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Effective Disclosure in the Regulation of Franchising

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Executive Summary

This paper outlines the use of disclosure in the regulation of the franchise sector in Australia, demonstrating that it does not meet conditions considered necessary for effective informational regulation. First, there is not enough reliable information to gauge the risks in informing the design of regulatory process and the choice of tools; second, the information in the disclosure document is not uniformly reliable, accessible and useable; and, third, a franchisee's ability to act on the information is limited because the franchise contract is not subject to negotiation and there are limited alternatives in the market. As potential solutions, this paper proposes that increased cooperation among and fuller representation of stakeholders, better information from dispute resolution processes, and registration of disclosure would improve the level of information about the sector generally. To ensure reliable, accessible and useable information, the information that is required to be disclosed should be identified by all stakeholders, with assurance that it is provided in an accessible, useable way. Finally, educational initiatives are needed to enhance franchisees' ability to act on the information. This paper also briefly surveys some other regulatory tools used in the regulation of franchising, but urges that these tools be selected as part of a democratic and participative regulatory process that accurately represents the interests of all stakeholders.

Keywords: *Informational regulation, disclosure, consumer law, standard form contract, relational contract*

Introduction

The franchising sector employs over 600,000 people in Australia, and contributes an estimated \$90 billion per year (about 11%) to the Gross Domestic Product. The national economy therefore derives significant benefit from the optimal operation and regulation of the sector, but whether the sector is operating optimally is not clear. Franchising is portrayed by trade associations as a perfect vehicle to transform inexperienced people into successful business owners, with higher success rates than for independent small business. Yet stories are legion of disappointed, would-be entrepreneurs whose experience of franchising leads them to claim it is a form of predation or servitude. Some estimate that over 30 percent of franchise units in Australia fail to turn a profit.¹

Franchising is a significant part of the economy, but there is little reliable evidence of the effectiveness of its operation or of government regulation of the sector. Officials at the Franchise Council of Australia (the FCA) declare that the Franchising Code of Conduct (the Code) is effective, but the Motor Trades Association of Australia (MTAA) has called for the strengthening of the Code. Pursuant to publicity of disputes between franchisors and franchisees in the Midas, 7-Eleven and Quizno's systems, the effectiveness of the Code again became a political issue in 2006, prompting the Government to initiate a Review of Disclosure.² The government response to this review, however, has not stopped complaints about abuses in the sector; in October 2007 the South Australian State Parliament Economic and Finance Committee announced plans to undertake its own inquiry into the laws regulating the franchise industry. After thirty years of regulation of the franchise sector in Australia, there is still no conclusive evidence of the effectiveness of this regulatory program, and the controversy continues.

This paper considers the effectiveness of the regulation of the franchise sector in Australia, and suggests that the question of the effectiveness of franchise regulation is important not only for Australia's franchise sector, but for the regulation of the sector in many countries. Australian franchising serves as an example for other countries seeking to encourage competitive franchise sectors in their economies, and the regulation of the franchise sector in Australia is instructive as a model for other countries for several reasons. First, regulatory practice in Australia is of a generally high standard; it is more

detailed than that of many countries and more coherent than the complex interplay of state and federal regulation in the US.³ Second, the fact that different approaches have been tested means Australia has greater depth of experience than many countries. Third, as Australia has a relatively high number of franchises per capita, its regulation is tested in a significant and growing sector of the economy.⁴ In addition to the ever-increasing importance of consistency in regulation across jurisdictions, the importance of uniformity in franchising is a further, sector-specific reason why consistent regulation and governance is particularly desirable.

This analysis begins with the premise that effective regulation is regulation that achieves its goals. The Regulatory Impact Statement states that the objectives of the regulation are to raise standards of conduct in the franchising sector without endangering the vitality and growth of franchising; to reduce the cost of resolving disputes in the sector; to reduce risk and generate growth in the sector by increasing the level of certainty for all participants; and to address the imbalance of power between franchisors and franchisees.⁵ To achieve these goals the Code relies on three regulatory elements:

- 1) a handful of substantive provisions;⁶
- 2) prescribed dispute resolution procedure (mediation); and
- 3) disclosure by any franchisor entering into, extending or renewing a franchise agreement to the prospective franchisee at least 14 days prior to signing the franchise agreement.

The focus of this analysis is on the potential for effective regulation through disclosure. Of the approximately 25 countries with sector-specific regulation of franchising, 18 countries (Australia, Belgium, Brazil, Canada, France, Indonesia, Italy, Japan, Kazakhstan, Korea, Lithuania, Malaysia, Mexico, Romania, Russia, Spain, Taiwan, and the US) rely on disclosure as a principal means of regulating the sector, as do 17 US states and a handful of Canadian provinces. Though they have not enacted sector-specific legislation, New Zealand and Sweden have voluntary codes of conduct that require disclosure. Disclosure is also the centrepiece of the International Institute for the Unification of Private Law (UNIDROIT) Model Franchise Disclosure Law. In all these jurisdictions regulation is based upon a rational economic model in which disclosure is

intended to enhance economic efficiency by addressing problems of information that is withheld, or is misleading, or difficult to obtain or to evaluate or that cannot be used because of behavioural bias (OECD Roundtable on Economics for Consumer Policy).

Part I: Evaluating Disclosure as a Principal Regulatory Tool against Conditions for Effective Disclosure

Disclosure is a form of informational regulation used to influence the flow of information in a market.⁷ Often favoured as a cost-efficient alternative to conventional regulatory approaches, disclosure has been a popular regulatory strategy in the US since its introduction in securities regulation in the 1930s (Case, 2001). The purpose of informational regulation underlying the securities rules has been to reveal risks to investors. Informational regulation is now not only used to protect investors, but also consumers; notable examples are for insurance and home mortgage products. It has also been applied in environmental regulation to equip the public with information about the activities of companies and their potential risks to local communities (Ripkin, 2006).

As a low-intervention tool, where recipients of disclosed information remain responsible for their decisions, disclosure reduces costs to the regulator in both monitoring and enforcement.⁸ Another benefit of the self-regulatory qualities of disclosure is the reduction of guesswork and mistakes by the regulator. Disclosure may also help to avoid the appearance of paternalistic approaches to regulating, a criticism commonly levelled at substantive regulation. The attractiveness of disclosure, then, is due largely to its self-enforcing qualities which are seen to offer an effective, low-intervention and cost-efficient alternative to conventional regulatory approaches in facilitating the efficient operation of markets.

