
Understanding the dynamics of conflict within business franchise systems

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High levels of franchising density and impressive growth in both franchise units and sector turnover have seen Australia described as “the franchise capital of the world”. In the Australian Franchising 2006 survey, 35% of franchisors reported being involved in substantial disputes with franchisees, raising questions in relation to both the nature of power sharing within franchising relationships and the suitability of current sector regulation. This article reports on research on franchising conflict conducted by Griffith University academics in conjunction with the Australian Competition and Consumer Commission. Causes of franchising conflict include system compliance, communication issues, misrepresentation concerns, and intervention of third parties, as well as profitability concerns. While mediation-type processes have generally been productive in managing franchising conflict, such processes will not always be suitable. A broader range of processes could be utilised, along with systems-based approaches.

INTRODUCTION

Australia has been described as “the franchise capital of the world”¹ because of its high level of franchising density and impressive growth in both franchise units and sector turnover. Some 62,000 franchise units belonging to 960 franchise systems, turned over \$128 billion in 2005.² Perhaps because of the sector’s rapid development since fast food chains were first established in the 1970s, it is not without its problems. The Australian franchising sector continues to grow rapidly, with a 12.9% rise in the number of franchise systems between 2004 and 2006. It employs some 426,500 people and represents 14% of Australia’s GDP.³ In view of the sector’s significance to the national economy, it is surprising that greater attention has not been paid to the management of franchising conflict.

This article outlines research being conducted as part of a study supported by the Australian Research Council (ARC) in conjunction with the Australian Competition and Consumer Commission (ACCC).⁴ It builds on pilot research completed in conjunction with the ACCC in 2006-2007 which revealed causes of franchise conflict relating to communication issues and financial concerns, as well as business choices and unforeseen circumstances impacting on franchisees. Third parties such as lawyers, franchise consultants, accountants and franchise associations have all been identified as exacerbating conflict. While mediation-type processes have generally been seen as productive and efficient methods of resolving franchise conflict, there is a need to develop complementary processes that can be utilised when they suit the circumstances. The research also raises interesting issues related to how franchise systems manage innovation and change, since this appears to be another key source of conflict.

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¹ Walker J, “Chain Reaction” (2004) 26 *Business Review Weekly* 36.

² Frazer L, Weaven S and Wright O, *Franchising Australia 2006 Survey*, Griffith University/Franchise Council of Australia (2006) p 9.

³ Frazer et al, n 2, p 9. The 14% of GDP calculation includes fuel retail and motor vehicle sales, both major industries which operate on a franchise basis.

⁴ The authors gratefully acknowledge the financial support provided by the ARC, the ACCC and Griffith University for this research project.

In the *Franchising Australia 2006* survey, 35% of franchisors reported being involved in substantial disputes with franchisees, raising questions in relation to both the nature of power-sharing within franchising relationships and the suitability of current sector regulation.⁵ The particular nature of franchise relationships and their importance to the national economy is such that specific regulatory measures are rightly considered necessary to safeguard the interests of inexperienced franchisees. The Australian Franchising Code of Conduct was introduced in 1998 and is administered by the ACCC. The Code requires disclosure of pertinent information to prospective franchisees and participation in mandatory dispute resolution processes where conflict arises. Following a review conducted in 2006, the disclosure requirements were strengthened earlier this year. It is interesting to note that many of the concerns that were significant both in the introduction of the Franchising Code of Conduct in 1998 and the conduct of the 2006 *Review of the Disclosure Provisions of the Franchising Code of Conduct* (the Matthews Review) continue to drive calls for change to the existing regulatory framework. This suggests the need for new approaches.

GOVERNMENT INQUIRIES

Government and regulatory interest demonstrates that identifying best practice in franchise regulation and dispute resolution is a very topical issue in Australia. The Federal Parliamentary Joint Committee on Corporations and Financial Services is currently conducting an inquiry into the Franchising Code of Conduct.⁶ This inquiry appears set to build on the 2006 Matthews Review which made significant recommendations relating to the content and timing of disclosures required to be made by franchisors to prospective franchisees.

