



Principal Research Officer
Standing Committee on Economics & Industry

By Fax 08-9222 7804

Re: REVIEW of LEGISLATION FOR A FAIRER GO FOR
FRANCHISEES

Following is a copy of our submission to the Federal (Ripoll) Inquiry into
franchising.

We are more than willing to front the Committee should the need arise.

Yours faithfully,

Graeme Brown & Anne Brown

**Parliamentary Joint Committee on
Corporations and Financial Services**

**INQUIRY INTO
FRANCHISING CODE OF CONDUCT
& OTHER RELATED MATTERS**

Submission by

Graeme and Anne Brown



September 2008

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1. Introduction

I thank you for the opportunity to make this submission to the Inquiry into franchising. It is encouraging that the issues my family and I faced as franchisees of Bakers Delight can be discussed without fear of retribution in this forum that can strengthen the legislation and ensure that our experience does not have to be repeated.

Our story is about misrepresentation. Bakers Delight made representations to us that induced us to buy a franchise from them. They gave us a surety that they would purchase the franchise back from us if the store proved unprofitable. Bakers Delight made the same representations to our bank.

When the franchise never achieved the levels of turnover that Bakers Delight represented it would, they refused our requests for them to repurchase it.

We got legal advice and our lawyer advised us that whilst we had a good case against Bakers Delight for misleading and deceptive conduct, there would come at a cost. These costs were both financial and emotional; and we could afford neither. Due to my experience with Bakers Delight I was suffering severe depression, and financially we were in dire straits. To try and raise at least \$250,000.00 to try and recover our losses was just not feasible. As a result, we walked away from taking any action.

My wife and I believe that the Franchising Code of Conduct is not effective in its current form. We believe that the Trade Practices Act needs clarification around the 'unconscionable conduct' provision, and we believe that the ACCC is not capable of regulating the franchising industry. The financial cost of getting justice is prohibitive. In effect, franchisees have no protection from predatory behaviour.

These are our personal opinions, based on our own experiences.

2. Our Bakers Delight Experience

My name is Graeme Brown. My wife and I are successful business people, running a profitable business within the milk industry for a number of years. We are also successful property investors. When it comes to business and investments, we do our due diligence. We did not, nor could we have, expected the treatment or conduct that we experienced at the hands of Bakers Delight.

In January 2001, my wife, Anne, and I decided to look into opening another business. Due to strong advertising in WA at the time, we decided to investigate becoming franchisees of Bakers Delight.

On the 5th February 2001, my wife and I attended a seminar held by Bakers Delight. At this seminar the Regional Manager of Bakers Delight (WA Branch), told the group that in the event that a Bakers Delight store did not make the forecasted profit levels as represented by Bakers Delight, or began to make a continual loss, Bakers Delight would buy back the underperforming store from the franchisee.

In early May of 2001 we looked into purchasing a news franchised bakery in North Perth. Bakers Delight constructed and fitted out the store, at our expense, for us to operate under the name of Bakers Delight North Perth.

Bakers Delight represented to us that the North Perth franchise would make a minimum level of weekly turnover and would be profitable. Bakers Delight also represented to us that if this proved not to be the case, they would repurchase the North Perth franchise immediately from my wife and I, as was their standard policy.

The North Perth Bakers Delight franchise never made the levels of turnover that Bakers Delight represented it would, and was unprofitable. Bakers Delight refused to repurchase the franchise, despite their representations, when it became clear it was commercially unviable.

My wife and I would never have purchased this franchise had we ever suspected it would have had such poor turnover levels, and profitability. It was on the basis of representations made to us by representatives of Bakers Delight that we bought the North Perth franchise and entered into a franchise agreement with them. But everything Bakers Delight represented to us was false.

2.1 Initial Investigation of Store Sites

Prior to purchasing the North Perth Site, my wife and I investigated what other alternative store sites were available.