Despite its advantages, however, informational regulation is not always the ideal regulatory strategy. An analysis of environmental informational regulation concluded that it has been 'at best, a blunt and unfocused instrument' (Case, 2006) with the capacity to generate problems, for example, if it provides inaccurate or incomplete information; fails to identify actual, existing concerns; promotes unjustified fears; produces a false sense of security; perpetuates misinformation; and/or promotes under or over-reaction.⁹ Some studies indicate that consumers make wiser decisions when they

are provided with less information (OECD Roundtable on Economics for Consumer Policy). In the regulation of franchising disclosure has been charged with harming the very consumer it purports to protect.

Not only are its disadvantages sometimes underestimated, but also disclosure's advantages may not be as great as they seem. Though it is relatively low-cost from the point of view of the regulator, costs to participants can be significant. The Review of the Franchising Code of Conduct reported a range of estimated costs by franchise systems for the preparation of disclosure documentation at \$2,000-\$65,000 per year. The Franchising Council of Australia (the FCA) submission to the Review reported an average annual cost per system of \$52,000. Franchisors are able to pass these costs on to franchisees, but what is not known is whether the benefits are worth the costs.

Generally, disclosure works by allowing the recipients of the disclosed information to negotiate and/or to find alternatives in the market. First, informational regulation facilitates private bargaining due to improved transparency and efficiency of markets.¹⁰ By reducing information asymmetries and with them the transaction costs which impede effective bargaining disclosure increases fairness and reduces market volatility.¹¹ Second, by providing market participants equal access to information, disclosed information helps recipients to make better-informed choices among the alternatives in the market. Disclosure can 'level the playing field' and so is thought to promote trust and boost confidence in the market.

To the extent that informational regulation relies on, 'market pressures...and public pressure to enforce...standards', it depends on the availability of reliable and 'useable' information. Informational regulation can be effective only if recipients have the ability to understand and use the information; also there must be alternatives in the market.¹² Research in the area of environmental regulation has identified several 'functions' as necessary for the establishment of an effective information disclosure strategy.¹³ According to this research, for informational regulation to be effective it is necessary to:

- 1) Gauge the extent and magnitude of the particular risks;
- 2) Obtain reliable information and to disseminate information in a form that is both useable by and accessible to the community; and

- 3) Ensure options for the target audience to act upon the information. Disclosed information might work effectively through pre-existing channels, including market interactions, and/or through new mechanisms including enforcement.¹⁴

These 'functions' of an effective disclosure strategy suggest a framework for evaluating the effectiveness of disclosure in regulating the franchise sector. First, informational regulation must gauge the extent and magnitude of the risks, in order to be designed to address these risks. Second, it must ensure that reliable information is obtained and disseminated in an accessible and useable form, so that franchisees can access and use information that they can rely upon. Third, disclosure must ensure that franchisees can act upon the information; otherwise no matter how reliable, accessible and useable the information may be, it is ineffective. Because there is a transaction cost for a franchisee to assimilate and use the information and because there may be opportunity costs, if it does not meet these conditions, disclosure may be counter-productive.

1.1 Gauging the Risks

The first function of effective informational regulation is to ensure that the necessary information is available in order to gauge the risks that regulation should address. The Preamble to the UNIDROIT Model Franchise Disclosure Law recommends an extensive list of factors for legislators to consider before instituting informational regulation. Hayek observed that information available to regulators is incomplete;¹⁵ therefore a regulator must find ways to ensure reliable information for its purposes as well as for market participants.

The lack of information about the franchising sector is a fundamental problem in the design of appropriate regulation. There are several reasons for the lack of reliable and accurate information about franchising. First, the sources of information about problems in the sector are limited and are dominated by franchisors with a strong interest in projecting a positive image of the sector. Second, conflicts of interest between franchisors and franchisees deter information sharing. Third, franchisees who may consider sharing negative experiences in franchising have legitimate concerns about the threat of defamation and breach of contract as well as breach of competition law. Fourth, evidence from dispute resolution processes is not available due to confidentiality of

mediation. The dearth of reliable information about the franchising sector is therefore a perennial problem that impedes efforts to tailor a regulatory program to the needs of the sector.

1.2 Ensuring Reliable Information

If disclosure is to work effectively, the second condition dictates that a franchisee must have access to reliable information. This includes information about the nature of the relationship between franchisor and franchisee (the franchise relationship) in general and about the franchise system in particular. The previous section on ‘gauging the risks’ outlined the obstacles to obtaining reliable information about the Australian franchise sector generally. Franchising is the subject of ongoing academic study, but there is still much about this business structure that is controversial and/or poorly understood.¹⁶ If marketing experts, economists, courts, regulators, and lawyers who study and analyse the sector have difficulty in characterizing franchising, it is understandable that prospective franchisees entertain misperceptions about the nature of this complex and multi-faceted relationship.

For example, the importance of the interaction of the standard form and relational characteristics of the contract is not explained to a franchisee. The power imbalance of the standard form combined with the reliance on trust and reciprocity of the relational contract results in a marked inequality of bargaining power; a franchisor has control, while a franchisee must rely on trust, reputation and other factors outside the contract. A typical prospective franchisee will not be aware that the lack of negotiation of the contract of the standard form combined with the flexibility, discretion, and vaguely defined obligation required by the relational quality of the franchise contract mean that a franchisor accords flexibility to itself (while at the same time imposing specific obligations upon franchisees) thus increasing uncertainty and risk for a franchisee. A franchisor can manage risk through contract, but a franchisee cannot. Finally, a franchisee will not be aware that the ‘contract as commodity’ approach of the standard form means that a franchisee takes on qualities of consumer of product, rather than an equal party to negotiation of terms. A fully-informed franchisee should understand how the contract sets up the conditions of imbalance of power and uncertainty in the

relationship, conditions that regulatory intervention sets as stated goals to redress (while in fact these conditions actually impair effective regulation through disclosure).

In addition to an understanding of the general nature of franchising, a prospective franchisee needs information about a particular franchise system in which it may choose to participate and invest. While disclosure purports to provide a franchisee with the necessary information about the nature of the investment and business commitment, the information that is most needed is not always provided. Of the 21 items required to be disclosed, the following illustrate how disclosure requirements may fail to adequately inform a franchisee.

