

CONSUMER PROTECTION FOR FRANCHISEES OF FAILED FRANCHISORS: IS THERE A NEED FOR STATUTORY INTERVENTION?

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The franchise agreement documents a long-term contract-based business relationship between a franchisor as supplier and its franchisee, a business consumer. Under contract law, assumptions are made about parties entering business relationships, and about the basis on which they agree the terms of their contracts. These assumptions are flawed where one of the parties, in this case the franchisee, is in a weaker position and unable to negotiate amendments.

Depending on many variables,¹ the impact of the franchisor's failure² on the franchisees ranges from slight to catastrophic. The imbalance of power between a franchisor and its franchisees was redressed to an extent in 1998 by the enactment of amendments to the *Trade Practices Act 1974* (Cth).³ Administrators and liquidators appointed to the failed franchisor are regulated by the *Corporations Act 2001* (Cth).⁴ Thus it is important to consider whether franchisees could all⁵ self-protect against franchisor failure through the franchise agreement or whether this protection can only be achieved through legislation. This article concludes that statutory intervention to protect the franchisee business consumer is the only workable response.

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¹ For example; the strength of the franchisor's brand, the size of the franchisee's investment, the amount of money the franchisee has borrowed, the particular franchise model adhered to, and the amount of time remaining on the franchise, the location of franchisees' businesses.

² References to franchisor 'failure' throughout this article imply administration or insolvency under the *Corporations Act 2001* (Cth).

³ *Trade Practices Act 1974* (Cth) s 51AC and *Trade Practices (Industry Codes--Franchising) Regulations* (Cth). A mandatory code of conduct under *Trade Practices Act 1974* (Cth) s 51AE.

⁴ Contracts are assessed as being assets or liabilities by the liquidator and are then dealt with accordingly.

⁵ L Frazer, S Weaven and O Wright, *Franchising Australia 2008* (2008) 10, estimate there were 76,000 franchise units in Australia in 2008. Each franchisee has a separate contract with one of Australia's approximately 1,100 franchisors.

In part I the franchise agreement is explored. In part II the franchisees' position as a business consumer is addressed. Part III touches on the allocation of risk of failure in franchise agreements. Part IV identifies assumptions that underpin the current response to franchisor failure. In part V the adequacy for the franchisee of the most common remedy for breach of contract, damages, is considered in the context of franchisor failure. Remedies for breach of the statutory warranties implied under the *Trade Practices Act* are also considered. In part VI, possible solutions are proposed.

I FRANCHISE AGREEMENTS AS CONTRACTS BETWEEN COMMERCIAL UNEQUALS

Commentators write that:

negotiations between two ... parties, which result in the formation of a contract are designed to advance the wants and needs of each of those contracting parties and provide an external framework within which rights under that contract can be enjoyed and duties performed.⁶

However, after conducting an inquiry into franchising in 2008, the South Australian Economics and Finance Committee observed that:

The basic premise on which the principles of freedom of contract and sanctity of contract rest is that contracts are negotiated at arm's length by equally positioned participants in the bargaining process. That premise is not fulfilled in the typical franchise arrangement.⁷

Certainty is widely accepted as being desirable in a commercial relationship. In the context of the carbon trading debate Heather Ridout points out that 'uncertainty is death for business.'⁸ Similarly there will be a potentially deadly period of uncertainty for franchisees if their franchisor fails. Each franchise agreement and the resulting business which the administrator or liquidator will categorise as an asset or a liability, will be dealt with accordingly. The Senate Parliamentary Joint Committee on Corporations and Financial Services report 'Opportunity not Opportunism: Improving Conduct in Australian Franchising'⁹ ('Opportunity not opportunism') acknowledged that this particular instance of uncertainty is not satisfactory and recommended 'that the government explore avenues to better balance the rights and liabilities of franchisees and franchisors in the event of franchisor failure.'¹⁰ An examination of franchise agreement as standard form contracts, relational contracts and exploitative contracts will help clarify why the franchisee is vulnerable.

⁶ L Willmott et al, *Contract Law* (Oxford University Press, 3rd ed, 2009) 16.

⁷ Economics and Finance Committee, Parliament of South Australia, *Franchises Final Report* (2008) 17.

⁸ Sky News, 'Australian Industry Group, Heather Ridout, with Kieran Gilbert', *Agenda*, 5 May 2009.

⁹ Joint Committee on Corporations and Financial Services, Australian Senate, *Opportunity not Opportunism: Improving Conduct in Australian Franchising* (2008) <http://www.aph.gov.au/SENATE/COMMITTEE/corporations_ctte/franchising/index.htm> at 23 August 2009.

¹⁰ *Ibid* recommendation 4 [6.40] xv.

