Franchisees Association of Australia Incorporated

(ARBN 119 802 489)

Submission to

The Inquiry by Alan Wein into Franchising Code of Conduct

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2nd February 2013

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Submission
Franchising Code of Conduct
Executive Summary

The Minister for Small Businesses announced that at the review into the Franchising Code of Conduct will consider the 3 questions identified below. The Franchisee's Association of Australia Incorporated (**Franchisee's Association**) fundamental position is summarised as follows:

Good faith in franchising

- The general law contention that franchising contracts and arrangements are underpinned by the doctrine *good faith* should be given legislative effect.

- The Franchising Code of Conduct ought to be an *enforced* as well as *enforceable* Code.

The rights of franchisees at the end of their franchise agreements including recognition for any contribution they have made to building the franchise

- The disclosure obligations under the Franchising Code of Conduct ought to extend not only to the legal infrastructure but also the most important aspects the commercial relationship, namely:

  » return on capital; and

  » revenue and profit.

- The fundamental issue is one of disclosure. Franchisees should be made unambiguously aware at the beginning of the franchise arrangement what franchisees can expect to achieve over the life of, and at the end of the franchise.

The operation of the provisions of the *Competition and Consumer Act 2010* as they relate to enforcement of the Code

- The Act provides a vehicle by which law reform can be given better effect.

- The Act might also be amended to countenance the creation of Legislative Instruments including, if thought necessary, to further codify the doctrines of good faith which ought to be mandated if not by the Franchising Code of Conduct itself than legislatively.

- The contention that the law ought not to be reformed by amending the Code, to impose an obligation of *good faith*, because to do so is to codify "aims and ideals" is no reason to do nothing. If the minimum standards imposed by the Code (by setting out requirements and obligations) are honoured in the breach then the Act itself ought to be amended to render the impositions of those standards as legislatively mandated.

- The Parliament might also consider the establishment of an office of *Franchising Ombudsman*.

- Parliament might also consider amending the reach of the Independent Contractors Act 2006 (Cth) so that that legislation (which is essentially an unfair contracts jurisdiction) is opened up to franchising.

1. Background

1.1 The Franchisee's Association is a not for profit body representing the interests of franchisees principally in the area of policy development and law reform.

1.2 The Franchisee's Association has approx 1000 members and affiliates and its business is conducted by an honorary board chaired by the Hon David P Beddall

1.3 The Franchisee's Association has made submissions to various state and federal parliamentary enquiries including enquiries which led to the 2008 and 2010 law reform.

1.4 The Franchisee's Association is pro-franchising but submits that the need for further reform of the sector remains manifest. The need for reform flows from the nature of the franchising relationship:

(a) as a matter of law, the relationship between a franchisor and a franchisee is an independent contract;

(b) the matter of commerce, the relationship between a franchisor and a franchisee is, as a rule of general application, a dependent (as distinct from independent) contract. That is the franchisee is dependent upon the franchisor for the integrity of the franchising system.

1.5 For many franchisees, after the acquisition of a family home, entry into a franchising arrangement is the largest single financial commitment a franchisee will make. Typically franchisees are *sold* on the proposition that the franchising system will protect and grow the franchisee's capital investment and afford the franchisee the opportunity of earning income beyond that which one would secure as an employee. Further, the representations are often that if the franchise system is followed the system will protect inexperienced franchisees against their lack of business experience or acumen.

1.6 In spite of earlier law reform the underpinning legislative principle seems to remain that the relationship between a franchisor and a franchisee is a *business to business* relationship. Whilst legally this might be the case, commercially franchising relationship can be anything but *business to business*. It is, as indicated, most often a relationship more aptly described as being one of *dependence*.

1.7 It is the Franchisee's Association's respectful submission that further law reform ought to recognise the misalignment between the nature of the legal relationship, and that of the commercial relationship. It is because of this that the franchising industry presents itself to state and federal parliaments on an almost perennial basis for reform. Until the legislative and regulatory reform address the fundamental and recurrent friction arising from relationships, often of dependence, which are treated by law and regulation as relationships of equality and independence, the pressure for law reform will continue.