- *Payments and earnings information:* A franchisor is not required to specify franchisee payments but may opt to provide a range. With respect to earnings, these figures need to be provided; a franchisor can simply state that it does not furnish earnings information. Not only does this raise the question on what basis the sale of the business is to be made, but also highlights potential inconsistency with the Trade Practices Act 1974 (Cth) (the TPA) misleading or deceptive conduct provisions where the Code allows a franchisor to decline to provide earnings information, while on the other hand failure to disclose material information can constitute a breach of TPA section 52.
- *Site information:* A franchisor can structure the legal aspects of a franchisee's premises occupancy in a variety of ways. A franchisee should be aware of how the nature of the tenancy of the franchised premises may impact his or her operation on an ongoing basis and at transfer or termination, but this information is not required to be provided.¹⁷
- *Intellectual property:* For any 'confidential' information a franchisor is permitted by the legislation to provide (a) a general description of the subject matter; and (b) a summary of conditions for use by a franchisee. A franchisee makes a significant upfront investment in the franchisor's intellectual property, but details about the ownership of and control over the intellectual property are not required to be disclosed.

- *Franchisee obligations:* A franchisor is permitted to refer to the contract in lieu of providing this information in the disclosure document.¹⁸ Where it is provided as a separate document, disclosure can simply summarize franchisee obligations in the contract. As franchisee obligations are usually extensive, the impact of any information disclosed may be lost. One solicitor's disclosure boilerplate, for example, lists items (a) through (s) with item (g) 'regarding franchisee goodwill, if any, upon expiry'. The impact of such important information may be lost in the middle of nineteen other terms. Other significant items grouped together in this list include a franchisee's right to sell its business, conditions of renewal, variation, and restraint of trade. Also, there is no registration of disclosure, and no publicly shared information about franchisor reputations.
- *Franchisor reputation:* Because of the high levels of control and discretion enjoyed by a franchisor, the reputation of a franchisor, including the nature of a franchisor's management of the system and the relationships within it, is critical to a franchisee in making its decision about buying a franchise. While some information about past business endeavours, business associates, and financial track record is provided, franchisees are likely to be frustrated in learning about this aspect of a franchisor's operation, first because no contact information is given for franchisees who have exited the system, and second because there is no information about franchisees in mediation because of confidentiality of mediation processes. A prospective franchisees' ability to obtain information and to understand the nature of problems in the sector and in that franchise system is thus compromised.

Monitoring of disclosure also helps to ensure reliable information. Just as franchisors collectively have an interest in marketing franchising as a business opportunity, each individual franchisor is in the business of selling franchises and so has an interest in projecting a positive image. The lack of monitoring of disclosure documents increases any franchisor temptation to provide more favourable information than is warranted, to leave out select details, or to minimise the importance of the disclosed information in discussions with a franchisee.

1.3 Ensuring Accessible Information

For disclosure to be effective, the information must be accessible to a franchisee, but physical accessibility and presentation can detract from this effectiveness. Accessibility may be compromised by the use of obscure language or ‘legalese’ and discrepancies in legal advice. Disclosure documents written by franchisors’ lawyers often employ formalized language a franchisee is not likely to be able to use if it does not understand. Franchisees often fail to secure adequate legal representation and advice which means they operate at a disadvantage, not only with respect to their understanding of the contract but also disclosure and other documents such as hire-purchase agreements, leases and security agreements. In some cases a franchisee must make an appointment to view certain information at a franchisor’s place of business. This practice has been expressly permitted by the Code with respect to such critical information as past performance of the particular unit or territory.

Because the disclosure document may be provided at a different date from the contract, it is important that the two documents are consistent. Franchisors sometimes provide more detailed information about payments in final documents that are presented to a franchisee to sign on the day at closing than was provided as part of the disclosure process.¹⁹ Most jurisdictions that require disclosure specify a time period to allow a franchisee reasonable time to review the information; in Australia it is 14 days.²⁰ The recruitment process, however, can take months. There can be a considerable amount of time and psychological investment in the deal by the time disclosure is introduced.

1.4 Ensuring Useable Information

Franchisee inexperience and behavioural bias can impair the ‘useability’ of disclosed information. Prospective franchisees often lack the sophistication and awareness necessary to properly assimilate and benefit from the information disclosed, particularly as many are inexperienced in business. Most franchisees have never signed a franchise contract before. Lack of skill in deciphering what the information means or in using it effectively can have debilitating consequences when a franchisee is faced with large amounts of information with the result that lengthy and complex disclosure may impede rather than facilitate decision-making.

Further limits to franchisees' ability to use information include psychological factors such as optimism and overconfidence. Studies show that people often have higher expectations of their own abilities than are justified by objective tests.²¹ A prospective franchisee may look at an underperforming location and be overconfident in his or her ability to overcome obstacles. Studies also show that overconfidence can lead people to believe they have better-than-average abilities to judge character so that they substantially overrate their own capacity to evaluate the trustworthiness of others.²² These factors can prevent a franchisee from realistic assessment of its future business partner.²³ Further, confirmation bias creates a tendency to discount new information.²⁴ Information may come too late, when a franchisee feels committed, has made specific investments and/or when confirmation bias prevents a franchisee from making use of the information, thus preventing a franchisee from effectively using disclosure.²⁵ As will be discussed in the next section, it may be also that a franchisee is not able to use disclosure to find alternatives in the market because of the timing of disclosure.²⁶ If disclosure fails to coincide with the time that a franchisee may be comparing alternatives, it cannot help a franchisee with this function.

1.5 Ensuring Options to Act

Disclosure helps a recipient of information to negotiate and/or to select alternatives. The standard form and relational characteristics of a franchise contract, however, impair the ability of a franchisee both to negotiate and to find alternatives. First, standard form contracting implies an imbalance of negotiating power.²⁷ In a situation where a franchisor writes the contract and does not allow negotiation of contract terms, a franchisee is unable to bargain even if it has the necessary information. Disclosure may have the potential to 'level the playing field', but less so if a franchisee cannot use the information to negotiate.

As the possibility of negotiation is foreclosed by the standard form, the principal function of disclosure in the franchising context would seem to be to enable a franchisee to make alternative selections in the market. Disclosure can be effective in this way, however, only if a franchisee has options. Investors and consumers, for example, can compare what is on offer in the market, and typically can find alternatives. The problem in

franchising is that there is often a lack of viable alternatives. A franchisee may not be able to find a substitutable product because of the importance of brand and the unique nature of the franchise concept. If an alternative is available, it may be on non-competitive terms because the terms in franchise contracts tend toward uniformity not only within each franchise system, but also across different franchise systems.²⁸ A franchisee's choice is thus effectively limited to either complete acceptance of the offered terms or walking away from a business to which it has become psychologically and often also financially committed.