My wife and I first entertained the idea of operating a bakery on Saturday, 27th January 2001, whilst talking to a Real Estate Agent in Busselton, who informed us that Busselton needed a well run bakery such as Bakers Delight, or coffee lounge such as Dome. However, we resisted the temptation to set up shop in Busselton.

On Sunday, 28th January 2001, I spoke to Tracy Leggett, an employee of the Bakers Delight Head Office in Melbourne, and daughter-in-law of a cousin of mine, Dave Leggett. Ms Leggett informed me that there was a viable store site available in Margaret River, and that it was to be advertised in the 27th January 2001 Long Weekend edition of the Western Australian Newspaper. My wife and I applied for this site.

2.2 Suitability Assessment and Training

In light of this, on 13th February 2001, my wife and I lodged an application to become Bakers Delight franchisees, following which I did a two-day orientation at Bakers Delight store in Joondalup.

On the 20th February 2001, my wife and I undertook an assessment by a recruitment and human capital management company in Subiaco, namely Chandler McLeod Group Human Capital Solutions, to determine if we were suitable to become Bakers Delight franchisees.

We were officially notified of our acceptance into the Bakers Delight system on Tuesday, 6th March 2001.

My wife and I then signed agreements prior to starting training, and paid \$8,200.00 for induction and insurance including GST.

Following this, we met with Gavin Dixon, the franchisee at Bakers Delight Dianella on Monday, 13th March 2001, where our training was to take place. This store did not have the Point of Sale registers or back office systems, so we did not receive the full training we had paid for.

It was during our training that my wife and I resolved that we were not prepared to leave the metropolitan area to operate a Bakers Delight store, without good reason, unless it was in Margaret River.

It was early on in our training, in mid March of 2001, that we discovered the Margaret River site had been awarded to Brunby's Bakeries. I was advised by my brother in Brisbane, who has a unit next door to the people who do the Brumby's Fit Outs Australia wide. Denis was talking to the owner who mentioned in passing that he was doing the Fit Out for Margaret River. When I told Dean Batchelor (Bakers Delight's Property Manager) he denied for several weeks that it could have happened.

2.3 Bakers Delight's Offer of the Beaumaris, Mullaloo and North Perth Store Sites

Subsequently, my wife and I were offered the Bakers Delight franchise in the suburb of Eaton, in late March of 2001, but declined to take it. Additionally, my wife and I with the Business Development and Property Manager for Bakers Delight in Western Australia, Dean Batchelor, examined another store site in the suburb of Merriwa that was to become available. My wife and I rejected the Merriwa site because we did not think it would be commercially viable. My wife and I discussed, with Dean Batchelor, the demographics and decided that the population was not sufficient to support a store.

In April of 2001, Dean Batchelor showed us the Mullaloo, Beaumaris and North Perth Sites. He stated, of his own volition, that Bakers Delight were prepared to pay \$600,000.00 for the North Perth Site, if it had an operating bakery, and that they had first right of refusal regarding it.

Following this, in late April of 2001, my wife and I considered obtaining a site outside the Dewsons (now IGA) supermarket in Mindarie. The site was owned by Foodland (now IGA) Glendalough, and Dean Batchelor led us to believe that it could be made available to us if we wanted it. However, Dean Batchelor did not investigate the actual details of how or when such a site may become available, and ultimately he deemed the site unsuitable.

Ultimately an odds and ends shop took up this site. It would have been ideal. Discussions then commenced between my wife, Toby Lawrence (representative of Bakers Delight Head Office (WA Branch) then in Subiaco), and I, in late April of 2001, with a view to potentially taking the North Perth Site.

Taking the North Perth Site at this point in time, seemed like the most viable option, even though our training store, Dianella, was on the market. This was because the Dianella store was only trading six days a week and had a turnover of approximately \$10,000.00 - \$11,000.00 per week.

2.4 False Representations made by Bakers Delight that induced our purchase of the North Perth Franchise

In discussions with Toby Lawrence and Dean Batchelor prior to purchase of the North Perth Site, representations were made regarding both:

- a. the expected turnover of the North Perth Store, and;
- b. the actions that Bakers Delight would take in repurchasing the North Perth franchise should it not make the estimated levels of turnover and thus not be profitable.