1.8 Interests supporting the status quo invariably protest that the systems works well the small amount of disputation and with the majority of disputes being resolved at conciliation. Proper analysis demonstrates that such is not the case. Resolution of disputes is similarly driven by inequality bargaining power and financial necessity not by even handed compromise.

2. The constitutional and legislative framework

2.1 The current regime operates in a legal framework which includes:

(a) the common law of contract;

(b) the common law relating to misrepresentation;

(c) the Competition and Consumer Act (2010) previously the Trade Practices Act, 1974 (Cth);

(d) various State fair trading acts or their equivalent; and

(e) statutory rule 1998 No. 162 as amended, otherwise known as the *Trade Practices (Industry Codes) Franchising (Regulation 1998)* (**Code**).

2.2 Within the legislative and regulatory regime in State and Commonwealth law, particular focus in franchising is directed to aspects of the *Competition and Consumer Act* and in particular, those sections of that legislation which pertain to misrepresentation in trade and commerce and unconscionable conduct in business transactions.

2.3 In consequence of the, so-called, *WorkChoices* reforms to the *Workplace Relations Act 1996*, tested in the High Court of Australia, there is no longer any doubt that the Commonwealth has power to make laws under section 51(xx) of the Australian Constitution (*the Corporations Power*) and this mandate further enlivens the legislative power of the Commonwealth in franchising. That is, it would be unusual indeed if there were any franchising arrangements throughout the Commonwealth which do not have at least one counter party to an arrangement which is a constitutional corporation within the meaning of section 51(xx) of the Constitution.

2.4 In this context, the Franchisee's Association recognises that the Code has improved the regulatory regime in which franchising operates and the most recent reforms to the Code, in this context, are recognised.

2.5 As indicated, a breach of obligation is enforceable typically, at the suit of the aggrieved party and in the experience of Franchisee's Association, the Regulators (ACCC and to a lesser extent, ASIC) adopt a hands off approach other than in cases in which non-compliance is recurrent or a breach of the Code is otherwise manifest.

3. An *enforced* Franchising Code of Conduct

3.1 The Code is directed in particular, to disclosure obligations and to mandating certain contractual content in franchising agreements, such as are found in Parts 3 and 4 of the Code.

3.2 Presently, the obligations to give proper disclosure to franchisees are sanctioned typically at the suit of individual franchisees, and then typically, after substantial losses (to those franchisees) and at great cost and through all the uncertainties of litigation.

3.3 There is currently no Regulator (as operates in the capital markets for example) whose role includes imposing sanctions, including criminal sanctions for breach of statute for material non-disclosure or indeed for other misrepresentations.

3.4 Sanction should reach not only legal persons (typically a corporation) who is a party to the franchising arrangement but should also reach directors, officers or persons relevantly concerned with the management of franchisor corporations.

3.5 The disclosure obligation should be continuous (as it is in the capital markets) and it is reiterated that an enforced disclosure regime as distinct from a merely enforceable disclosure regime, will do much to change the behaviours of recalcitrant franchisors without doing insult to complying franchisors.

3.6 Under current arrangements, the recalcitrant franchisor can only be brought to book at the suit of the franchisee in circumstances where even establishing a breach of the Code may not be determinative of a favourable outcome for that franchisee.

3.7 It would be an easy and readily invoked reform to render a breach of the Code as a *statutory count* that gives rise to civil law consequences, adverse to the offending party where the breach of a statutory count is established. Such a civil penalty regime was found historically under statutes such as the *Factories Shops & Industry Act 1962 (NSW)* and is part of the industrial law which imposes civil penalties of consequence upon employers, for example, for under payment of wages. The *Fair Work Act, 2009 (Cth)* enlivens the regime which allows for criminal sanction as well as civil penalty.

3.8 In franchising, such is not the case, even when a franchisor is in manifest breach of the Code.

3.9 An adverse consequence in civil litigation for breach of a statute is a material point however it is subservient to the main point. The main point is, because the need to resort to contested litigation is a barometer of the failure of the regulatory regime, more should be done, legislatively, to bolster that regime.