A *Standard Form Contract*

the liberal fiction that all the effects of a contract should be attributed to the will of those who made it still persists though contract law today even though the overwhelming majority of contracts are the product of the will of only one of the contracting parties.¹¹

This is the case in franchising where consistency is achieved through the use of standard form franchise agreements; and the outcome is a contract that reflects the will of the franchisor. Franchisors draft the franchise agreements to maximise their position. This makes good commercial sense as it helps the franchisor achieve administrative efficiency and maintain consistent standards. In some franchise networks, for instance Subway, one standard unit franchise agreement is used throughout the world with only minor variations from one jurisdiction to another.

John Carter et al confirm K M Sharma's thinking when they state that:

the assumption that will and intention form the substratum of every contract is heavily attenuated by inequality of bargaining power between individual and corporation whose power is marked by common use of standard form contracts.¹²

Lindy Willmott et al add that:

standard form contracts are typically used by parties who are in such a strong bargaining position ... that they are able to prescribe the terms on which they are prepared to contract on a 'take or leave it' basis.¹³

The franchise agreement is an example. The franchisor supplier drafts the franchise agreement. The franchisee business consumer takes it or leaves it, seldom having the opportunity to vary the standard form.

Franchisees are encouraged to read the franchise agreement and ask questions, but any requests for changes are strenuously opposed by the franchisor. Standardisation of outcome is a more important result for a franchisor than letting a franchisee enter the relationship in the mistaken belief that they have any bargaining power. The franchisee accepts the franchisor's unwillingness to negotiate because standardisation reinforces the franchisor's marketing pitch – we know how to do it, trust us and sign on with us and you will be successful before you know it!

B *Relational Contract*

Franchise agreements are also an example of relational contracts. The franchise agreement is unavoidably incomplete. There is an assumption underlying a relational contract that the major events which are foreseeable, and which could fundamentally change the relationship, have been addressed in the contract. It is also acknowledged that some events are not foreseeable and will be the subject of negotiation if and when they occur. As Gillian Hadfield observes:

¹¹ K M Sharma, 'From Sanctity to Fairness' (1999) 18 *New York Law School Journal of International and Comparative Law* 95, 115.

¹² J W Carter, E Peden, and G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) 8.

¹³ Willmott, above n 6, 583.

incomplete contracts (such as franchise agreements) often exist deeply embedded in an ongoing relationship. The parties are not strangers; much of their interaction takes place ‘off the contract’ mediated not by visible terms enforceable by a court, but by a particular balance of cooperation and coercion, communication and strategy.¹⁴

Relational contracts are thus, incomplete. ‘In contract theory, incompleteness is [also] due to the cost and sometimes unavailability of information.’¹⁵ During the initial contract negotiations ‘parties incur ex ante transaction costs, including the costs of anticipating future contingencies and writing a contract that specifies an outcome for each one.’¹⁶ ‘Both ex ante and ex post contracting costs prevent parties from writing complete contracts and give rise to what economists refer to as the problem of incomplete contracts.’¹⁷ It is submitted that there is no equitable, logical or cost-based justification for the relational contract making extensive provision for some known possible events that would have a relatively minor effect on the network, such as the possibility of a franchisee dying, while failing to provide for known and potentially network-debilitating events, such as franchisor failure.

‘To a lawyer, a contract may be incomplete in failing to describe the obligations of the parties in each possible state of the world.’¹⁸ The problem with this conception of incompleteness is that it is again difficult to explain why franchisees would knowingly leave gaps around the possibility of franchisor failure. After all, ‘the cost to making contracts complete in this sense is trivial.’¹⁹ A flaw in applying the theory of trading off ‘front-end and back-end costs’²⁰ to justify not providing for franchisor failure ‘up front’ is that franchisors fail sufficiently often for the risk to be eligible for inclusion in the franchise agreement from the outset. It would be relatively inexpensive to insert provisions about franchisor failure into the franchise agreement and the traditional justification that issues left for the back end will be resolved by the courts is hard to justify where the trigger event is the insolvency of one party.

Franchise agreements, as ‘long-term contracts involve continuing financial commitment in the course of which the consumer, being imperfectly informed and not fully aware about his needs – is largely reliant on the advice, guidance and skills of his counterparty.’²¹ This is the promise of franchising. In the words of American franchise lawyer Richard Solomon:

If you look at all the franchise adverts for franchise opportunities in any business category, they all say the same thing - we know how to do it - we can show you how to do it - you save a lot of money and reduce risk of failure if you do it with us - we have the

¹⁴ G K Hadfield, ‘Problematic Relations: Franchising and the Law of Incomplete Contracts’ (1990) 42 *Stanford Law Review* 927, 928.

¹⁵ R E Scott and G G Triantis, ‘Incomplete Contracts and the Theory of Contract Design’ (Working Paper No 23, The John M Olin Program in Law and Economics Working Paper Series, 2005) 4-5, and *Case Western Reserve Law Review* 56:1<<http://law.bepress.com/uvalwps/olin/art23>> at 15 February 2010.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.* 10.

²¹ A Georgosouli, ‘Investor Protection Regulation: Economically Rational?’ (Working Paper Series, University of London, Centre for Commercial Law Studies, 2006) 10 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=893451> at 15 February 2010.