2.4.1 False Representations of Turnover Levels

On three separate occasions Toby Lawrence represented that the North Perth Store would turnover at least \$15,000.00 per week.

First, in early May of 2001, prior to the finishing of the bakery training of my wife and I, Toby Lawrence unequivocally represented that the weekly turnover for the North Perth Store would be at least \$15,000 .00 per week.

The second time was also in May 2001, a month prior to the cessation of training, a further representation was made during discussions regarding the possible purchase of the North Perth franchise. Whilst talking to my wife and I out the back of the Dianella Store, Toby Lawrence stated that the North Perth Store would turnover \$15,000.00 per week but we would, if operating it, have to produce as if it were going to turnover \$20,000 .00 per week, in accordance with the Bakers Delight Wastage Policy. Toby Lawrence also stated that if he were financially able, he would buy the North Perth franchise himself.

We purchased the franchise on 28.06.2001. Despite requests, we were never provided with a reconciliation that included invoices and proof of how Bakers Delight spent our money. We believe that Bakers Delight may have acted fraudulently in regard to the set-up of our North Perth store, and so are refusing to supply this documentation.

Thirdly, a few days before the opening of the North Perth franchise, Toby Lawrence called me from a wedding he was attending in Queensland, to discuss store operation, and stated again that production needed to be at a level such that \$20,000.00 turnover could be made per week.

2.4.2 Representation that Bakers Delight would buy back the North Perth Store should forecast turnover levels prove to be unobtainable.

At a seminar held by Bakers Delight on 5th February 2001 Georgie Blake, the Regional Manager of Bakers Delight WA Branch, told the group that attended, that in the event that a Bakers Delight store did not make the forecast profit levels as represented by Bakers Delight, or began to make a continual loss, Bakers Delight would buy back the underperforming store from the franchisee.

2.5 Agreement to purchase the North Perth franchise

It was on the strength of Dean Batchelor's representations about the value of the North Perth Site in April 2001, and Toby Lawrence's representation about turnover and store repurchase in May of 2001, that my wife and I decided to purchase the North Perth Site, and the North Perth Store which we were to operate on it. We notified Dean Batchelor of such intention.

When we purchased the North Perth franchise, my wife and I paid the landlord \$30,000.00 to take over the lease. We have since discovered that the previous lessee was bankrupt, which raises grave doubts about the level of turnover that he could have been making whilst operation in North Perth.

Over the next 12 weeks, Bakers Delight undertook a full fit out of the North Perth Site. We ordered uniforms, and interviewed and hired staff in order to get the North Perth Store up and running.

2.6 Representations made by Bakers Delight to Challenge Bank (now Westpac Bank) and the Commonwealth Bank of Australia

On deciding to purchase the North Perth franchise we applied for Finance with our Business Banking Relationship Manager at the Commonwealth Bank of Australia, Phil Adamson.

As the Commonwealth Bank had never financed a Bakers Delight store before we were told there was going to be a lengthy delay in obtaining finance approval.

After a period of a few weeks, Bakers Delight put considerable pressure on us to approach Challenge Bank (Westpac) for Finance. Challenge Bank was itself put under

pressure from Bakers Delight to approve any such applications, as they had to date done the majority of Bakers Delight's banking work. Finance was approved in principle on the same day we went to see Challenge Bank. Finance approval from the Commonwealth Bank also arrived later on that same day, which was 4th May 2001.

Bakers Delight provided financial information regarding the projected turnover of the North Perth Store to Phil Adamson.

This information indicated that the North Perth Store would turnover at least \$14,000.00 per week, and that if it failed to do so, Bakers Delight would, as they had done in the past with the Warwick and Wanneroo stores, buy it back from the franchisees.