3.10 In the capital markets investors go to those markets knowing that there is a regulatory sanction and enforced obligations to give fulsome disclosure on persons seeking to raise money in the capital markets. Indeed, it might be said that the disclosure obligations in the capital markets if transferred to franchising would be overly onerous. We do not contend for overly onerous disclosure obligations in franchising. Indeed, the disclosure obligations under the Code are, in and of themselves, sufficient if enforced subject to the reservation we have expressed that they are not efficacious with respect of a fulsome disclosure of the commercial fundamentals.

3.11 Commercial fundamentals can be expressed simply:

> *A franchise agreement which facilitates entry into a franchise business does so typically to the following intent:*
>
> *(a) that the franchisee will become a member of a broader organisation which will, over time, (typically) provide the franchisee with an opportunity to retain a return on capital investment; and*

(b) in the meanwhile, the franchisee could expect to earn good income in the franchise system; and

(c) in most cases the franchisee can realise its capital investment by selling the business into the market as an ongoing concern; and

(d) that the franchise systems are such that they will support even inexperienced franchisees who, if they follow the system, will be successful notwithstanding those persons lack business experience or business acumen.

3.12 As indicated, Franchisee's Association's direct experience is that the current disclosure regime is not efficacious with respect to the fulsome disclosure of the commercial fundamentals; the regime focus is on the legal aspects. That is not to say that the current disclosure regime is not concerned with these issues, however the disclosure regime could in this respect, as well as with respect to the current disclosure obligations, become a document in the nature of a warranty given by the franchisor to the franchisee, being a warranty which is necessarily qualified.

3.13 The nature of the warranty is that the disclosure is accurate and can, in all respects, be relied upon. The nature of the qualification is that the warranty does not extend to guarantee that the franchisee will be successful in the operation of a franchise business. Franchisee's Association does not support a regulatory regime designed to prevent people from failing in business.

3.14 The Franchisee's Association, if invited, would be happy to work on a model disclosure document of the type we have exemplified to other Inquiries

3.15 The central point is that disclosure in the nature of a qualified warranty ought to obligate the franchisor to disclosure how the system operates commercially with respect to revenue and profit generation and with respect to capital expenditure, capital growth and the ability to realise capital on exiting the system. If the model is one where there is no capital return than that fact ought to be expressly disclosed at the outset; often it is not.

3.16 Such is completely consistent with a disclosure regime which is, after all, an attempt by various parliaments to mandate a *basis of contract* regime which binds both franchisors and franchisees. In other words, franchisees are encouraged to enter a franchise system on the basis of representations made in good faith. Consequently misrepresentations of material facts ought to result in consequences which are adverse to the representor. That said, the current legal regime covers off on this point, but it does so in a most unsatisfactory way. That is, franchisees bear the onus of proof in establishing material misrepresentation in contested litigation, which rarely can they afford.

3.17 A more particular disclosure regime would not shift the legal onus. The franchisee in contested litigation would still have the legal onus to prove its case. A more particular disclosure regime would, however, shift the evidentiary onus because the disclosure documents (modified as envisaged) would be simply tendered in the proceedings and would constitute discreet evidence of the basis of contract and the basis of disclosure. Further, the disclosure regime could operate as a warranty from the franchisor qualified only in the manner described above.

3.18 To the extent that this part of Franchisee's Association's submission is met with the admonition *"this is far too onerous ... this is death by regulation ..."* the Franchisee's Association submits that the representations of the commercial aspects of a franchise system are made in the context of commercial negotiation between franchisors and putative franchisees in any event. All that is asked is that those representations should be reduced to writing under a regime that is concerned to ensure they are true and correct. As such, the obligation is not objectionable.

4. An Enforced Code

4.1 The Franchisee's Association urges Parliament to pass laws which result in the breach of the Code resulting not only in civil consequence of the type referred to at 3.7 above but also in criminal sanction. That is to say, a penalty in the nature of a fine (or in extreme or recurrent circumstances, imprisonment) for a breach of a statutory obligation. To work, that same regulatory regime should create co-extensive liability so that directors, officers or persons concerned in the management of franchising businesses have a co-extensive liability for breaches of the Code by incorporated franchisors.