'secret' to success - we will support you to achieve success - we have the proven system - we have the name recognition - we get you up and running quickly. In actual fact, most of this is not even remotely true.²²

The justifications for a contract not to be comprehensive in its terms; that it is relational, that it is too expensive to include all possible future contingencies, that the franchise agreement needs to be standardised for ease of administration, do not support the omission of terms about franchisor failure. This is an event whose possibility is real, and whose consequences will potentially be devastating for the franchisee consumer. It can be concluded that relational contracts are not well equipped to deal with insolvency as the event that triggers a need to renegotiate, franchisor failure, also signals the end of the relationship between the franchisor and its franchisees. It is too late.

C *Exploitative Contract*

Rick Bigwood describes the power imbalance between the franchisee and franchisor that creates the environment for exploitation:

What is crucial is that the vulnerability that gives rise to the asymmetric power relation between the parties is such that P [plaintiff franchisee] ought to be *excused* ... from having to exercise that level of responsibility or self-reliance expected and required of the generality of contracting parties. ... the exploitable circumstances condition presupposes a weakness or vulnerability that, in the circumstances, *removes* P from the normal assumptions made about the bargaining 'game'... the crux of the exploitable circumstances criterion lie in the nature and extent of the *power relation* existing between the parties. What matters is that P's interests have become peculiarly sensitive to – that is, they can be directly, strongly and adversely affected by – D's [defendant franchisor's] choices and actions and this resultant vulnerability becomes the *source* of D's bargaining power.²³

The nature of the franchise agreement as a standard form contract means a franchisee is typically unable to negotiate amendments to provide it with rights if the franchisor fails. Consequently, the supplier franchisor is entering a franchise agreement that potentially exploits the consumer franchisee.

If protection of franchisees from the consequences of franchisor failure is not achievable through the franchise agreement, how has the legislature responded? In part II the effectiveness of two key statutory initiatives is considered in the context of franchisee protection for franchisees of failed franchisors.

II STATUTORY SUPPORT FOR PARTIES TO THE FRANCHISE AGREEMENT

The franchise agreement is the basis of a long-term business relationship. The marketing that leads to the formation of the franchise agreement, however, is closer in style to marketing for everyday consumer purchases. Since 1998 s 51AC of the *Trade*

²² R Solomon, *License to Lie, Cheat and Steal: Impact of Acknowledgement & Integration Clauses* (2008) Blue MauMau
<http://www.bluemaumau.org/license_lie_cheat_and_steal_impact_acknowledgement_integration_clauses> at 15 May 2008.

²³ R Bigwood, *Exploitative Contracts* (Oxford University Press, 2003) 143.

Practices Act 1974 (Cth) and Franchising Code of Conduct 1998 (the Code)²⁴ ‘represent statutory intervention into the kinds of contracts that routinely involve a substantial imbalance in bargaining power.’²⁵

A Section 51AC Trade Practices Act 1974 (Cth)

It may be possible for franchisees to argue that a franchisor embarking on a course of strategic insolvency²⁶ did so in breach of ss 51AC (a), (i), (ja) and (k) of the *Trade Practices Act 1974* (Cth).²⁷

The franchisor may have breached s 51AC (3) (a) as by the time it sought to become insolvent it would have received the franchise fee, permitted the franchisee, in many cases, to invest sunk costs, and would know its insolvency before the end of the franchise term would deprive the franchisee of the opportunity to recoup its investment and make a profit.

The franchisor may have breached s 51AC (3) (i) (ii) *Trade Practices Act 1974* (Cth) in failing to disclose the risk that the franchisor might decide to adopt a course of strategic insolvency. As the franchisee signed the franchise agreement in good faith relying on the franchisor’s declaration of solvency, ss 51AC (3) (ja) and (k) *Trade Practices Act 1974* (Cth) might also provide franchisees with some leverage when confronted with strategic insolvency.

Section 51AC *Trade Practices Act 1974* (Cth) has not yet formed the basis of action specifically aimed at relieving a franchisee from its contractual obligations towards a franchisor’s administrator.²⁸ It is unlikely to do so because:

²⁴ *Trade Practices (Industry Codes--Franchising) Regulations* (Cth).

²⁵ Willmott, above n 6, 11.

²⁶ See D B Noakes, ‘Measuring the Impact of Strategic Insolvency on Employees’ (2003) *Insolvency Law Journal* 91, fn 5, quoting Peta Spender ‘strategic insolvency arises when the bankruptcy is invoked due to strategic decision-making rather than being a passive response to market forces.’