Substantial franchising sector inquiries have been conducted in 2007-2008 in both Western Australia and South Australia. The *Inquiry into the Operation of Franchise Businesses in Western Australia* (WA Inquiry) was prompted by the circumstances surrounding the closure of the Rockingham KFC store in November 2007.⁷ The recommendations from the WA Inquiry emphasise the importance of franchisee education and effective disclosure requirements, including the need for clarity about rights and responsibilities in relation to renewal of franchise agreements. The inquiry recommendations in relation to dispute resolution relate to improved flexibility and enforceability.

The *Franchises Inquiry* by the Economic and Finance Committee of the Parliament of South Australia (SA Inquiry) has usefully identified the “atypical nature of the franchise contract – two business entities bound together in a contract seeking mutual and separate profitability” and noted that such arrangements are “unsurprisingly susceptible to disputation”.⁸ The Committee emphasised the need for the ACCC to take a more substantial role in regulating and educating the franchise sector. The Committee noted various advantages of mediation, including informality, confidentiality, accessibility and low cost but noted the potential for the flexibility of the process to be used to reinforce existing power imbalances in favour of franchisors. The Committee suggested the need for supplemental dispute resolution processes beyond mediation and litigation to be developed. These could include an industry ombudsman scheme and arbitration processes.

Given the depth of coverage and consideration of a range of other franchise-related issues, perhaps a more comprehensive analysis of dispute resolution options could have been expected from these inquiries. Concerns regarding the power imbalances inherent in franchising relationships are such that it should not be assumed that mediation processes will be suitable for addressing franchising conflict. The diversity of the franchising sector indicates the need for the development of a suite of complementary dispute resolution processes that can be tailored to the particular circumstances. The

⁵ Frazer et al, n 2, pp 56-60.

⁶ See Federal Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into the Franchising Code of Conduct*, http://www.apf.gov.au/senate/committee/corporations_ctte/franchising/index.htm viewed 8 January 2009.

⁷ Small Business Development Corporation, *Inquiry into the Operation of Franchise Businesses in Western Australia* (2008) (WA Inquiry Report).

⁸ Parliament of South Australia, Economic and Finance Committee, *Final Report: Franchises*, Report No 65 (2007) (SA Inquiry Report) p 17.

Franchising Australia 2006 survey refers to there being considerable diversity across the franchising sector in terms of the industries involved (retail non-food is most prominent, followed by property and business services and retail food); the age of systems (some with considerable franchising experience while others franchise almost immediately upon commencing business); the size of systems (average number of units per system is 22 with almost half of all systems having less than 10 units); and geography and structure (more than two-thirds of systems make use of a master franchise structure).⁹

The *Franchising Australia 2006* survey reports that resolution of franchising disputes is more often initiated by franchisors than franchisees.¹⁰ Sometimes these disputes result in protracted legal proceedings that divert time and financial resources from the respective businesses of franchisors and franchisees, as well as disrupting operations and damaging the brand. The food retailer, Lenard's (over 190 stores servicing 10 million people annually), encountered adverse media coverage in 2005 regarding legal proceedings over earnings misrepresentations. Occasionally, litigation has resulted in franchisor bankruptcy or liquidation. One example is provided by the Great Australian Ice Creamery franchise which was well established before encountering conflict regarding misleading and deceptive conduct in the 1990s.¹¹ Litigated outcomes may appease some franchisees in dispute but can be disastrous for the remaining franchisees in the system who find themselves without a franchisor and franchise network. The compulsory mediation provided for in the Code appears to be used predominantly as a remedial method of conflict resolution, rather than a proactive means of managing long-term intractable conflict based (largely) upon the imbalance of power within the franchising relationship.

GRIFFITH AND ACCC RESEARCH PROJECT

This project builds on research completed in 2006 which produced the report, *Franchising Australia 2006*. This survey of business format franchisors provided demographic data, including statistics surrounding the incidence of franchising disputes and how they were resolved. Reference has already been made to the finding that 35% of franchisors had been involved in a substantial dispute (ie a dispute with a franchisee referred to an advisor for action) within the previous 12 months. Resolution was more often initiated by franchisors rather than franchisees, with 29% being dealt with by mediation and 14% of disputes resolved through litigation in the courts. The main causes of substantial disputes were reported as relating to lack of system compliance by the franchisee, communication problems, misrepresentation issues and lack of franchisee profitability.