In addition to the problems raised by the standard form, the relational quality of the contract impairs the ability of a franchisee to use the information. Relational contracts are not amenable to regulation by disclosure because they reflect the uncertainty of the long term largely through the use of open-ended terms, flexibility and discretion in the contract.²⁹ The relational qualities of flexibility and discretion mean that there are significant aspects of the contractual relationship that are left to be arranged by the parties over time. Because these aspects are not specified, much of the 'deal' remains to be determined and therefore cannot be disclosed at the time of contract formation. While contract formation, the target of disclosure, is a critical stage, performance of the franchise contract extends over a period of many years. The franchise contract is not conducive to regulation by disclosure because the relational quality of the franchise contract is inconsistent with the regulatory focus on formation. Further, the relational contract emphasizes the 'trust us' aspect of the relationship, and detracts from the psychological importance of franchisee due diligence.

Perhaps most importantly, a franchisee cannot act on the information because a franchisee cannot rely on the information. A franchisor typically protects against the risk of a TPA section 52 breach by requiring a franchisee to sign a deed of representation,³⁰ as well as through contractual provisions that may include a merger clause,³¹ and/or a clause that states that the 'sales representative is not our agent'.³² Together these measures form multiple barriers to successful claims by franchisees of misleading or deceptive conduct on the part of a franchisor in recruitment and negotiation.³³ The Code disclosure requirements, when taken together with the risk of misleading or deceptive conduct under TPA section 52, create an incentive for franchisors to disclose required

information but to do so in such a way that a franchisee cannot later claim to have relied upon the information. Perversely, then, rather than reinforcing the Code, the misleading or deceptive conduct provision of TPA section 52 may actually diminish the utility of disclosure.

To summarise, Part I has shown that disclosure does not meet the conditions that are considered essential for effective regulation by disclosure, gauging the extent and magnitude of the particular risks; obtaining reliable information; disseminating information in a form that is both useable by and accessible to the community; and ensuring options for the target audience to act upon the information. First, there is not enough reliable information to gauge the risks in informing the design of regulatory process and the application of regulatory tools. Therefore it has been impossible to inform the design of disclosure with a systematic assessment of the risks through a participative regulatory process that determines what information must be provided, about the nature of the enterprise generally and about specific franchise systems. Second, the information a franchisee receives in the disclosure document is not reliable, accessible and useable because the right information is not always provided; there is no registration and no monitoring to ensure compliance; the language of disclosure can be unclear; the presentation and timing of the information is not always consistent with the need for the information; there are inconsistencies with other regulation; and franchisees who are often inexperienced and ill-equipped to use the information are subject to behavioural biases. Third, the standard form and relational qualities of the contract impair a franchisee's ability to act on the information because the franchise contract is not subject to negotiation, because there are limited alternatives for contract terms, and because any available alternatives may not be practicable due to the late timing of disclosure. The relational nature of the contract is also inconsistent with disclosure as a regulatory tool as significant parts of the contract are left unspecified, and therefore cannot be disclosed. Disclosure provides select pieces of information, but not necessarily the 'right' information, to individual franchisees at a particular point in time and in a form that may not be useful or accessible, to help them negotiate a deal that is not negotiable, and/or to select alternatives where there are effectively very limited alternatives.

Part II: Enhancing Disclosure

Part II describes some measures aimed toward addressing the problems with respect to each of the conditions necessary for effective regulation through disclosure. It also suggests revising regulation of the sector generally in order to improve the effectiveness of regulation in achieving its goals.

2.1 Measures to better gauge the risks

More meaningful measurements to inform regulatory process generally could be obtained through a variety of avenues including legitimate studies and surveys carried out through transparent processes that accurately reflect all stakeholders' interests. This would require cooperation of industry leaders and regulators with diverse independent research initiatives to reduce the dominance of the trade association as a source of information about the sector to franchisees, the regulator and the public.³⁴ More complete and balanced information could be obtained from franchisees and franchisors, through, for example, the use of an intranet, possibly in the form of chat groups and blogs, as there is currently no resource of this kind for Australian franchisees. Other measures to improve the quantity and quality of information about the sector include full representation of stakeholder interests on consultative panels; more information from dispute processes, especially the Code-mandated process of mediation; and registration of franchise systems and disclosure documentation. In addition to these measures the regulator should consider employing a range of other analytic tools, including comparative risk assessment, cost-benefit analysis, and cost-effectiveness analysis to inform, monitor and assess regulatory activity.³⁵

2.2 Measures to enhance the reliability of disclosed information

Better information about the nature of the contractual relationship would help a franchisee in making a decision about whether to operate an independent small business or to purchase a franchise and, if the latter, the information would inform further choices about which franchise to purchase. Measures to ensure reliable information about the franchising relationship and the nature of franchising generally might include educational initiatives that involve franchisors, franchisees and the regulator on an ongoing basis, rather than the being limited to the franchisor/franchisee interaction at the time of

entering the contract. With respect to the standard form and relational nature of the franchise contract, a franchisee can be apprised of, for example, the significance of the non-negotiability of the standard form contract, of the discretion left to a franchisor in the unspecified aspects of the relational contractual arrangement, and of the high levels of risk assumed by a franchisee.

Giving a franchisee the right information also raises the issue of ensuring reliable information about the particular franchise system. This should begin with stakeholders' collective identification through participative process of the nature and extent of the risks to both sides in order to legitimately determine what information should be disclosed to a franchisee. Some examples are discussed here, but it is important that franchisors and franchisees identify the risks and the issues for themselves, with the participation of experts and other stakeholders.

- *Earnings information:* Earnings information can be provided to a franchisee in a way that is consistent with both the Code and TPA section 52. Under TPA section 52, failure to provide material information can constitute misleading or deceptive conduct. If a franchisor still does not disclose earnings information, a franchisee should not simply be required to sign a document to this effect and a Deed of Representation to the effect that a franchisee has not relied. This provides a franchisee with little recourse when earnings do not meet those it has been lead to expect through oral representations, inferences and agents' representations. Instead, it is suggested that a franchisee include a statement of what information it does rely upon in making the decision to purchase the license.
- *Payments information:* If this information, or any other information that is supposed to be disclosed, is contained in the final contract but not in disclosure documents, the omission amounts to non-compliance which should be subject to procedures for monitoring and enforcement of the regulation.³⁶
- *Earnings information:* Earnings information is critical to the decision to purchase a franchise. A franchisor should be required to certify whatever earnings estimates are provided. This information should not be permitted to be exchanged entirely via the back of a napkin by unofficial agents followed by the signing by a franchisee of a

deed of representation and other disclaimers that leave a franchisee without recourse when the unofficial earnings estimates prove to be exaggerated.