²⁷ *Trade Practices Act 1974* (Cth) s 51AC, Unconscionable conduct in business transactions

(1) A corporation must not, in trade or commerce, in connection with:

(a) the supply or possible supply of goods or services to a person (other than a listed public company);

(b) omitted

engage in conduct that is, in all the circumstances, unconscionable.

s 51AC (3) Without in any way limiting the matters to which the court may have regard for the purpose of determining whether a corporation or a person (the supplier) has contravened subsection (1) or (2) in connection with the supply or possible supply of goods or services to a person or a corporation (the business consumer), the court may have regard to:

(a) the relative strengths of the bargaining positions of the supplier and the business consumer; and

(b) - (h) omitted

(i) the extent to which the supplier unreasonably failed to disclose to the business consumer:

(i) (omitted); and

(ii) any risks to the business consumer arising from the supplier’s intended conduct (being risks that the supplier should have foreseen would not be apparent to the business consumer); and

(j) omitted

(ja) whether the supplier has a contractual right to vary unilaterally a term or condition of a contract between the supplier and the business consumer for the supply of the goods or services; and

(k) the extent to which the supplier and the business consumer acted in good faith.

²⁸ During the course of the litigation in the franchise test case under s 51AC *Trade Practices Act (1974)* Cth, *Australian Competition & Consumer Commission v Simply No-Knead (Franchising) Pty Ltd* [2000] FCA 1365 the franchisor became insolvent but the litigation did not relate to the insolvency.

- Successful proceedings under the *Trade Practices Act 1974* (Cth) assume that the franchisor will be solvent and thus able to meet legal costs and a judgment debt.
- The *Corporations Act 2001* (Cth) imposes pre-conditions on continuing or commencing litigation once an administrator or liquidator has been appointed. This is discussed in part V of this article.

B *Franchising Code of Conduct 1998 (the Code)*

Protection for parties to the franchise agreement is achieved through the Code implying terms into the franchise relationship, and requiring the franchisor to provide disclosure. A breach of the Code gives access to remedies under Part VI of the *Trade Practices Act 1974* (Cth). It is assumed that the Code provides franchisees with the information they need so they can structure their affairs to self-protect, or that it protects them in key risk areas.

‘The Code sets out the requirements of the pre and during contract disclosure. The primary focus of disclosure is contract formation.’²⁹ Regulation 6A lists the purposes of the franchisor’s disclosure document as being:

- (a) to give to a prospective franchisee, or a franchisee proposing to enter into, renew or extend a franchise agreement, information from the franchisor to help the franchisee to make a reasonably informed decision about the franchise; and
- (b) to give a franchisee current information from the franchisor that is material to the running of the franchised business.

The extent to which these purposes are fulfilled is limited by the franchisee’s advisers’ experience and the budget. The disclosure extends only to the matters listed in the Code. Thus, franchisees may not be directed to consider other issues, including possible consequences of franchisor failure. As Elizabeth Spencer observes, ‘effective regulation through disclosure requires the availability of options for action.’³⁰ A franchisee ‘negotiating’ a franchise agreement will have the same two options available to all consumers under a standard form contract; they can ‘take it or leave it.’

The disclosure encapsulates a ‘moment in time’ status of the franchisor, including ‘a statement of solvency to comply with Regulation 20.1. But, in general only public companies are required to be audited. Even if an auditor has identified a situation that casts doubt on the entity’s “going concern” status, the franchisor’s directors may have been able to satisfy the auditor that there are mitigating circumstances and that all will be well for the franchisor. Those mitigating circumstances may or may not eventuate. Thus, the audit which was essentially a snapshot that confirmed the entity met the test of solvency, may present a misleading picture of the solvency of the franchisor.’³¹ There is anecdotal evidence that the directors of one franchisor that became insolvent in 2008 knew their business was insolvent in 2007 but continued selling franchises. The

²⁹ E C Spencer, ‘The Efficacy of Disclosure in the Regulation of the Franchise Sector in Australia’ (Paper presented at the third meeting of the European Network on the Economics of the Firm, GREDEG, CNRS and University of Nice Sophia-Antipolis, France, 7 September 2006) 7.

³⁰ Ibid 20.

³¹ J Buchan, ‘Challenges that Franchisees of Insolvent franchisors Pose for Liquidators’ (2008) 26 *Insolvency Law Journal*, 29-30.

fact that this conduct is fraudulent does not change the fact that the business consumers were not protected.

The Code implies terms into franchise agreements. Relevantly, regulation 23(b) allows the franchisor to terminate a franchise agreement if the franchisee becomes bankrupt or insolvent. There is no reciprocal right for franchisees.

From the moment the franchisor's business starts to fail, the applicability of the Code become debateable. The Code may apply to administrators.³² It would be consistent with insolvency policy for the Code to remain applicable up to the time the liquidator is appointed. Until then, the franchisor's business may theoretically still be viable. The Code does not apply to liquidators.