4.2 A model for co-extensive liability is found in workplace health and safety statutes. In those statutes (and as the Franchisee's Association submits, in franchising) the legislative intention is manifest. The intention is to change behaviour so that organisations as a matter of fact, have proper regard to their legal obligations and are a substantial risk, and in the case of individuals with decision making power in such organisation, substantially personal risk, in circumstances where there is a serious or recurrent breach of obligations.

4.3 Such a regulatory regime should not be the source of complaint from the vast majority of franchisors who do their best to comply with the obligations under the Code. Indeed, such a regulatory regime would impose very little additional burden on the majority of franchisors who strive to comply, and do in the main comply, with the obligations mandated under the Code.

4.4 There are a number of options, from the menu of options, which Parliament might accept as being appropriate civil consequences for a breach of statutory obligation. At the behest of an aggrieved party, a consequence of a breach of a statutory obligation might be to void or render a voidable or unenforceable, in whole or in part, the consequence of a statutory breach. Such a submission might be met by opponents to the submission by reference to *Ketchell's* case decided by the High Court on 27 August 2008. For convenience, we have attached a case note which demonstrates why reliance on the decision in *Ketchell's* case, in opposition to this submission would be misconceived. It should be borne steadily in mind that the imposition of consequences for statutory breach are designed to serve to moderate behaviours.

4.5 The conclusion of the High Court in *Ketchell's* case can perhaps be expressed colloquially:

> *Even though the Trade Practices Act mandates that a corporation will not, in trade and commerce, contravene the Code, such a breach at worst either has no necessary consequences and at best provides a gateway to further litigation under other provisions of the Trade Practices Act.*

4.6 These other provisions include remedies under section 87 of the then Act (declaratory relief, orders varying the contract, orders permitting for avoidance, orders providing for the return of property and ultimately orders providing for money damages) and other possible remedies under the unconscionable conduct in business transactions provisions of the new Act the Competition and Consumer Act . This submission, in this respect can be redacted to the following propositions:

(a) a breach of statutory obligation ought to have consequences;

(b) those consequences can be:

(i) criminal;

(ii) civil; and

(iii) both criminal and civil.

5. Unfair contracts

5.1 In certain states of the Commonwealth, for example New South Wales, franchising agreements were susceptible to the reach of unfair contracts jurisprudence under Part 9 of Chapter 2 of the *Industrial Relations Act* 1996 (NSW).

5.2 The unfair contracts jurisprudence fell into disfavour and was indeed in large measure, ousted by the Work Choices Amendments to the *Workplace Relations Act* 1996 (Cth). However a good deal of what was in Part 9 of Chapter 2 of the NSW Act found its way into the *Independent Contractors Act* 2006 (Cth) (**ICA**).

5.3 The Federal Magistrates Court of Australia and the Federal Court of Australia have been granted jurisdiction under the ICA.

5.4 The ICA has designed to regulate arrangements between so called, independent contractors, by reference to commercial law principles as distinct from a reference to principles as operate in industrial law more attuned to the relationship of employers and employees. Even so because of the nature of definitions under the ICA franchising contracts are said not to be *caught* because the jurisdiction is said to be limited to *services contracts*. Franchising contracts or arrangements are said to be something other than a services contract which would attract jurisdiction.

5.5 The objects of ICA are expressed to be:

(a) to protect the freedom of independent contractors to enter into *services contracts*; and

(b) to recognise independent contracting as a legitimate form of work arrangement that is primarily commercial; and

(c) to prevent interference with the terms of genuine independent contracting arrangements.

5.6 Definitionally the first threshold question relates to services contracts. The language which distinguishes between independent contract and contract of employment as it is developed in the law is not helpful. An independent contract is described as a *contract for services (services contract) and employment contract (master/servant relationship) is described as a contract of service.*

5.7 There are a number of threshold conditions before one can get to the unfair contracts jurisdiction under ICA. The first of these appears to be the definition of *Services Contracts* defined as follows:

> *"Services Contract is a contract for services:*
> *(a) to which an independent contractor is a party; and*
> *(b) the relation to the performance of work by the independent contractor; and*
> *(c) that has the requisite constitutional connection specified in subsection (2).*

The requisite constitutional connection is at least one party to the arrangement has to be a constitutional corporation within the meaning of section 51(xx) of the Constitution.