A series of interviews was subsequently conducted seeking insights on issues of power and control in franchise relationships from franchising sector experts. The 40 interviewees included experienced franchisors and franchisees, franchising consultants, lawyers, mediators, accountants and brokers regarded as key figures in the sector. Participants were asked to comment and speculate about the nature of the franchising relationship and the causes and consequences of conflict in franchising. It was found that franchisors and franchisees use a range of strategies, from problem solving and persuasion to bargaining and litigating. Choice of process depended on the characteristics and complexity of the issue in conflict, the financial "stakes" of the issue, the power and dependency relationship of the partners, and perceived levels of trust, co-operation and communication in the franchising relationship.¹²

The third stage of the research will drill down further into the causes and consequences of conflict in franchise systems. Eight case studies will be conducted, involving the franchisor and two franchisees in each case study. A series of propositions will be developed for further testing with a large sample of franchisors and franchisees. This data will then be analysed and used to inform the

⁹ Frazer et al, n 2, pp 10-11, 19-20.

¹⁰ Frazer et al, n 2, p 56.

¹¹ Frazer L, Giddings J, Weaven S and Wright O, *Searching for Answers: The Cause and Resolution of Franchising Conflict*, Paper presented at the International Council of Small Business World Conference (Turku School of Economics and Business Administration, Finland, 13 June 2007) p 5.

¹² Frazer et al, n 11, p 16.

development of conflict management system proposals and community education materials for franchisees to be provided to the ACCC. It is clear that there are very high expectations placed on the ACCC (see, eg the reports of the WA and SA Inquiries) in terms of its public education role being a key element of its regulatory responsibilities in the franchising sector.

UNDERSTANDING THE FRANCHISING RELATIONSHIP

Greater understanding of the particular nature and dynamics of franchising relationships will be critical to any efforts to manage conflict across the sector. Franchisees need to understand the ways in which their interests will coincide with those of franchisors in some respects but not in others. They also need to understand the importance of fully informing themselves of what they can expect from the franchise relationship. Franchisors need to recognise the value of working effectively with franchisees in order to enhance their common interests. The current reliance on mediation as the key process for addressing franchising conflict raises the need for all concerned to understand the mediation process – in terms of what it entails, when its use is likely to be productive and what other processes should be utilised to address franchising conflict where mediation is not appropriate.

Educating those involved – This will be important for those considering entering a franchise as well as those already in such a relationship. The SA Inquiry Report notes that some of those entering a franchise will have little business acumen and can be lured into a franchise “honey trap” by promises of success.¹³ While it would be irrational not to take the time and use the resources to carefully evaluate a franchise opportunity, it is clear that some prospective franchisees do not pay sufficient attention to this evaluation process. In this context, one member of the SA Inquiry asked the question, “How do you legislate against stupidity?”.¹⁴ There is also a need to educate the various third-party advisors (including lawyers, accountants and business advisors) who play an important role in advising prospective franchisees. The authors’ research to date has identified that third-party advisors are considered to be a key source of franchising conflict.¹⁵ Interviews also disclosed that the franchise parties need to prepare for the prospect that the dynamics of their relationship will change over time.

Effective disclosure requirements – The Matthews Committee Review emphasised the importance of disclosure requirements as a key tool in regulating the franchising sector. Elizabeth Spencer of Bond University gave evidence to the SA Inquiry regarding the three functions she has identified that need to be addressed in order for a disclosure strategy to be effective: gauging the extent and magnitude of risks; ensuring the dissemination of reliable and accessible information; and ensuring that franchisees can act on the information.¹⁶ The timing of disclosures is critically important. Jenny Buchan of University of New South Wales identified the need for prospective franchisees to be in a position to make an informed decision as early as possible in the franchise assessment process: “The timing of the issue of disclosure means that a franchisee is psychologically fully committed to become a franchisee of the franchise system they get the disclosure for before getting the disclosure.”¹⁷ It has also been suggested that the current disclosure regime requires more “teeth” in terms of the enforceability of its requirements.¹⁸

Understanding & appreciating risk – The Explanatory Statement to the Franchising Code of Conduct notes that the fundamental nature of the franchising relationship contributes to higher levels of conflict than for other business ventures. In franchising arrangements, the ownership of the business is separated from control of its capital assets: “A franchisee invests in the business and bears the majority of the risk associated with the operation of a particular outlet while the franchisor maintains

¹³ SA Inquiry Report, n 8, p 18.