The Productivity Commission conducted a Review of Australia's Consumer Policy Framework in 2008. The words 'business consumer' did not appear in the resulting report, which paved the way for a number of responses, including the Trade Practices Amendment (Australian Consumer Law) Bill 2009³³ and the Commonwealth Consumer Affairs Advisory Council Issues Paper, Consumer Rights.³⁴ Neither response will have an impact on franchisees whose franchisor fails as they are concerned with protecting 'consumers'³⁵ not 'business consumers'. It should be noted, however, that:

Senator Nick Xenophon has separately proposed amendments ... which include reintroducing business-to-business contracts [such as franchise agreements] relating to goods and services of less than \$2million and to introduce a "safe harbour scheme" under which a regulator would authorise model industry contracts and terms.³⁶

Because the original inquiry³⁷ was not framed to include the question 'what rights should business consumers have if their supplier fails?' the impact of failing franchisors is unlikely to be taken into account as amendments are debated.

III THE ALLOCATION OF RISK OF FAILURE IN FRANCHISE AGREEMENTS

The risk of the franchisee failing is currently addressed in both the franchise agreement and the Code. Anecdotal evidence suggests that one franchise agreement (of 270) in the

³² Administrators cite *Brian Rochford Ltd (Administrator appointed) v Textile Clothing & Footwear Union of NSW* (1998) 47 NSWLR 47; in support of the proposition that they are not bound by the Code; the Australian Competition and Consumer Commission cites *FTC v Smith* (1997) 71 FCR 150 in support of the proposition that the Code does cover administrators.

³³ Trade Practices Amendment (Australian Consumer Law) Bill 2009 <http://parlinfo.aph.gov.au:80/parlInfo/download/legislation/bills/r4154_first/toc_pdf/09139b01.pdf;fileType%3Dapplication%2Fpdf> at 23 August 2009.

³⁴ Commonwealth Consumer Affairs Advisory Council, *CCAAC Review of Statutory Implied Conditions and Warranties* (2009) Australian Government, The Treasury <<http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1586>> at 23 August 2009.

³⁵ Consumer contract is defined in s 2(3) of the 2009 Bill as:

s 2 (3) A consumer contract is a contract for:

(a) a supply of goods or services; or

(b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

³⁶ J Eyers, 'Consumer Laws may be Diluted', *The Australian Financial Review* (Melbourne), 2 November 2009, 5.

³⁷ Productivity Commission, *Review of Australia's Consumer Policy Framework* (2008).

Traveland franchise that failed in 2001 contained a clause permitting the franchisee to terminate the contract if the franchisor became insolvent. For the other franchisees the following was more likely:

We'd just renewed the franchise agreements on our 4 outlets for 5 years when the franchisor's administrator was appointed. We went to see a QC to see if we could get out of the agreements and there was no way.³⁸

Although in the United States it is possible to access franchisors' precedent franchise agreements via web based databases without charge, there is no public register of franchise agreements in Australia. In the absence of Australian franchise agreements, 70 franchise agreements from a United States website³⁹ were analysed. None mentioned franchisor bankruptcy.⁴⁰ Seventy six percent permitted the franchisor to terminate the franchise agreement, usually with no notice and no right to cure [the default] if the franchisee became bankrupt.⁴¹

When negotiating a contract it is common ask one's client to identify the main commercial areas which, if not addressed, would radically compromise the deal. If the client is the franchisor, the franchisee's death or the administration, insolvency or bankruptcy of the franchisee would be identified. Insolvency of the franchisor is categorised as an 'uncontrollable risk' by Rupert Barkoff and Andrew Selden,⁴² who identify the risk that 'your franchisor goes bankrupt' as a potential risk franchisee clients should be educated about by their legal advisers. Education about a problem as serious as franchisor failure is no substitute to providing for it in a franchise agreement. The failure of advisers to insist on franchisor failure being addressed may be a result of advisers knowing that the contract is standard form, exploitative and not negotiable.

The franchisor executes the franchise agreement and requires it be executed not only by the franchisee but also by the franchisee's directors as guarantors. Franchisor's directors rarely provide personal guarantees to franchisees. Thus, the franchisor can protect personal assets much more easily than the franchisee can.

Another example of risk shifting occurs where a franchisor structures a franchise relationship like a commission agency. Here, the franchisees' customers pay the franchisor for the products or services sold by the franchisees. The franchisor pays commission to its franchisees. Two risks that the franchisees assume in this scenario are; that the franchisor will be prepared to chase the customer for payment, and that the franchisor will remit the commission to the franchisees; both in a timely manner.

³⁸ J Buchan and L Frazer, 'The Domino Effect: How Ansett Airlines' Failure Impacted on Traveland Franchisees' (Paper presented at the 2nd Biennial Conference of the Academy of World Business Marketing and Management Development Conference, Paris, 10 – 13 July 2006) 1906.

³⁹ Free Franchise Docs <<http://www.freefranchisedocs.com/index.html>> at 5 June 2008.

⁴⁰ The word used for both corporate insolvency and personal bankruptcy in the USA.

⁴¹ J Buchan and B Butcher, 'Premises Occupancy Models for Franchised Retail Businesses in Australia: Factors for Consideration' (2009) 17 (2) *Australian Property Law Journal* 143, 170. It should be noted that these clauses in the US agreements may be unenforceable under the US Bankruptcy Act.

