitored by the requirements of the franchise agreement. It seems a reasonable inference from the rose-tinted approach to the franchisees in this case that the franchisors were themselves misled about the efficacy of franchise agreements as some kind of retailing touchstone to success. In fact, it can hardly be said that there was much retailing history or structure upon which franchise agreements could be created .... A serious doubt exists whether there was any sufficient business and product recognition to be franchised in any event.*

So Barbara's House and Garden quickly went from being the role model for entrepreneurial franchising to the proving ground for the effectiveness of s52 of the Trade Practices Act and the NSW Industrial Relations legislation in redressing, respectively, misleading conduct and unfair, harsh and unconscionable conduct.

Unfortunately for the plaintiff franchisees successful litigation did not translate into compensation. Companies in liquidation or receivership, and bankrupt directors, cannot compensate successful franchisees. And, even if they can, this is hardly an equitable solution to a reality faced by all franchisees.

This then is the background to my meeting the Barbara's House and Garden franchisees.

## The cost of failure

Business failure is horrible and has heavy economic and social costs. Each franchisee had a terrible story of financial loss to the extent of bankruptcy in some cases as well as moving stories of social dislocations including family breakdown and psychiatric problems.

A decade later the influential Fair Trading Report which led to the introduction of the Franchising Code of Conduct officially recorded such consequences. Presented with stories of business failure that resulted not only in personal financial ruin for families, but in illness, divorce and even loss of faith in God, the Fair Trading Report concluded the that "the social

impact alone is sufficient to justify action".

The argument that regulation of the franchise sector was an impediment to entrepreneurship and growth –an argument that had prevailed in the 1980s when a bold franchise sector was able to successfully lobby a timid government not to proceed with proposed franchising legislation – could not be sustained. The 1997 Fair Trading Report made a convincing case for regulation and led directly to the current Franchising Code of Conduct and the introduction of the business unconscionability provisions of the Trade Practices Act.

These initiatives, together with the pre-existing and powerful TPA prohibition of misleading conduct, subject the Australian franchise sector to the world's most comprehensive regulatory regime for franchising. There is wide, if not unanimous support for this regulatory scheme which has raised the standards of franchising in Australia and contributed to the internationally acknowledged high standards of the sector.

**Franchisee failure is difficult to define—not every outlet closure is failure and not every outlet continuance is success—and even harder to measure**

I like to think that my submission to the Committee, cited in the preface to the chapter on franchising, was influential:

*Good franchising is very good. It is undoubtedly the most efficient and effective distribution system ever invented. ..Good franchising is so much better than independent business operation...but bad franchising is so much worse.*

So then, Australia's regulatory scheme promotes good franchising and discourages bad franchising. However it does not, and cannot, quarantine franchises from failure.

Business failure as noted above is horrible and has high economic and social costs but entrepreneurial activity in a free enterprise system does not, and cannot, come with a guarantee that a business venture will be successful.

## Business creation

In writing on this subject I frequently quote the submission of COSBOA, the voice of small business, on the proposed but later abandoned franchise reform initiatives in the mid 1980s which propounded an underlying philosophy of franchise regulation well worth repeating:

Entrepreneurship and business creation in free enterprise society such as ours necessarily includes an element of risk and it should not be the role of Government to remove it. Nevertheless in the particular circumstances of franchising there are elements quite different to normal business development because of overriding risk for other than purely business or commercial reasons. Those special additional risks arising in part because of the balance of power in the franchising relationship should be minimised while leaving the commercial risks and decisions to be handled by the parties concerned.

The typical franchising relationship is characterised by both an information imbalance and by a power imbalance between franchisor and franchisee. The prior disclosure provisions of the Franchising Code of Conduct address, fairly effectively, the information imbalance.

Other provisions of the Code such as those dealing with termination and transfer address some aspects of the power imbalance and the s51AC TPA unconscionabilty provisions of general application provide residual protection, albeit after the event, in cases of commercially reprehensible conduct.

The Code has of course recently been amended to fine-tune the prior disclosure provisions and the business unconscionability provisions have recently been amended to include "unilateral variation" clauses in the list of discretionary unconscionabilty factors which can be taken into account by a court.

Franchising, like any small business, has its risks

These provisions could be further strengthened—and franchisees were no doubt disappointed the recent Matthews Committee which reviewed the Code was restricted by its Terms of Reference to disclosure issues. Any initiatives that can be taken to reduce the possibility of failure that are consistent with the basic principles of a free enterprise economy are worthy of consideration.

But no regulation can quarantine franchisees from business failure arising from purely business reasons.

## Entrepreneurial activity in a free enterprise system does not, and cannot, come with a guarantee that a business venture will be successful

Franchising, and indeed all other business operations, operate in a competitive environment which, as the High Court noted two decades ago in the Queensland Wire case is by its nature "deliberate and ruthless" with competitors trying to "injure" each other by taking sales away from each other. These injuries are, the High Court explained, "the very nature of the competition the TPA is designed to foster".

The market reality for business in Australia—franchised or not franchised—was recently clearly explained by Harper J in the Victorian Supreme Court:

*The purchase of any small business is seldom free from risk. A business... is susceptible to the whims of the gods...While the vendor of a business clearly must not mislead the purchaser about its nature and value, life's uncertainties are such that there cannot in the absence of a carefully worded term be a guarantee that the new owners will be successful. Even then, a vendor who sought to give, and a purchaser who was minded to accept, such a guarantee would alike probably be unwise.*

Franchisee failure is difficult to define—not every outlet closure is failure and not every outlet continuance is success—and even harder to measure. At academic franchise conferences no topic engenders more interest or debate than franchisee, and franchisor, failure rates.

The IFA—the US equivalent of the FCA—today disassociates itself from statistics prepared on its behalf which claimed failure rates which are today generally accepted to be unrealistically low. In Australia the Griffiths University 2006 Franchising Survey estimates that only 4 percent of franchisees are in a "substantial dispute' with their franchisor with a "substantial dispute" meaning not the conduct of a mediation or the commencement of litigation but simply the involvement of an external advisor.

Of course the evidence that Australian disputation and failure rates are admirably low when measured against international benchmarks provides no comfort at all to a failed franchisee.

Franchising is attractive to a prospective franchisee because it promises a proven concept and a proven system in addition to initial training and ongoing support. The Franchising Code of Conduct can, and does, protect the franchisee in many respects but it does not and cannot guarantee quality, viability, longevity or that the concept or the system is proven.

Regulation has a vital and acknowledged role in protecting franchisees but it cannot remove commercial risk. It cannot remove the possibility of failure or guarantee success. Ultimately a prospective franchisee's best protection against failure is educated, informed and conscientious due diligence. ■