- *Site information:* Disclosure is needed about the nature of the legal entities involved and what rights these entities can exercise in a variety of circumstances, including transfer, termination, and franchisor insolvency.
- *Intellectual property:* A franchisee should be informed of how specifically the franchisor owns the specific property it is licensing to a franchisee and a franchisee's rights with respect to that property should a franchisor's rights be compromised, for example through insolvency.
- *Franchisee obligations:* A franchisee's obligations under the agreement including and in addition to the contract (e.g. through the operations manual) must be clearly and specifically explained, including any franchisor right to unilaterally alter these obligations.
- *Franchisor reputation:* A prospective franchisee needs information about franchisees that have left the system. The 2006 Review of Disclosure recommended that the Code 'be amended to require not just the numbers but also names, location and contact details...' of former franchisees. The government 'agreed' to the recommendation, stating that the Code be amended 'to *allow* franchisors to provide details of names, location and contact details *where consent has been obtained and where that information is available to the franchisor.*' The added italics highlight the permissive nature of this provision. It is not a requirement of franchisors, and will only operate where a franchisor has made an effort to keep such information and has sought and obtained consent, conditions which are unlikely given that providing the information is not in a franchisor's interest in the first place. There is a need for collective initiatives to make information available about reputations of franchise systems.

Though informational regulation is largely self-regulatory, the regulator has a continuing role in monitoring the ability of participants in the sector to adequately perform their self-regulatory functions. While some jurisdictions have set up a separate regulatory institution and/or a separate advisory entity for one or more functions,³⁷ Australia relies

on the Australian Competition and Consumer Commission (the ACCC). The 2006 Review of the Disclosure Provisions of the Franchising Code of Conduct found, however, that, 'A number of submissions from franchisees expressed concern about the level and extent of action by the ACCC to deal with claims of breaches of the Code by franchisors.'³⁸ A franchising 'consultative panel' meets periodically to enable the sector participants to consult with the regulator, but there is no prescribed procedure for monitoring the effectiveness of the Code. If the Code is to be effective, there must be adequate capacity by the regulator to enforce the Code where necessary. Measures are also needed to harmonize enforcement and interpretation of misleading or deceptive conduct of the Trade Practices Act and the Code disclosure. Standardization of procedures regarding measurement and collection methods for disclosed information could help assure disclosure of reliable information. In particular registration is a potentially very valuable tool to help ensure that franchisors are in compliance with regulatory requirements.

In France and the US there are penalties for non-compliance with disclosure. In Australia there are penalties for providing false or misleading information under the TPA misleading or deceptive conduct provisions, but there are no fines for failure to comply with the Code. Though it seems clear that the regulation of franchising in Australia needs more effective and comprehensive enforcement, monitoring and review procedures, several items of the 2006 Review of Disclosure were rejected by the government on the grounds that they would be difficult or inappropriate for the ACCC to enforce. Perhaps, if the administrative burden is too great for the ACCC, other stakeholders should be enabled to assist with enforcement. For example, some monitoring of franchisors may be carried out through collective action by franchisees.³⁹

2.3 Measures to enhance the accessibility of disclosed information

Further assurances of physical accessibility and proper timing of disclosure can be instituted. The recent review did recommend that franchisees no longer should be required to go through the extra step of making an appointment to visit a franchisor's office or other locations to view disclosed information and the government agreed. As previously discussed, it may also be beneficial to provide disclosure earlier, possibly

through staged disclosure. Because the language of disclosure in some cases may be confusing, further measures can help to ensure franchisee access to legal advice. If franchisees are to understand the terms of a franchise contract without having to consult with a lawyer, a 'plain language' requirement could be included in the legislation.

2.4 Measures to enhance the 'useability' of disclosed information

Education is a critical component of the success of participative processes; it complements disclosure as a regulatory tool.⁴⁰ The focus of regulatory intervention is on the supply side, but the fact that recipients are often inexperienced and/or naïve about business practices indicates a need for regulation to better address behavioral bias on the demand side. A collective effort within the franchisee community to provide education to prospective franchisees could help, but such an effort assumes the existence of a franchisee 'contracting community'⁴¹ that currently does not exist. For this reason it may be necessary for the regulator to take the lead in encouraging the development of such a community to fulfill this function.

2.5 Measures to ensure franchisees' ability to act on the information

The first two conditions for effective disclosure have focussed on the supply-side and its provision of reliable, accessible and useable information. The focus of the third condition shifts to a franchisee's ability to act on the disclosed information through negotiation and/or choice of alternatives in the market. This is the element of 'responsibilizing' the consumer, to assume its share of the duty to avoid risks.

First, as discussed above, negotiation is not generally available to an individual franchisee. Disclosure may, however, help franchisees to negotiate collectively, as in the case of the Culligan franchise system in the US.⁴² Because disclosure does little to enhance a franchisee's ability to negotiate, there is greater emphasis on disclosure's other key role, that of increasing a franchisee's ability to make alternative selections in the market. Where standard form contracts are used, the 'market for terms' is seen as a means to balance bargaining positions. A franchisee may not be able to negotiate, but if it does not agree to the terms, it can in theory 'enter the market through alternative means.'⁴³ Potential benefits include engendering contracting parties' awareness of their rights and obligations under the contract, and reducing the incidence of unfair surprise. A

market for terms can supplement consumer education about the nature of the contract by enhancing both parties' attentiveness to contract terms from the outset. Further, by bringing business people back into their own contracts, the roles of both solicitors and regulators may be trimmed, thus making the contract more relevant to the parties themselves.⁴⁴

Because the alternatives are limited for a franchisee to find favourable contractual terms and because, even where there are discernable differences among contract terms, the prospective franchisee may not be able to shop for terms because of timing or bias, complementary measures are crucial, for example a contracting community and wide use and understanding of terms through education and public relations. When it does choose to enter a contract, a franchisee needs education and guidance about the arrangement. Currently, disclosure may not protect franchisees partly because there is no explanation of the risks involved with particular contract terms. Education can highlight the differences in contract terms where there are differences, to help parties make more informed use of the contract and to raise awareness not only of the alternatives but also of the potential, if any, for collective negotiation. Much of the information that is needed could be provided through a process of collaboration in educational initiatives that involve franchisors, franchisees and the regulator, and not by the particular prospective franchisor as part of the contracting process. There is a role for the regulator to coordinate collaborative initiatives to improve educational programs by the regulator or associations.