⁴² R M Barkoff and A C Selden, *Fundamentals of Franchising* (American Bar Association, 3rd ed, 2008) 292.

If a franchisor fails, franchisees without a termination right in their franchise agreement have to decide whether to risk terminating the franchise agreement on the basis of anticipatory breach⁴³ or citing the franchisor's breach of a collateral contract, such as a premises lease. The alternative is to remain contractually bound to the failed franchisor, and in a legal 'holding pattern' until the administration or winding up is complete. This can take months.

IV ASSUMPTIONS ABOUT THE CURRENT RESPONSE TO FRANCHISOR FAILURE

Assumptions about the current response to franchisor failure include; firstly, the franchisee had full access to information about the franchisor and the franchise network, and thus intended to be bound by the words of the franchise agreement. Secondly, the failure of a franchisor's business is partly attributable to the franchisees. Thirdly, in the absence of fraud, mistake, duress or another recognised category of misconduct by the stronger party, franchisees could have negotiated to self-protect,

In this part the franchisees' opportunity to conduct meaningful due diligence, the causes of franchisor failure and the consequences of franchisors acting in their own interest are explored.

A *Due Diligence*

The Franchise Council of Australia writes; 'franchising not only requires responsible franchisor behaviour but proper franchisee due diligence.'⁴⁴ This is indisputable. However, obtaining full 'information is costly, sometimes prohibitively so.'⁴⁵ Effective due diligence is hampered by factors that may include the following.

Franchisors often operate through several legal entities. For example, in *Pampered Paws Connection Pty Ltd (ACN 116 460 621) v Pets Paradise Franchising (Qld) Pty Ltd (ACN 054 406 272)*,⁴⁶ the franchisee applicants were dealing with eight different legal entities. The more entities there are, the more expensive and difficult it is to conduct due diligence.

Some franchisors and related entities are trusts. For example in *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd (In Liquidation) (ACN 089 837 329)*, *Braddon Ralph Webb, Orlawood Pty Ltd (ACN 059 294 334)*, *Peter Clarence Foster, Sean Petrie Allen Cousins, Kevin Anthony McMullan, Alan Kenneth Cooper, Stephen D'alton*, Lander J observed that the franchisor, Chaste:

was entirely controlled by the fourth respondent, Mr Foster and the second respondent, Mr Webb, and those two gentlemen, through the entities which they controlled, namely, WMMT and WFDT[two trusts], would receive respectively 75 per cent and 25 per cent of

⁴³ J W Carter, E Peden and G J Tolhurst, *Contract Law in Australia* (LexisNexis Butterworths, 5th ed, 2007) 669.

⁴⁴ Response by the Franchise Council of Australia to Reports (1) Minister for Small Business, Western Australian Government, Inquiry into the Operation of Franchise Businesses in Western Australia; and (2) The Economic and Finance Committee, Parliament of South Australia, Inquiry into Franchises, Franchise Council of Australia, Steve Wright (CEO) (2008) 11.

⁴⁵ Scott and Triantis, above n 15, 6.

⁴⁶ [2008] FCA 1606 (24 October 2008) <<http://www.austlii.edu.au/au/cases/cth/FCA/2008/1606.html>> at 2 November 2009.

the profits. As far as a bystander was concerned, Chaste was entirely controlled by Mr Webb. No bystander could have known that there were agreements in place ... which gave control of Chaste to Mr Foster.⁴⁷

Where a franchisor is a trust, information that the franchisor is not compelled to supply is not on the public record and is thus inaccessible to a franchisee. No amount of due diligence gives a franchisee access to a crystal ball that foretells a franchisor's failure or that a franchisor will choose strategic insolvency.⁴⁸

In Australia neither disclosure nor a franchisor's pro forma franchise agreements are publicly available. This means that franchisees' advisers cannot compare the offering before them with the franchisor's usual documentation or with franchise agreements of other comparable franchisors. This limits the value of professional advice as it is not able to be contextualised. 'Opportunity not opportunism'⁴⁹ shows that the government has partly accepted that this problem causes a real impediment to the creation of responsive policy. Recommendation 2 starts to address a solution by recommending 'the government investigate the benefits of developing a simple online registration system for Australian franchisors'.⁵⁰

Finally, the franchisee will, ideally, engage advisers with franchise expertise. However this requires a level of expertise that not all franchisee advisers possess. As Solomon identified:

knowledge of business law may enable someone to 'read' a contract competently, but that isn't really the due diligence on the transaction itself... a business lawyer who is not up to date on what is happening in the franchise industry most probably will not 'spot' many of the contract language traps.⁵¹

Franchisees cannot always conduct adequate due diligence.