Although the finance application was never actually taken up with the Commonwealth Bank, Phil Adamson in assessing the commercial viability of the North Perth Store as a business, indicated to my wife and I, that to repay a potential loan and breakeven (excluding the wages we were each to be paid), a minimum turnover of \$9,500.00 per week would need to be made.

With such representations having been made, my wife and I went for an interview with Sam Randeria at the Challenge Bank located on the corner of St George's Terrace (40 St George's Terrace) and Barrack Street in Perth. This interview started at 2:00pm and by 3:15pm we had conditional approval that was to be confirmed by a later facsimile.

Such approval was achieved in part due to a business template that Bakers Delight had prepared and provided us with to give to Challenge Bank. This template included a partially complete business plan, and allowed predicated sales figures to be input into it to generate predicted future turnover levels, and thus our loan repayment ability.

Based on the predicted sales figures used the template indicated that at least \$15,000.00 per week could be generated. This suggested to Challenge Bank that we would easily be able to repay the money that we were requesting they loan us. Accordingly, loan repayment terms were set at \$12,984.00 per month, for the first 6 months, to be reduced to \$7,200.00 per month thereafter.

Following this my wife and I signed off from training (which was a prerequisite to operate the North Perth Store), and then signed a franchise agreement. Bakers Delight held the head lease, and we signed a licence Agreement to sub-lease the site from them. We then opened the North Perth Store on 28 June 2001.

2.7 Production levels at the North Perth Store

The first week the North Perth franchise turned over \$8,200.00 and this soon, dropped back to just over \$5,000.00. This was a long way short of the represented \$15,000.00.

2.8 Affects on my health

The turnover levels of the North Perth Store never reached anywhere near \$15,000.00 per week. Due to the stress caused by this, my health began to suffer. This resulted in me collapsing twice in the bakery on Saturday the 21st July 2001, firstly into the mixing bowl during the day, and then into the rubbish bin later that night.

In the ensuing few weeks I collapsed several more times, and my doctor diagnosed me with severe depression resulting from the poor performance of the North Perth store. My doctor told me to sell the store or I would die in the shop.

My wife and I met with Georgie Blake, Regional Manager of Bakers Delight in Western Australia, on 27th August 2001, to discuss the sale of the North Perth Store.

2.9 The Sale Process

Bakers Delight refused to re-purchase the North Perth franchise from us, but agreed to help us sell it.

Two months later, on 28th October 2001 we received an offer from another franchisee for \$250,000.00. Noting that we had setup the store just 4 months before, paying \$409,934.83, we had to refuse so we could cover the debt we now had from the bank. We struggled on, suffering staggering financial losses.

The next offer did not come until 22nd December 2003; from a purchaser who was introduced to us by Bakers Delight, and offered to purchase the North Perth store for \$260,000.00. Due to our financial situation and my deteriorating health we could not refuse. Settlement occurred on 4th March 2004.

The North Perth Store never turned over close to \$15,000 .00 per week in the entire time my wife and I ran it, as there simply was insufficient demand in the North Perth area at the time to achieve such turnover figures.

Accordingly, it became was never profitable. As Bakers Delight reneged on their agreement to re-purchase the franchise, we had to keep it open for 139 weeks and 1 day waiting for Bakers Delight to approve a new franchisee to purchase it.

3. The ACCC

In April 2007 our complaint was included in the group of former Bakers Delight franchisee complaints forwarded to the ACCC by the Honourable Joanna Gash, MP. In October 2007 our complaint progressed to the 'in-depth' stage of the investigation.

My wife and I met with the investigators on two occasions. Graeme met first with the ACCC in their Canberra offices in June 2007 and Anne in their Perth offices in July 2007. We provided them with a large amount of documentation and evidence backing up our complaint of misleading and deceptive conduct (breaches of the Trade Practice Act). Including the name of the bank manager to whom Bakers Delight made the same misrepresentations.

We were led to believe by the ACCC that they had made a case against Bakers Delight, and were devastated when the ACCC decided to take no action against them.