With respect to the problems engendered by the relational aspects of the contract, because a relational contract emphasizes the 'trust us' aspect of the relationship, and so detracts from the psychological importance of franchisee due diligence, it may be necessary to counter-balance this with educational programs that do highlight the risks in the relationship and emphasize the importance of franchisee due diligence.

Reputation offers several advantages for franchisees to act on the information in finding alternatives in the market; it is available early; it can be made widely available; and it can be used for comparison, whereas disclosure is only available relatively late in the decision process and for the one system, so it has less value as a comparative tool. A

franchisee needs information about the reputation of the particular franchisor, including business history and dispute resolution patterns. Enhancing the importance of reputation in the sales process would benefit high-quality franchisors and the overall image of the sector. Some of the information about franchisor reputation can be provided by a franchisor in disclosure,⁴⁵ but much of this information can only be provided by participants in the market, by franchisees, and also by suppliers, and consumer organizations. Provision of information through the market may require regulator intervention; to the extent it happens commercially, the information will probably not be widely available and will be less available to the prospective franchisees that most need it. There has been no successful, centralized effort at gathering data about the reputations of franchisor systems that could be made publicly available.

Of all these measures the single most important way to improve the function of disclosure is through the registration of disclosure because it addresses all three conditions for effective disclosure.⁴⁶ Registration of disclosure documents can improve the function of disclosure because it:

- 1) provides important baseline data about the sector as a whole. In the US, ‘Using these documents has generated a volume of highly reliable data unmatched in any prior survey-based studies.’⁴⁷ In Australia such information could prove invaluable in identifying the problems in the sector, formulating regulatory goals, and in selecting the appropriate tools to achieve them;
- 2) improves compliance in order to increase the reliability of information; and
- 3) allows the possibility of comparison to supports a market for terms.

In addition, registration increases transparency in regulatory process. In a sense, registration enables disclosure to begin to address imbalances of power in the relationship, because it makes information available to franchisees collectively, rather than parsed to individual franchisees just days prior to signing the contract. Though registration of disclosure was recommended by the 2006 Review, the government did not agree, expressing concerns that registration would overburden the regulator and could be seen as regulator endorsement.⁴⁸

2.6 Beyond Disclosure: Expanding the Tools through Revised Regulatory Process

Improvement to disclosure is one avenue towards better regulation, but it does not address the systemic problem. There is a call for the expansion, diversification and improved calibration in the use of regulatory tools in which participative process is used to select from a full range of private and public regulatory instruments.⁴⁹

A wider range of tools.

As an alternative to reliance on a limited number of tools whose efficacy is unproven, current theories of regulation and formulations of best practice require that regulatory process comprehend the dynamics and interactions among a versatile range of regulatory tools and that it take advantage of synergies among these tools to achieve regulatory objectives.

Prescriptive standards include mandatory warranties; confidentiality requirements; and prescription of the contents of the contract including specification of unfair terms, mandatory contract duration, and good faith requirements. Prescriptive regulation may also prohibit certain practices. Prescriptive standards are often specific and can be perceived as being imposed on the sector rather than undertaken voluntarily, so that they may be incompatible with self-regulation, engendering attitudes of 'creative compliance'.⁵⁰ They are, nevertheless, widely used in franchise regulation.

Procedural standards are often used where measurement is difficult; they include, for example, licensing and specified procedures for the parties' interactions during contract formation and/or performance, such as disclosure. The cooling-off period required at contract formation (Australia and Malaysia) is a procedural regulation as are the transfer and termination procedures (Australia and some US states), such as those that provide that a franchisor must not unreasonably withhold consent for franchisee to transfer a franchise. Procedures for franchisor's changes to territory allocations, selection of franchisees, and matching franchisees to units and territories are also possible. Dispute resolution procedures include mandatory mediation (Australia and Korea). In Australia mediation is a Code-mandated dispute resolution procedure thought to engender greater participation, greater transparency, and assistance to parties in understanding and utilising conflict management procedures. In practice, however, mediation can reinforce existing imbalances in the franchise relationship, necessitating consideration of other dispute resolution processes. One such option is an ombudsman service that provides a resource for information and communication, feedback, advice, and dispute resolution.⁵¹

Performance standards define the regulated interest's responsibility in terms of the goal to be achieved; they include certain requirements of a franchise business before it can sell franchise units; minimum qualifications for franchisors (Romania); and fiscal solvency requirements before registering franchise offerings (Virginia). A franchise system might be required to operate a certain number of pilot units for a certain number of years before it can sell franchise units (China and Vietnam), or the franchise (Italy). Performance standards for franchising might also include Codes of Ethics and/or Practice (New Zealand and the European Community).

The roles of participants in regulatory process.

Disclosure puts a heavy burden on a prospective franchisee to be equipped to receive, understand and act upon the disclosed information. It can be effective only if a franchisee is properly positioned to fulfil this role, but a franchisee is neither adequately equipped to play its role in the disclosure process, nor is it a full participant in the broader regulatory process.

A broader range of tools can ameliorate the problems of imbalance of power and uncertainty in the franchise relationship. The most important step required in the revision of the regulation of franchising, however, is to begin with process, democratic, participative, collaborative process consistent with the 'new learning' about regulation. This requires a reframing of the roles not only of a franchisee, but also of franchisors and of the regulator.

Regulators have viewed franchising as a business-to-business transaction, and have not regarded franchisees as needing consumer-like regulatory protection. This evaluation of the power in the relationship is inaccurate; in fact the imbalance of power in every aspect of the franchising relationship, including the regulatory process itself, contributes significantly to the ineffectiveness of disclosure as the principal tool used to regulate franchising. Franchisors control information about the sector generally and dominate discourse within and about regulation of the sector. Franchisors provide the disclosed information as they see fit, without the benefit of monitoring. Franchisor trade associations are the only organizations 'educating' franchisees to equip them to use the information, and franchisors draft 'industry standard' contract terms that they are unwilling to negotiate, thus depriving franchisees of their ability to act on disclosed information. The regulator facilitates this arrangement; there is no reason to expect franchisors to try to change it. Recognition by the regulator and representation to the regulator of franchisees as consumers is therefore a critical aspect of establishing fair conditions in the sector

The under-representation of franchisee interests is a major problem, but the various attempts that have been made to organize franchisees have met with little success. In Australia, as in most countries, the trade association that promotes the sector, lobbies, and educates is dominated by franchisors. The responsibility falls to the government to drive the needed change, to ensure a program of efficient and effective regulation that comprehends, acknowledges and involves the interests of all stakeholders at all stages. Instead of command-and-control, a participative process offers an alternative to the regulator to the role of imposing rules, allowing it to more fully involve a franchisee and to better assist all stakeholders in the development, enforcement and monitoring of regulation.