B *Franchisees Caused the Failure of their Franchisor*

In 1991 Australia's Franchising Task Force Report ('the Beddall report') identified some of the reasons for franchisor failure as under capitalisation of the franchisor, too rapid expansion of the franchise system, poor product or service, poor franchisee selection, franchisor greed, external factors, devaluation of the Australian dollar, an increase of import duties, the withdrawal of an important source of products, an aggressive and cheaper competitor, or a severe downturn in the economy.⁵² In the United States and the United Kingdom:

⁴⁷ [2005] FCA 1212 [para 22].

⁴⁸ D Noakes, 'Measuring the Impact of Strategic Insolvency on Employees' (2003) 11 *Insolvency Law Journal* 91, n 5, quoting Peta Spender, 'strategic insolvency arises when the bankruptcy is invoked due to strategic decision-making rather than being a passive response to market forces.

⁴⁹ Joint Committee on Corporations and Financial Services, Australian Senate, above n 9.

⁵⁰ Ibid para 4.81.

⁵¹ R Solomon, *License to Lie, Cheat and Steal: Impact of Acknowledgement & Integration Clauses* (2008) Blue MauMau

<w http://www.blumaumau.org/license_lie_cheat_and_steal_impact_acknowledgement_integration_clauses> at 15 May 2008.

⁵² *Report by the Franchising Task Force* to the Minister for Small Business and Customs, the Hon David Beddall, MP (1991) 2.7 – 2.10.

failure as a result of ‘franchising-related’ factors, [was assessed] by Cross as falling essentially into five key categories, being business fraud, intrasystem competition, involving franchise outlets being located too close, insufficient support of franchisees, poor franchisee screening and persistent franchisor-franchisee conflict.⁵³

Franchise lawyers add:

Bankruptcy provides a useful business tool for a company to reorganize its operations, deleverage its balance sheet, accomplish a sale of assets, obtain new financing or improve its capital structure. ... bankruptcy may assist a franchisor in addressing the following challenging business issues; overexpansion in the market and the need to eliminate units, an unworkable equity structure, desire to sell or merge with another entity, threat of franchisee litigation, desire to refinance but the lender has expressed concern about financial or other issues.⁵⁴

Although the causes of franchisor failure are under-researched when compared with other aspects of franchising a ‘feature of the known Australian franchisor insolvencies is that none of them was of the franchisees’ making.⁵⁵

C Parties will each Act in their own Interests

Australian franchisors had the opportunity to prove they could put other interests before their own when franchising was regulated by the voluntary Franchising Code of Practice (FCP). The FCP ‘was introduced in 1993 to address problems in franchising identified in the 1991 report by the Franchising Task Force.’⁵⁶ It was an opportunity for Australia’s franchisors to demonstrate they could self-regulate. In 1994 the Government commissioned a review of the FCP. Robert Gardini wrote; ‘as at 30 September 1994, 376 franchisors had registered with the FCAC [the body administering the FCP]... it appears that approximately 50 – 60 percent of franchisors are registered’.⁵⁷

Both the franchisors that did register and those that did not, acted in their own interest. Most banks required registration as a pre condition to providing lending support to the franchisor’s franchisees.

The franchise sector’s equivocal response to complying with the FCP may be an indication of how it would respond to the suggestion that all franchise agreements, voluntarily, include provisions addressing franchisees’ rights if the franchisor failed.

⁵³ In J Stanworth, D Purdy, and S Price, ‘Franchise Growth and Failure in the USA and the UK: a Troubled Dreamworld Revisited’ (1997) 2(2) *Franchising Research: An International Journal* 75, 78-9, citing J Cross, ‘Franchising Failures: Definitional and Management Issues’ (1994) *Society of Franchising Conference Proceedings* 2-4.

⁵⁴ S B Foster and C Johnsen, ‘The War of the Worlds: Bankruptcy Versus’ (Paper presented at American Bar Association, 28th Annual Forum on Franchising, Orlando, Florida, USA, 19 – 21 October, 2005) 1. In the USA the word bankruptcy encompasses corporate insolvency and personal bankruptcy.

⁵⁵ J Buchan, ‘Franchisor Failure in Australia - Impact on Franchisees and Potential Solutions’ (Paper presented at the 19th Annual International Society of Franchising Conference, London, UK, 20 – 22 May 2005) 13.

⁵⁶ R Gardini, *Review of the Franchising Code of Practice* (Australian Government Publishing Service, 1994) v.

⁵⁷ Ibid.

Those that did register may have been motivated by the credibility that the ‘FCP compliant’ by-line lent.

However, ‘the motor vehicle industry decided not to participate in the code, as have significant areas in the real estate sector.’⁵⁸ Those that did not register also acted in their own interest for reasons including; following their lawyers’ advice not to voluntarily expose themselves to the obligations the FCP imposed on franchisors, they had nothing to hide and thus concluded that registration with its attendant compliance requirement would impose a cost that they would pass on to franchisees for no gain, they did have something to hide and did not want to risk exposing themselves to a random audit, a small proportion of franchisors claimed not to know of the existence of the FCP. Thus the assumption that franchisors will act in their own interests is correct.