5.8 The question arises whether a franchising contract or arrangement constitutes a *services contract* within the meaning of ICA. We can dispose of the point shortly. The contention against franchising arrangements being susceptible to the reach of the ICA is based upon the proposition that a *services contract* as defined, does not on its proper interpretation, encompassing franchising arrangements which might in all other respects be thought of as independent contracts. This is because, so the argument runs, that a franchisee, although a counterparty, is not performing work to the benefit of the franchisor but is rather performing work for the benefit of third party consumer in franchise system. In other words, a franchising contract (and arrangement) is not because of the definition *contract for services* a *services contract* within the meaning of ICA.

5.9 It is within the gift of the Parliament to amend the ICA to put the issue beyond doubt. There is no good reason, in principle, why franchisees should not have access to the Federal Magistrates Court of Australia and the Federal Court of Australia to take advantage of the unfair contracts jurisdiction and the jurisprudence being developed under ICA.

5.10 Importantly the ICA limits the court's remedial powers to orders which address the contract complained of only and then only to the extent that it is unfair. Section 16(2) of the ICA is in the following terms:

> *"16(2) Any orders may only be made to the purpose of placing the parties to the services contract is nearly as practicable on such a footing that the ground on which the opinion is based no longer applies."*

In other words, the remedy must address the contract only to the extent that it is unfair and not to any further extent.

5.11 There is a provision for the court to make interim orders to preserve the position of parties pending final hearing and orders. That jurisdiction can be used by the court to make injunctive or *cease and desist* orders. In franchising this can be a most important remedy indeed, designed as it is, to maintain the status quo or to prevent the continuation of conduct which may be causing serious commercial damage.

5.12 In this context it is instructive to note the powers given to the court they are found at section 15 of the ICA and are relevantly in the following terms:

> *"15. Powers of Court*
>
> *(1) In reviewing the services contract... the court may have regard to:*
>
> *(a) the relative strengths of the bargaining position of the parties to the contract and, if applicable, any persons acting on behalf of the parties; and*
>
> *(b) whether any undue influence or pressure was exerted on, or unfair tactics were used against, a party to the contract; and*
>
> *(c) whether the contract provides total remuneration that is, or is likely to be, less than that of an employee performing similar work; and*
>
> *(d) any other matter the court thinks relevant..."*

Franchisee's Association asks respectfully but rhetorically: what's wrong with that in the context of franchising?

5.13 The Franchisee's Association submits Parliament could readily amend the ICA to allow parties to a franchising contract access to that jurisdiction. In this context it should be recalled that the object of any such reform is to change behaviour. As such the ICA may be further amended to create co-extensive liability for directors, officers and persons concerned with the management of franchisor corporations who engage in behaviours that fall foul of the jurisdiction. Any such legislative amendment should be appropriately qualified so as to maintain the integrity of the limited liability of corporations other than for behaviours which result in such corporations showing a contumely disregard for the proper and lawful conduct, indeed good faith, in trade and commerce.

6. A Franchising Ombudsman

6.1 Recent experience in the industrial law adds to commonwealth experience in banking and superannuation namely, that the office of an Ombudsman can considerably reduce the disputation and serve to deal effectively with pattern conduct and disputes before they devolve to the point of litigation.

6.2 The role of the Ombudsman might extend to a complaints function analogous to that which operates under the Fair Work Act. The Ombudsman might intervene for example on a complaint of asserted non-compliance with disclosure obligations against the codified disclosure standards. A regime of remedial orders, enforceable undertakings escalating to fines and penalties could readily be enacted. A vetting process, as part of the complaints process, might be implemented against standards encoded as envisioned in the event the Code is amended to create clearer disclosure obligations including as to the commercial arrangements; the Ombudsman having power to make recommendations and remedial orders or receive enforceable undertakings for imputed breaches.

6.3 An Ombudsman is typically a *go to* entity which in franchising can:

(a) be independent and impartial;

(b) dispense educational materials;

(c) advise parties as to options;

(d) conduct a regime whereby breaches of the Code can be dealt with on the basis of *enforceable undertakings* given to the Ombudsman;

(e) launch prosecutions;

(f) oversee alternative dispute resolution regimes;

(g) collect statistics;

(h) report to Parliament.