Conclusion

Regulators rely on disclosure in franchising, as they do in other contexts, largely because of its self-regulatory qualities. It allows the people who are in many ways best suited to the task, the parties themselves, to play a role in their own regulation. Though it is believed to be efficient as a regulatory tool, however, there is no evidence that disclosure makes a significant difference in consumer or market behaviour in the franchising sector. This paper demonstrates that disclosure cannot be expected to be effective because the conditions considered essential for effective regulation by disclosure are not met.

There are measures that can be taken to improve the function of disclosure. There is a need for better information about the nature of franchising generally. Accurate and reliable information is needed from franchisees about their needs to inform the design of appropriate regulation. Then, to the extent that such regulation does rely upon disclosure, a franchisee needs the right information; that information must be reliable, accessible and useable; and a franchisee must be able to act upon the information.

Despite its traditional appeal as a low-cost, low-intervention regulatory tool, disclosure is not the only method by which the sector can be regulated. There is a range of other tools that can enhance, supplement or replace disclosure. Most importantly, however, regulatory process must involve the full participation of stakeholders. There is a need for a comprehensive regulatory scheme that does not leave the self-regulatory sphere to run itself, but rather supports and enhances self-regulation through effective direct intervention.

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ENDNOTES

¹ Personal interviews with Lee Anstice, franchise consultant and George Parkis, former CEO of the Franchisee Alliance. Rupert Barkoff, a franchise lawyer and commentator in the US, estimates that about a third of franchises in the US fail to make a profit.

² Further impetus for a review is considered by some to have been the report, *When the Franchisor Fails*, Report prepared for CPA Australia by J. Buchan, the University of New South Wales, January 2006.

³ See International Institute for the Unification of Private Law (UNIDROIT), *Legislation and Regulations Relevant to Franchising* (2002), at <www.unidroit.org/english/franchising/annex.htm> 26 March 2004.

⁴ Though the US may have a wider and more varied record of franchise regulation, both at the state and federal levels, the complexity of legislation in the US at state and federal levels limits its role as a model regulatory environment.

⁵ Explanatory Memorandum, Trade Practices (Industry Codes - Franchising) Regulations 1998 (Cth) No. 162 at <<http://www.comlaw.gov.au/ComLaw/Legislation/LegislativeInstrument1.nsf/framelodgmentattachments/77630AD9222B25BCCA256F73000E7654>> at 15 June 2006.

⁶ The Code mandates a seven-day cooling-off period for franchisees; a franchisor must obtain from the prospective franchisee signed statements that a franchisee has been given advice, or has been told to seek advice prior to signing the franchise contract; there can be no general indemnity of franchisor by franchisee; there can be no prohibition on franchisees' freedom to associate with other franchisees; and procedural provisions are required with respect to transfer and termination.

⁷ Anthony I. Ogus, *Regulation: Legal Form and Economic Theory* (1994).

⁸ David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 ELR 10773, (2001) Environmental Law Institute, Washington, DC, <<http://www.vanderbilt.edu/vcems/papers/ELRVersion2.pdf>> at 9 May 2006.

⁹ Cass Sunstein, 'Informational Regulation and Informational Standing: Akins and Beyond' (1999) 147 *University of Pennsylvania Law Review* 613.

¹⁰ David W. Case, *The Law and Economics of Environmental Information as Regulation*, 31 ELR 10773, (2001) Environmental Law Institute, Washington, DC, <<http://www.vanderbilt.edu/vcems/papers/ELRVersion2.pdf>> at 9 May 2006.

¹¹ Susanna Kim Ripken, 'The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation' (2006) 58 *Baylor Law Review* 139.

¹² Cass Sunstein, 'Informational Regulation and Informational Standing: Akins and Beyond' (1999) 147 *University of Pennsylvania Law Review* 613.

¹³ Tom Tietenberg, 'Disclosure Strategies for Pollution Control' (1998) 11 *Environmental and Resource Economics* 587.

¹⁴ Id.

¹⁵ (OECD Roundtable on Economics for Consumer Policy)

¹⁶ Roger Blair and Francine Lafontaine, *The Economics of Franchising* (2005) 218.

¹⁷ For more information on the structure of retail tenancies in franchising see Jenny Buchan, 'Who is the franchisee contracting with and does it matter anyway?' 51st ICSB World Conference, 2006, Melbourne, Australia.

¹⁸ The same provision is made for franchisor obligations required to be disclosed.

¹⁹ Also, where prepayments are made, it is not always clear whether these are refundable if a franchisee decides not to go forward within the seven-day cooling off period, but a recent case interprets the Code to offer significant protections; see *Ketchell v Master of Education Services Pty Ltd* [2007] NSWCA 161 in

which the New South Wales Court of Appeal held that a franchising agreement was illegal because it contravened clause 11(1) of the Franchising Code of Conduct.

²⁰ The longest, 20 days, is required in France. Brazil requires 10 days, Italy 15 days. US states' requirements vary.

²¹ Ripken, 'The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation' (2006) 58 *Baylor Law Review* 139.

²² Id.

²³ Id.

²⁴ Confirmation bias is defined as the tendency to give greater weight to information that confirms existing opinions. See Ripken, 'The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation' (2006) 58 *Baylor Law Review* 139.

²⁵ Ripken, 'The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation' (2006) 58 *Baylor Law Review* 139.

²⁶ See Barnhizer, Daniel D. (2005) Inequality of Bargaining Power *University of Colorado Law Review* 76 p.204.

²⁷ See Freidrich Kessler, 'Contracts of Adhesion - Some Thoughts about Freedom of Contract' (1943) 43 *Columbia Law Review* 629 and Gillian Hadfield, 'Problematic Relations: Franchising and the Law of Incomplete Contracts' (1990) 42 *Stanford Law Review* 927.