We now believe that the ACCC did not conduct an in-depth investigation at all, and are themselves misleading the public about how they conducted the investigation into Bakers Delight. The ACCC did not contact our bank manager to discuss the Bakers Delight

issue; instead it seems that the ACCC simply took our complaints to Bakers Delight and have accepted their version of events. This is not an 'in-depth' investigation.

My wife and I believe that the ACCC are not capable of administering the Franchising Code of Conduct or the Trade Practices Act in regard to franchisees. We believe they do not understand what 'unconscionable conduct' means and are in fact, in the words of John Farrell from the NFIB (National Federation of Independent Business) "commercial children".

4. Recommendations

We make the following recommendations for your consideration:

1. Penalties be introduced for breaching the Code;
2. A Franchising Ombudsman be set up;
3. A low cost/no cost arbitrary body be set up to allow franchisees access to affordable dispute resolution;
4. Good Faith and provisions be included in the Code;
5. 'Unconscionable Conduct' to be better defined within the Trade Practices Act;
6. Clause that allows for retrospective claims be introduced into current legislation.

5. Final Word

It is our belief that the Code does protect franchisees in its current form. The Trade Practices Act is not an accessible solution to franchisee issues due to the cost of litigation. It is our hope that you will introduce a system that allows for quick resolution to franchise issues that is affordable to franchisees in distress.

We thank for taking the time to read our story. We are available to answer any questions you may have regarding this submission.

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Supplementary Submission-GD&AE Brown

To the Chairman,

I recently made a submission to the Joint Standing Committee, submission number 49. I wish to provide the following supplementary comments to be read in conjunction it.

I have read the Proof Committee Hansard in relation to the Franchising Code of Conduct dated, Wednesday, 5 November 2008. Of particular interest to me is the presentation made by Mr. Stephan Giles, the Legal Committee Chair of the Franchise Council of Australia.

"We are beyond the US. In Australia, if a franchisor makes a statement as to a future event, for example, 'I think you could earn \$10,000 a week out of this store', then that reverses the burden of proof and gives the franchisee an even stronger case, effectively as a matter of law, to take that on. That is where a lot of cases have been run. In the states they do not have that New Zealand is completely deregulated as we speak. Singapore is the same. The UK is completely deregulated. The Australian model really does lead the way".

I would like to emphasize, that my Franchisor, Bakers Delight Holdings, was investigated by the ACCC and, that I met the "burden of proof" I have written evidence to support the analogy that Mr. Giles presents as I found myself in that position. Importantly, my concern is that the ACCC failed to recognize that the burden of proof had been established in my case specifically.

Further, Mr. Giles does not relay to the Committee in his example that franchisors are protected by unfair contracts and his comments are in themselves misleading.

A classic example is the Bakers Delight Holdings contract which reads as follows:

Part 15 – Miscellaneous Clauses

Acknowledgements by you

73. You further acknowledge that: (f) we have not made any statements of representations to you that have induced you to enter into this Agreement apart from those recorded in item 17.

Entire agreement

74. This agreement records our entire agreement as to the subject matter of this agreement. Any prior discussions or negotiations not recorded in this agreement are deemed to be of no effect.

This effectively means that the franchisor can intentionally mislead the franchisee and the franchisees credit provider by lying and are protected by unfair contract laws. It also means that franchisors of dubious quality can dream up cash flow projections and lie about the financial viability of their product and be protected by the sanctity of the contract. This why you will commonly hear "experts" like the Mr Giles and Graeme Samuals comment that "You sign it you wear it"

This is where I have real concerns that the ACCC is failing in their duty to protect franchisees.

The ACCC continues to reinforce poor franchisor conduct and perpetuate contract failure by permitting franchisors to hide behind unfair contracts.

It goes without saying, that the Government must move to dismiss unfair contracts that are clearly heavily weighted in favour of the franchisor and their superior bargaining position. This will go some way to protect franchisees who are currently not covered by consumer or investment laws, and are instead allowed to fall through the cracks.