6.4 The role of the Ombudsman could also include keeping a register of complaints which it would make available to prospective franchisees. Complaints recorded against a given franchisor or franchise system could be registered. The Ombudsman would establish criteria for the registration of complaints including the rejection of complaints that were vexatious and frivolous.

6.5 To quote from the review of the New Zealand experience, the Ombudsman could be "expected to tell the weak and helpless that their complaints have no foundation when this is so, and to tell those that consider themselves wronged that they have received due process".

6.6 The creation of a franchising Ombudsman might lead to the removal of the Office of Mediation Advisor with the mediation and conciliation functions being overseen by the Ombudsman. This would have the advantage of the Ombudsman's office being able to track, against any particular franchise system, disputes that raise *in principle* or other systemic complaints. Presently cases are dealt with through the mediation system on a *one off* basis and are settled on that same basis and in consequence systemic problems in a given franchise system are rarely highlighted in the way that brings those problems to book at an early time.

Questions of good faith in franchising

- The general law contention that franchising contracts and arrangements are underpinned by the doctrine *good faith* should be given legislative effect.

- The Franchising Code of Conduct ought to be an *enforced* as well as *enforceable* Code.

- The Regulator, be it ACCC, ASIC or an Ombudsman should have as part of its regulatory function an ability to remedy, and ultimately prosecute for, non-compliance with minimum standards of conduct. Regulators have such powers in the capital markets and the Franchisee's Association submits there is no in principle reason why such should not be invoked in some measure at least in franchising.

- If the Code is not the instrument to mandate good faith, that is insufficient justification for not mandating good faith legislatively otherwise.

- The doctrine of *good faith* is well known to the law and the suggestion it is not sufficiently certain is, with great respect, fallacious. At its core would sit the notion that Franchising Agreements should not be used as instruments of oppression.

- The good faith obligation should inure from the time pre-contractual negotiations, throughout the legal relationship and in bringing that relationship to an end.

- On the last point, good faith should inform the processes of sale and assignment of a franchise and the obligations should be mutual.

The rights of franchisees at the end of their franchise agreements including recognition for any contribution they have made to building the franchise

- The disclosure obligations under the Franchising Code of Conduct ought to extend not only to the legal infrastructure but also the most important aspects the commercial relationship, namely:

  » return on capital; and

  » revenue and profit.

- The fundamental issue is one of disclosure. Franchisees should be made unambiguously aware at the beginning of the franchise arrangement what franchisees can expect to achieve over the life of, and at the end of the franchise.

- If the franchise model is a revenue only model and a return on capital investment, for example, by the maintenance or enhancement of good will, by sale or assignment, is not promised, such should be expressly disclosed at the outset.

The operation of the Competition and Consumer Act 2010 with respect to enforcing the Code

- The Act provides a vehicle by which law reform can be given better effect.

- The Act might also be amended to countenance the creation of Legislative Instruments including, if thought necessary, to further codify the doctrines of good faith which ought to be mandated if not by the Franchising Code of Conduct itself than legislatively.

- The use of Legislative Instruments might afford a mechanism by which the Code can be developed and modified without the recurrent need for public Inquiries.

- The contention that the law ought not to be reformed by amending the Code, to impose an obligation of *good faith,* because to do so is to codify "aims and ideals" is no reason to do nothing. If the minimum standards imposed by the Code (by setting out requirements and obligations) are honoured in the breach then the Act itself ought to be amended to render the impositions of those standards as legislatively mandated.

- The Parliament might also consider the establishment of an office of *Franchising Ombudsman* for the reasons set out at in section 6 above.

- A Franchising Ombudsman should be empowered on the analogy of the Fair Work Ombudsman to oversee, run a complaints function with powers to ensure compliance with the regulatory regime on an escalating basis from educative, through recommendation, enforceable undertaking and ultimately by civil and criminal sanction.

- Parliament might also consider amending the reach of the Independent Contractors Act 2006 (Cth) so that that legislation (which is essentially an unfair contracts jurisdiction) is opened up to franchising.

