

# Review of the Franchising Code of Conduct

Submission from

**Ray Borradale**

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40A Ashmole Road  
Redcliffe  
Queensland 4020

07 3883 4053

0401790027

[ozfranchising@hotmail.com](mailto:ozfranchising@hotmail.com)

## **My Background briefly:**

With twenty-five years experience in franchising I have been involved with many franchisors and have been employed in virtually every aspect of franchising. I have also been a franchisee and for the last ten years I have been an advocate for Code reform to better protect franchisee investors and the reputation of Australian franchising.

While reporting on the state of affairs in Australian franchising at the Australian page of US based Blue MauMau, the world's most influential franchising website, I have been contacted by many hundreds of franchisees from more than one hundred franchise brands.

I estimate that my advocacy, support, research and writing on franchising covers almost 15,000 hours over the last decade.

## **Code Review:**

Franchising in Australia contains scores of investment worthy brands operating in the best interests of all stakeholders. At the other end of the scale are the scores of brands that are not viable investments and abuse their immense power to profit from the continual turnover of franchisees.

In current considerations of the performance of changes to Franchising Code of Conduct it is important to examine the most recent influences on the process.

While there have been federal inquiries mentioning problems in franchising going back to 1976 this last round of Inquiries into the performance of the Franchising Code of Conduct began to build momentum in about 2003.

The federal government under Howard ignored calls for a review. That was followed by the Rudd Minister at the time, Craig Emerson, rejecting the need for a federal review until pressured by the 2008 South Australia [Labor] and Western Australia [Liberal] undertaking of their franchising inquiries in disgust at the federal refusal.

The two state and the federal Inquiries all concluded that there existed serious problems in franchising and the recommendations from all three were very similar.

Emerson then brought in an 'Expert Panel' clearly as a means to avoid serious reform and then adopted changes to the Code that would do almost nothing to counter the problems in franchising or deal with the growing tarnish that threatens investment in Australian franchising. The Franchise Council of Australia's orchestrated opposing submissions were recognized and those from franchisees, academics and various associations and advocates were ignored.

I personally have no doubt that Emerson's decisions were swayed by the generosity of the FCA representing what is in truth less than 5 of a percent of all stakeholders in franchising and definitely containing many of those brands that are the worst in franchising.

I remind that it is the franchisees who are responsible for virtually all investment in franchising. It is the franchisees who are major contributors to the economy. It is franchisees who are major employers. And it is franchisees who contribute to local economies and community sporting teams and charities.

I will not bore anyone with another recital of the thousands of incidents of financial, health and relationship costs in rogue franchising that support an economist's view that any money turning over is good for the economy.

Western economies over the last one hundred and fifty years have grown on the back of cultivated entrepreneurial spirit and it is no coincidence that those same economies now suffer the consequences of selling out that environment to serve bigger masters.

Franchising's contribution to the Australian economy will be a constant although growth has slowed and will continue to suffer as long as rogue franchisor operators damage franchise investment confidence in contrast to what was once hoped to be a healthy business model ensuring strong future competitive markets against the dangers of total big business domination.

The problems in franchising are not complex and the solutions are not complex; the solutions were contained in the recommendations coming from the three original Inquiries. Self interested lobbyists and their paid for supporters may dress up the issues with gobbledygook, one sided legal arguments and distortions but the issues are not complex. Why there has been no meaningful reform is not complex either. That is about who pays who to allow the carnage to continue.

Under Graeme Samuel the ACCC was complicit in destroying people's lives if for no other reason than his focus was elsewhere where the rewards were greater.

There is no question that the ACCC questioned wasting resources pursuing many cases where the Trade Practice Act offered no legal ability to be successful. However the ACCC held those problems up as an excuse not to

conduct serious case testing where the Act and the practices employed against franchisees should clearly have been pursued.

Given its historic performance there can be no wondering why Australian franchisees mostly do not bother contacting the ACCC with complaints.

The current chairman of the ACCC, Mr Rod Sims, has done much to rebuild confidence that the ACCC will regulate franchising as best it can with what little it has to work with.

Mr Sims is calling for penalties to be introduced into the Code as a deterrent. I am calling for penalties and those additional abusive practice deterrents that have been introduced into legislation for all of small business in South Australia.

The arguments against the introduction of good faith are designed to confuse dim-witted law makers who fail to appreciate the extremely broad use of good faith obligations within existing Australian, Canadian and US legislation. Apparently it is possible to define good faith. No one wants a drawn out litigious environment and that is why such things are called deterrents.

Amidst the razzle dazzle golden opportunity marketing of the franchising industry first time franchisees sign into contract language with back-slapping assurances that amongst other things, they will naturally be able to profit from their investment and effort at end of term or choose to renew. End of term arrangements as they generally stand with franchisees entitled to zero good will from their investment and effort offer rogue franchisors a bonanza motive to manipulate franchise terminations and/or force franchisees to sell their investment back to franchisors for a pittance.

The franchisor profit incentive from repeatedly reselling franchises is enormous but most do and will collapse taking with them franchisees, suppliers, the ATO and an array of other creditors. Today we are experiencing a newer trend where the lack of effective regulation has made franchising easy pickings for many private equity investors with a modified version of the 'strip and run' business model.

Dispute resolution processes are only truly effective when parties to a dispute enter into those proceedings in good faith. No matter how the statistics can be interpreted the imbalance of power lends itself to overwhelming the weaker underfunded franchisee doing nothing to offset that damage, brand and industry reputation damage or economic damage.

Those practices and the financial destruction of franchisees through changes to operations manuals allowing abusive franchisors/supplier kickbacks have been adequately dealt with during Inquiries and they must be stopped or investment in franchises and that contribution to the economy will continue to suffer. Good faith obligations have worked in Canada.

I offer one further criticism of the ACCC. It has failed to monitor and justify it's sponsorship of the online franchisee induction course at Griffith University.

The course fails miserably and in fact appears to have been influenced to ensure that prospective franchisees continue to be lulled into a false sense of confidence. It contains misrepresentations and lies. Clearly academia's financial needs are better met by the ongoing relationship with the Franchise Council of Australia.

The Australian people are entitled to and expect strong competition law to protect consumers, our industries and Australian investors in those industries. Instead our governments undermine our economy by embracing anyone with the financial resources to influence profits going overseas or into the pockets of the few.

Inquiries and reviews seem to almost always and only generate political opportunism. [REDACTED]



Conversely, Australian franchisees celebrate and thank those many politicians, very few mainstream journalists and members of academia who have made it blatantly obvious their opinions are not for sale and they recognize evil.

There are two sides to the franchising debate represented by those with nothing to gain and the sleazy self-interested masquerading as respectable

conservatives. Logic suggests that historical federal support of the former indicates a corrupted process. A representative of the Franchise Council of Australia did warn the penny-poor Australian Franchisees Association that it had \$5M in a fighting fund in 2004.

No matter how the FCA prefer to spin their story there has been nothing in the recommendations from the three Inquiries that would cause a problem for any decent franchisor. In South Australia the orchestrated franchisor tears and threats to leave the state because of the Small Business Commissioner Act 2011 went quiet and it is business as usual.

I resent having to make this last submission to what I consider as simply an extension of a long running federal sham and will continue to do my best to expose rogue franchisors and corrupted bureaucrats and politicians while warning prospective franchisees that franchising in Australia is just too dangerous an investment under current federal legislation.

Nonetheless I thank you for the opportunity to once again contribute to the illusion of government credibility that rightfully smears Australian politics. While I hope this submission is to be published I suspect that will not happen as further evidence that the Inquiry/Review process is too often tainted.

Yours faithfully



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Ray Borradale