¹⁴ SA Inquiry Report, n 8, p 22.

¹⁵ Frazer et al, n 11, pp 8-9.

¹⁶ SA Inquiry Report, n 8, p 21.

¹⁷ SA Inquiry Report, n 8, p 24.

¹⁸ See SA Inquiry Report, n 8, p 41; WA Inquiry Report, n 7, pp 19-20.

control over the design of the overall system and the quality of the output.”¹⁹ While franchising is promoted on the basis of limiting the risks involved in setting up a small business, there are major concerns about particular risks inherent in the nature of the relationship. Franchises are promoted on the basis that franchisees will be working collaboratively with the franchisor when in fact there is a range of aspects where the parties potentially have directly competing interests.

The importance of good faith – Calls have been made for the introduction of a statutory duty of good faith as part of a clearer framework for the conduct of franchisees and franchisors. The SA Inquiry received “numerous accounts where a threat of termination was apparently employed to force the under-value sale of a franchise outlet by a franchisee back to a franchisor”.²⁰ Such accounts provide support for additional protections to safeguard the interests of franchisees. Obligations to act in good faith should be particularly important where a franchisor has an involvement with the retail premises in which any particular franchise business is operating. Buchan has identified a range of franchise occupancy models which involve either the franchisor or a master franchisee having an interest in the business premises leased by the franchisee.²¹ There may be insights that can be gained from the mutual obligations that are accepted by parties to alliance and relationship contracts.

A renewal framework – Renewal is recognised as a clear pressure point in any franchise relationship. Reference has already been made to the instance of the KFC Rockingham store, which closed after a franchise relationship lasting 20 years. That instance was the catalyst for the WA Inquiry, which recommended greater disclosure of the franchisee’s entitlements to goodwill or other compensation if a franchise agreement is not renewed.²² The SA Inquiry recommended the introduction of a statutory duty of good faith as a “good step towards creating a level playing field for the participants in the industry” and discouraging “arbitrary termination while introducing an additional measure of accountability”.²³

Diversity of franchise systems – Insufficient recognition appears to have been given to the difficulties involved in using one set of regulatory requirements to address such a large and diverse sector of economic activity. The measures required to safeguard the interests of parties to a small-scale franchise system will differ from those for a large-scale system involving hundreds of units. Involvement in a well-established system will raise a different set of disclosure and good faith issues to those raised for a fledgling system involving a new concept.

SOURCES OF FRANCHISING CONFLICT

Reference was made earlier to the dimensions of conflict said to be inherent in the nature of franchising relationships: “Given the atypical nature of the franchise contract – two business entities bound together in a contract seeking mutual and separate profitability – it is unsurprisingly susceptible to disputation.”²⁴ Research in the business discipline suggests that conflict resolution mechanisms in dyadic relationships (such as franchising) are dependent upon: (1) *issue characteristics* (eg the intensity, complexity and financial stake associated with an issue in dispute); (2) the nature of the *relationship* between agent and principal (eg trust, dependency and relationism); (3) *personality*

¹⁹ *Trade Practices Regulations 1998* (Cth); *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Cth), Explanatory Statement.

²⁰ SA Inquiry Report, n 8, p 58.

²¹ SA Inquiry Report, n 8, p 78.

²² WA Inquiry Report, n 7, p 48.

²³ SA Inquiry Report, n 8, p 70.