²⁸ See Barkoff, Rupert M. (2002) Drafting Tips: Pitfalls of Preparing a Franchise Agreement *Franchising Business and Law Alert* 8 p.5. Barkoff notes that many contractual provisions have become 'industry standard.' This uniformity in contracts is self-reinforcing. If the terms are uniform in contracts that are non-negotiable, franchisees may not bother to read or understand the terms, and in turn there will be less incentive for franchisors to improve them.

²⁹ I. Ayres and R. Gertner, 'Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules' (1992) 101 *Yale Law Journal* 729.

³⁰ The Deed of Representation that many franchisees are now required to sign states in essence that in making the decision to enter the agreement, a franchisee has not relied on any information provided by a franchisor.

³¹ Also known as a 'whole agreement' or 'integration clause', the 'merger clause' is a clause that is included in most franchise contracts. The clause states that the writing constitutes the sole and final agreement between the parties.

³² See *Poulet Frais Pty Ltd v The Silver Fox Company Pty Ltd* [2005] FCAFC 131.

³³ Most recently, the Lenard's case involved misleading or deceptive conduct under TPA section 52 of the *Trade Practices Act 1974* (Cth) (TPA) and the extent to which the operation of TPA section 52 can be circumvented by disclaimers and 'entire agreement' clauses.

³⁴ In this respect there are some franchising organizations that might serve as models. The European Franchise Federation (the EFF) lists as its objects the coordination of the national organizations, unbiased and scientific study and the dissemination of that information; it outlines in some detail how it approaches its 'scientific, pedagogic, informational and ethical objectives'. The French Franchise Federation (the FFF) actively supports academic research, and the FFF and the American 'International Franchise Association' (the IFA) also actively support the unification of franchisor and franchisee interests, perhaps most importantly by unifying them as members in one association.

³⁵ Anderson F. et al. (2000) Regulatory Improvement Legislation: Risk Assessment, Cost-Benefit Analysis, and Judicial Review *Duke Environmental Law and Policy Forum* 11 p.89.

³⁶ Personal interview with former Tweed Heads Lenard's franchisee, Samantha Gow, Gold Coast, January 2006.

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- ³⁷ Malaysia has an advisory board and a special agency to oversee regulation.
- ³⁸ See Recommendation 24 of the Review of the Disclosure Provisions of the Franchising Code of Conduct, October 2006, <<http://www.industry.gov.au/content/itrinternet/cmscontent.cfm?objectID=6B99EC0B-BC2F-F60A-CD6A9D32E1031993> at 14 May 2007.
- ³⁹ P.H. Rubin (1978), 'The Theory of the Firm and the Structure of the Franchise Contract', 21 *Journal of Law and Economics* 223.
- ⁴⁰ Neil Gunningham, Peter Grabosky and Darren Sinclair, *Smart Regulation: Designing Environmental Policy* (1998).
- ⁴¹ Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 4.
- ⁴² Thursday, 16 November 2006, Culligan's New Franchise Agreement Reflects 'True Partnership' This posting was written by Peter Reap, editor of CCH Business Franchise Guide <<http://traderegulation.blogspot.com/2006/11/culligans-new-franchise-agreement.html> at 1 December 2006.
- ⁴³ James Jordan and Judith Gitterman, 'Franchise Agreements: Contracts of Adhesion?' (1996) 16 *Franchise Law Journal* 1, and David Hess, 'Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness' (1999) 25(1) *The Journal of Corporation Law* 41.
- ⁴⁴ Todd D. Rakoff, 'Contracts of Adhesion: An Essay in Reconstruction' in John J. A. Burke (ed), 'Reinventing Contract' (2003) 10(2) *Murdoch University Electronic Journal of Law* [180] <http://www.murdoch.edu.au/elawwithissues/v10n2/burke102_text.html> at 14 August 2003.
- ⁴⁵ Such information would include the number and nature of mediations in which they have been involved (in addition to the information that already must be provided about ongoing litigation) and contact information for franchisees who are, for one reason or another, no longer with the system.
- ⁴⁶ Registration of disclosure documents is required in about 14 US states. Malaysia also requires filing of disclosure documents. There was a registration requirement for franchise systems in Canada (Alberta, repealed); this requirement is still in place in Malaysia, Spain, and some US states. State laws generally define franchising similarly to the FTC Rule, but differences between the states' definitions and exemptions can be crucial to determining whether a particular sale was or was not the sale of a franchise. California, Hawaii, Illinois, Indiana, Maryland, Michigan, Minnesota, New York, North Dakota, Oklahoma, Rhode Island, South Dakota, Virginia, Washington, and Wisconsin require a registration or notice filing before offering franchises for sale, and pre-sale disclosure through 20 items in a prescribed format called a Uniform Franchise Offering Circular (UFOC). Also, Oregon requires pre-sale disclosure without a governmental filing. See Mark Miller, 'Unintentional Franchising' (2005) 19(2) *St. Mary's Law Journal* 308. Registration of intellectual property is required in Kazakhstan. Korea and Japan have registration requirements for franchise consultants or brokers.
- ⁴⁷ *Deacons on Franchise Legislation* (2006) Franchisebusiness.com.au <<http://www.franchisebusiness.com.au/articles/FC/0C0402FC.aspx>> at 10 July 2006.
- ⁴⁸ The Government Response stated that 'Decisions relating to the viability and associated risks of any business venture are ultimately the decision of the businesses themselves,' Australian Government Response to the Review of the Disclosure Provisions of the Franchising Code of Conduct, February 2007, <[http://www.industry.gov.au/assets/documents/itrinternet/Response_to_Recommendations_\(Final\)06Feb0720070206091019.pdf](http://www.industry.gov.au/assets/documents/itrinternet/Response_to_Recommendations_(Final)06Feb0720070206091019.pdf)> at 14 May 2007.
- ⁴⁹ The work of Hugh Collins; Julia Black; Gunningham and Grabosky; Martin and Cave; and Baldwin, Scott and Hood; among others, call for the expansion, diversification and improved calibration in the use of regulatory tools.
- ⁵⁰ Gunningham et al, *Smart Regulation: Designing Environmental Policy* (1998).

⁵¹ Kuta, (2003) Universities, Corporations, and States Use Them Now It's Time To Protect Them: An Analysis of the Public and Private Sector Ombudsman and the Continued Need for a Privileged Relationship *Southern Illinois University Law Journal* 27 p.389.