- The Corporations power has proven sufficient to allow the Federal Parliament to legislate to include franchising within the jurisdictional reach of Courts under the Independent Contractors Act.

- The unfair contracts jurisdiction as operating in the Federal Court system has proven to be a Court of easier access and if the contention is that franchising is (legally at least) a *business to business* relationship, there can be no reasonable objection to accessing that jurisdiction.

Schedule

Case Note: Ketchell's Case

1. The High Court of Australia made its decision on 27 August 2008 in *Master Education Services Pty Limited v Ketchell* (2008) HCA 38.

2. The case was an appeal from the Supreme Court of NSW which it held that a material non-compliance with the Franchising Code of Conduct rendered the subject franchise agreement unenforceable due to illegality of common law.

3. The illegality, so the argument ran, was in consequence of a breach of the statutory obligations contained in section 51AD of the *Trade Practices Act* 1974 (Cth) (TPA). The duty to comply with the Franchising Code of Conduct is mandated by the TPA.

4. The decision of the High Court of Australia can be put, and was put by their Honour's succinctly in the number of paragraphs in the judgment. Firstly from paragraph 18:

> *"In the present case, the prohibition in section 51AD (a corporation must not, in trade and commerce, contravene an applicable industry code) is directed to securing compliance by franchisors with the requirements of industry codes, and the consequence of contravention is a grant of remedies provided for in Part VI of the TPA (that is the enforcement and remedies provisions)."*

In other words the High Court held that there was no need to refer directly to the harsh common law consequences (unenforceability and consequence of illegality) in circumstances where the TPA itself provided a menu of remedies.

5. At paragraph 38 of the judgment their Honours wrote, as to the remedies:

> *"The Act provides a more flexible approach. It allows the court to prevent entry into a franchise agreement, to vary the terms of the agreement entered into in breach of the Code, or to terminate such an agreement or provide compensation for loss and damage, if it is shown to have been caused by the contravention..."*

6. Their Honours continued at paragraph 39:

> *"One of the purposes of the Code is the protection of the position of the franchisee... it would be an unusual result if, (in circumstances where the franchise agreement was rendered unenforceable) that the franchisee's bargain was struck down in every case regardless of the position in which it placed the franchisee. It is not to be assumed in every case that the franchisee wishes to be relieved of the bargain. To render void every Franchise Agreement entered into where a franchisor had not complied with the Code would be to give the franchisor, the wrong-doer, an opportunity to avoid its obligations but at the same time place the franchisee in breach of obligations (the franchisee may owe) to third parties."*

7. With that, the Court concluded (also at paragraph 39 of the judgment):

> *"A preferable result, and one which the TPA provides, is to permit a franchisee to seek such relief as is appropriate to the circumstances of the case."*

8. In this respect their Honours were referring principally to section 87(2) of the TPA which provides a menu of remedies including:

   - declaratory relief;
   - orders varying the contract;
   - orders permitting avoidance in whole or part of the contract;
   - orders providing for the return of property;
   - orders providing for damages (money compensation).

9. It seems that on this particular issue at least, the High Court has had a final word.

10. The conclusions of the High Court can be put colloquially:

> "*Even though the TPA mandates that a corporation will not, in trade and commerce, contravene the Franchising Code of Conduct such a breach at worst either has no necessary consequence and at best provides a gateway to further litigation under the provisions of the TPA.*"

11. The rhetorical question is if this is where the law is, is it where the law should be?

12. Franchisee's Association's contention is that the law can be improved by making provision for breach of a statutory obligation having consequences. Those consequences can be:

    (i) criminal;

    (ii) civil;

    (iii) both criminal and civil.

13. Criminal sanctions could be prosecuted at the initiative of the Franchising Ombudsman or by ACCC or some other public authority.

14. Civil consequences can be analogous to those which operate, for example, in the industrial law. Namely give rise to a civil statutory count whereby the aggrieved party is afforded a forensic advantage such as limitation on the offending party's ability to raise a counter claim. Alternatively a civil money penalty being imposed with the aggrieved party having the ability to claim a moiety.