²⁴ SA Inquiry Report, n 8, p 17.

characteristics of the involved parties (eg importance placed upon autonomy); (4) *external influences* (eg limited vs strong market demand); and (5) *structural characteristics* of the organisation (eg level of bureaucracy).²⁵

These research findings resonate with the characterisations made by various dispute resolution researchers. Moore characterises conflicts into five groups, relating to values, relationships, data, structures, and interests.²⁶ Tillett and French, Sourdin, and Condliffe all provide similar characterisations.²⁷ Franchising arrangements give rise to conflicts across these groups. The National Alternative Dispute Resolution Advisory Council (NADRAC) identified a range of causes of franchising conflict in a submission to the 2000 *Review of the Franchising Code of Conduct*: financial issues causing franchisees to seek either release or re-negotiation of their agreements; disputes with third parties; operational disputes with potential to impact on others involved in the same franchise scheme; and financial issues interconnected with family and personal issues.²⁸

A suite of dispute resolution processes needs to be available for addressing franchise-related conflicts. Parties are encouraged to negotiate directly while the ACCC also notes that either party may need to consider litigation where urgent issues arise. The Franchising Code directs parties to mediation if direct negotiations do not result in agreement. If requested by either party, both parties must attend the mediation and try to resolve the dispute. Refusal to attend the mediation or to make a genuine attempt to resolve the dispute will constitute a breach of the code and thereby a breach of the Act. However, effective enforcement of such requirements is a difficult issue.

Compulsory mediation is viewed in the franchising literature as a “low-risk”, co-ordinative mechanism to alleviate distrust between partner entities. However, many dispute resolution writers²⁹ have understandably questioned the use of mandatory mediation, which is likely to generate control concerns for the participants.³⁰ Moreover, pilot data revealed that franchisors may be using mediation as a subtle method of leveraging their dominant power position in the franchising relationship. The initial interviews indicate that diverging expectations of parties is a significant source of franchising conflict. Franchisors viewed unrealistic expectations on the part of franchisees as particularly significant. Causes of conflict within franchise systems included poor selection (of franchisees and business sites), ineffective training of new franchisees, as well as financial/cost pressures. Poor communication skills were also considered to be a difficulty faced by all parties to franchising arrangements.

Change is seen as a source of conflict in franchise systems. This includes new initiatives or a new image and can be linked to financial pressures as well as marketing funds (since the franchisee generally has to pay). Lack of consultation also created conflict because franchisees often felt forced into specific actions with limited information. Most respondents felt that effective communication within the system enabled most conflict to be prevented or dealt with in an effective manner. Franchise

²⁵ See Dant RP and Schul PL, “Conflict Resolution Processes in Contractual Channels of Distribution” (1992) 56(1) *Journal of Marketing* 38; Frazier GL, “Organizing and Managing Channels of Distribution” (1999) 27 *Journal of the Academy of Marketing Science* 226; Palmatier RW, Dant RP, Grewal D and Evans KR, “Factors Influencing the Effectiveness of Relationship Marketing: A Meta-Analysis” (2006) 70 *Journal of Marketing* 136.

²⁶ Moore C, *The Mediation Process* (3rd ed, Jossey-Bass, 2003).

²⁷ Tillett G and French B, *Resolving Conflict: A Practical Approach* (3rd ed, Oxford University Press, 2006); Sourdin T, *Alternative Dispute Resolution* (2nd ed, Lawbook Co., 2005); Condliffe P, *Conflict Management: A Practical Guide* (LexisNexis Butterworths, 2002).

²⁸ NADRAC, *Submission to Review of Franchising Code of Conduct* (2000).

²⁹ See, eg Boule L, *Mediation: Principles, Process, Practice* (2nd ed, LexisNexis Butterworths, 2005); McIntosh M, “A Step Forward: Mandatory Mediations” (2003) 14 ADRJ 280; Carroll R, “Trends in Mediation Legislation: ‘All for One and One for All’ or ‘One at All’?” (2002) 30(2) *Western Australian Law Review* 167.

