The Regulation of the Franchise Relationship in Australia: A Contractual Analysis

Presented by

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(Ph.D.)

CERTIFICATION

This thesis is submitted to Bond University in fulfilment of the requirement is for the Doctor of Philosophy. This thesis represents my own work and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

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Elizabeth Crawford Spencer

20 September 2007

THESIS ABSTRACT

The Regulation of the Franchise Relationship in Australia: A Contractual Analysis

This dissertation examines whether the regulation of the franchise sector is effective in achieving two of the stated goals of the Franchising Code of Conduct. These two goals are redressing the imbalance of power in the relationship and increasing levels of certainty for participants in the sector. Based on the 'new learning' in regulation, this dissertation takes an expansive approach to the concept of regulation. It considers how, in a 'multi-layered system of governance', the layers of regulation of the franchising sector contribute to these goals. The results of the analysis suggest that private, self-regulation through the layers of market and contract sets up a relationship where there is an imbalance of power in favour of a franchisor and uncertainty for a franchisee. The market interaction between the parties establishes these conditions, which are reinforced by the contract, in particular by the interaction of the standard form and relational qualities of the contract. A public layer of governance, direct intervention in the form of the Franchising Code of Conduct, relies largely on self-regulatory tools such as disclosure and is also ineffective in addressing the imbalance of power in the relationship and in increasing levels of certainty for franchisees. Because neither self-regulatory mechanisms nor legislative intervention achieves the stated goals of redressing imbalance of power and uncertainty in the franchise relationship, the analysis concludes that a reframing of regulation is necessary. The recommended revised regulatory program features collaborative, participative, democratic process to gather and assess good measurements that inform the identification of problems and the selection of tools appropriate to address those problems.

Keywords: *Regulatory theory, regulatory process, instruments and tools of regulation, regulating contract, standard form contract, relational contracting, franchising, imbalance of power, uncertainty in franchising relationship, discretion in franchise contracts, regulation of franchising, lack of information about the franchising sector, use of contract as tool to measure effectiveness of regulation, use of disclosure in regulation of franchising*

PUBLICATIONS ARISING FROM THIS RESEARCH

The conceptual framework of a multi-layered system of governance as applied to franchising was outlined in 'Regulating Franchising in Australia: Toward a Post-Regulatory State?' published in the proceedings of the International Society of Franchising 19th Annual Conference (2005).

Chapter Four adapts material that has been published under the title, 'Standard Form and Relational Aspects of Franchise Contract', in the proceedings of the 20th Annual International Society of Franchising Conference (2006).

An abbreviated version of Chapter Six has been accepted for publication in a special issue of the *International Review of Applied Economics* on 'regulation and governance of the firm' as an article entitled 'The Efficacy of Disclosure in the Regulation of the Franchise Sector'.

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Bobux Marketing Ltd v Raynor Marketing Ltd [2002] 1 NZLR 506

Dymocks Franchise Systems (NSW) Pty Ltd v Todd and Others [2002] UKPC 50 [2004] 1 NZLR 289

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Cubic Corp. v Marty 229 2d 828 (Cal. App., 1986)

ABBREVIATIONS

Alternative dispute resolution (ADR)

American Association of Franchisees and Dealers (AAFD)

American Bar Association (ABA)

Australian Chamber of Commerce and Industry (the ACCI)

Australian Competition and Consumer Commission (ACCC)

Department of Public Prosecutions (DPP)

Franchising Policy Council (FPC)

International Institute for the Unification of Private Law (UNIDROIT)

Motor Trades Association of Australia (MTAA)

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