³⁰ McGillicuddy HB, Welton GL and Pruitt DG, “Third Party Intervention: A Field Experiment Comparing Three Models” (1987) 53 *Journal of Personality and Social Psychology* 104.

systems were considered more likely to be involved in increased levels of conflict if they operated without a clearly defined development strategy (other than a specified number of units) and an ability to adapt to changing market trends.³¹

Lawyers, franchise consultants, head office staff, accountants, franchise associations (including the Australian Franchisees Association (AFA) and the Franchise Council of Australia (FCA)), as well as the ACCC, were all identified as likely to exacerbate conflict in some situations. External advisors, such as lawyers, accountants and franchise sales consultants, were seen to exacerbate conflict through miscommunication of expectations and information. The AFA was seen as being primarily interested in its own agenda to increase profile and membership, whereas the FCA was seen as creating a negative culture in franchising (mainly due to franchisor dominance of the organisation). The ACCC was seen as exacerbating conflict which had already manifested within a system when they intervened under the Code of Conduct. Certain respondents were concerned about the perceived alignment of the ACCC with the FCA and the impact this might have on its neutrality. Much of this suspicion is obviously a matter of very differing perspectives.³²

Franchise systems which do not focus on innovation and development or which do not include franchisees in the innovation process were said to be more likely to generate conflict. Mature franchise systems tend to utilise monitoring in a formal manner to ensure that innovation occurs in a productive and controlled manner in accordance with a defined strategy (although this is not mentioned clearly in the interviews, it is derived from the fact that respondents felt these systems were well structured). Respondents tended to be critical of the use of informal controls in franchise systems due to concerns about the potential for manipulation. However, respondents felt that when other types of informal systems such as “pats on the back” and other positive reinforcement strategies were introduced, along with strong communication channels, this was likely to be viewed as proactive and positive and less open to misinterpretation.³³

PROMOTING EFFECTIVE RESOLUTION OF FRANCHISING CONFLICT

The government’s *Response to the Recommendations of the Review of the Disclosure Provisions of the Franchising Code of Conduct* in 2007 emphasises the role of the ACCC in educating potential franchisees regarding the importance of risk analysis and the significance of clauses giving a franchisor rights to unilaterally alter or terminate a franchise agreement. In order to discharge its increasingly important functions in this area, the ACCC recognises the benefits of enhancing its understanding of the dynamics of franchising conflict.

It is important to consider *systems-based* approaches when seeking to address conflict management with franchise *systems*. The range of possible conflicts suggests that both individual franchising schemes and the sector more generally can benefit from the development of Integrated Conflict Management Systems. In 1988, Ury, Brett and Goldberg codified various systems’ design principles aimed at heading off unnecessary disputes, emphasising the value of processes based on interests as opposed to positions.³⁴ These insights were further developed by Costantino and Merchant,³⁵ the Society of Professionals in Dispute Resolution,³⁶ and the British Columbia Attorney-General’s Department.³⁷ Bingham has identified that the field of systems design “offers

³¹ Frazer et al, n 11, p 8.

³² Frazer et al, n 11, pp 8-9.

³³ Frazer et al, n 11, pp 9-10.

³⁴ Ury W, Brett JM and Goldberg SB, *Getting Disputes Resolved: Designing Systems to Cut the Costs of Conflict* (PON, 1988).

³⁵ Costantino C and Merchant CS, *Designing Conflict Management Systems* (Jossey-Bass, 1996).

³⁶ Society of Professionals in Dispute Resolution & Institute of Conflict Resolution, *Designing Integrated Conflict Management Systems*, Cornell Studies in Conflict and Dispute Resolution, No 4 (2001).

³⁷ Ministry of Attorney-General, British Columbia, *Reaching Resolution* (2003).

particularly rich ground” for collaboration “between the research and practice communities”.³⁸ Laurence Boule has identified that “despite the existence of a sophisticated regulatory scheme administered by two government-funded agencies, there are several shortcomings in the system from a dispute systems design point of view, including the lack of diagnosis for mediation suitability and the need for more specificity in aspects of the scheme”.³⁹

John Levingston has drawn on his experience as a mediator of franchise conflict in a recent article.⁴⁰ He documents a range of deficiencies and problems with the existing Franchising Code of Conduct mediation process. Process deficiencies include the scope for a franchisor to issue a default notice before a reference to mediation and the lack of sanctions (for absence of good faith, lack of authority or breaching confidentiality). One further process deficiency identified by the SA Inquiry relates to the unavailability of options for a multi-party mediation, where several franchisees engaged in the same dispute with their franchisor might be represented as a group in the process.

Other problems identified by Levingston include inequality of negotiating power, parties who prepare poorly, and who attend without representation or independent advice or with limited authority. Inadequate party preparation might be addressed through the use of more substantial intake processes designed to inform parties better about the mediation process. In view of the mandated nature of Franchising Code of Conduct mediations, it might reasonably be expected that a substantial intake process must be followed to ensure that parties are well prepared and that mediation is likely to be a productive process.

Levingston describes the problem of a refusal of one or more parties to compromise. He goes so far as to state that “[a] refusal to compromise any issue at a mediation constitutes an absence of good faith and arguably amounts to unconscionable conduct”.⁴¹ This raises questions about the nature of the mediation process that is being used. It indicates a process that many would not describe as mediation, given that definitions of mediation emphasise the voluntary nature of participation without expectations that the parties will necessarily reach agreement. Levingston offers a clear message that franchisees are not always well served by the current dispute resolution arrangements. He considers that the Franchising Code should include an express obligation for parties to a Code mediation to act in good faith and to compromise their disputes.

The SA Inquiry Report refers to a range of other processes that could usefully be integrated with the existing mediation arrangements. These include an industry ombudsman scheme or industry expert panel and a rights-based arbitration model for suitable disputes. The SA Inquiry considered the current Code mediation process was not sufficiently comprehensive “in terms of expertise, breadth, flexibility of approach or durability of outcome” and recommended consideration of the establishment of a Franchise Ombudsman or Franchise Tribunal or a Franchise Arbitration Unit.⁴² Boule notes the importance of emphasising the early use of unassisted negotiation as well as the early provision of information and guidance on preliminary steps that might productively be taken prior to a conflict escalating.⁴³

FUTURE PROSPECTS

The franchising sector will no doubt continue to attract considerable attention from regulators as its importance to Australia’s national economy continues to grow. Franchising has thrived during the period of sustained economic growth enjoyed by Australian business over the past decade. Given the

³⁸ Bingham LB, “The Next Step: Research on How Dispute System Design Affects Function” (2002) 18(4) *Negotiation Journal* 375.

³⁹ Boule, n 29, p 356.

⁴⁰ Levingston J, “Franchise Mediations: Experience, Problems and Solutions (Reflections of a Franchise Mediator)” (2008) 19 ADRJ 83.

⁴¹ Levingston, n 40 at 94.

⁴² SA Inquiry Report, n 8, pp 49-54.

⁴³ Boule, n 29, p 361.

recent declines in business and consumer confidence, the *Franchising Australia 2008* survey may well highlight changes in this regard. The strength of the economy may also be a key factor influencing the incidence of franchising disputes.

In the authors' research, a series of respondents suggested that a Franchise Industry Ombudsman should be established. While such a proposal warrants further examination, it should be noted that there has been little in the way of critical analysis of existing private sector ombudsman schemes.⁴⁴ Earlier this year, the English National Consumers Council published a report calling into question the effectiveness of ombudsman schemes and noting that there is a pressing need for such schemes to be developed strategically rather than in an ad hoc manner.⁴⁵

The reports from both the WA and SA Inquiries are very useful in providing an understanding of the range of issues involved in efforts to foster a more equitable and efficient franchising sector. Given that the government has responsibility for the operations of the ACCC, those responsible for responding to the Report of the Joint Parliamentary Committee Franchising Inquiry should pay particular attention to the education and enforcement roles of the ACCC as well as enhancing the range of processes that can be used in addressing franchising conflict. Perhaps, if the sector is to continue to develop and thrive, it needs to be more focused on the fairness and equality that tend to characterise effective partnerships.

⁴⁴ O'Shea P, "Underneath the Radar: The Largely Phenomenon of Industry Based Consumer Dispute Resolution Schemes in Australia" (2004) 15 ADRJ 156.

⁴⁵ Brooker S, *Lessons from Ombudsmania* (National Consumer Council, 2008).