Conflicts of interest may, and do, create counter-incentives for complying with contractual obligations. Especially in long term contracts and in conditions of asymmetric information [of which entry into a franchise agreement is an example⁵⁹], the possibility of opportunistic behaviour appears considerably increased not least because the value of the contract and the investment depends on the [supplier] firm’s performance after the point of purchase. [Theoretically] [c]ontracting out would be a way in which consumers could avoid being exposed to the risk of their counter-party’s misconduct.⁶⁰

Georgosouli, writes that ‘the costs involved discourage’⁶¹ contracting out. In franchise agreements the cost, the standard form nature of the contract, and the franchisees’ lack of awareness of the risk of franchisor failure all contribute to pre-contractual conflicts of interest being resolved in favour of franchisors.

‘The literature assumes that the private goal of contracting parties is to maximize the shared value created by a contract (the “surplus”).’⁶² Underlying the notion of parties acting in their own interests is the assumption that parties to a relational contract will also act in the interests of the relationship. The vision the franchisees buy into is that a franchisor and its hard working, loyal franchisees make the team that builds a strong brand. But, from the perspective of a legal economist, ‘People will obey the law only if it is in their interests to do so.’⁶³

A franchisor wishing to exit the franchising model but continue operating its core business under a different model has the choice between strategic insolvency and other legal avenues that involve termination of the franchise agreements and paying damages to franchisees. Why would some not choose insolvency? ‘Laws are not costless.’⁶⁴ If the franchisor becomes strategically insolvent, the sunk cost of fitting out the premises and all other costs that a solvent franchisor voluntarily exiting franchising to pursue another business model might be required to reimburse to franchisees in a buy-back scenario, will not need to be reimbursed by the franchisor. The franchisor may decide that on

⁵⁸ Ibid.

⁵⁹ See J Buchan, ‘Ex Ante Information and Ex Post Reality for Franchisees - The Case of Franchisor Failure’ (2008) 36 *Australian Business Law Review* 407–31.

⁶⁰ Georgosouli, above n 21 citing I D C Ramsay, ‘Rationales for Intervention in the Consumer Marketplace’ (Occasional Paper for the Office of Fair Trading, 1984) 28-37.

⁶¹ Georgosouli, above n 21.

⁶² Scott and Triantis, above n 15, 2.

⁶³ C Veljanovski, *The Economics of Law* (Institute of Economic Affairs, 2nd ed, 2006) 58, 63.

⁶⁴ Ibid 65.

balance it is not in its interests to exit franchising by buying back its franchisees' businesses. It is cheaper to become insolvent.

V THE ADEQUACY OF CURRENT REMEDIES ON THE OCCURRENCE OF FRANCHISOR FAILURE

Remedies accessible by the franchisee include remedies for breach of contract, or for breach of the *Trade Practices Act 1974* (Cth).

A *Did the Franchisor Breach the Contract?*

For the plaintiff to have access to remedies for breach of contract the defendant must have breached the contract. A franchise agreement typically imposes a duty on the franchisee to:

(2) (c) carry on business activities in compliance with all laws, regulations, and codes of conduct and any instructions, directions, requirements and requests made by any statutory, governmental, industry or regulatory body, and in accordance with the highest standards of ethics and business practice. The franchisee shall also obtain and maintain all necessary permits and licences to enable the franchisee to properly operate the franchised business in accordance with this agreement and the law.⁶⁵

A requirement that the franchisee remain solvent, consistent with the requirements of the statute laws that a business must not trade while insolvent, is thus part of the franchisees' contractual duty under clauses such as cl (2) (c) above. Reciprocal contractual obligations on franchisors to obey the law do not appear in standard franchise agreements. Nor is the franchisor contractually bound to remain solvent.

A statutory obligation not to trade while insolvent is imposed on directors of all corporations by the *Corporations Act 2001* (Cth).⁶⁶ But a breach of the *Corporations Act 2001* (Cth) by the franchisor is not, of itself, a breach of the franchisor's obligations under the franchise agreement. Nor is it, of itself, necessarily a breach of the *Trade Practices Act 1974* (Cth). If the franchisor has not breached a provision of the franchise agreement, a claim for breach of contract cannot easily be mounted under contract law.

The franchisee may consider suing the franchisor for anticipatory breach, breach of a collateral contract, or pursuing a quasi-contract action such as unjust enrichment. The possibility of actions based on contract will not be pursued further as they do not present a clear way of overcoming the statutory stay on proceedings during winding up.

B *Impediments under the Insolvency Regime*

The appointment of an administrator triggers a stay of proceedings under s 440D of the *Corporations Act 2001* (Cth)⁶⁷ and 'enforcement processes cannot be begun or

⁶⁵ Butterworths, *Franchise Law and Practice* (Butterworths, Sydney, loose-leaf) Standard Form Franchise Agreement FP: 1030.

⁶⁶ *Corporations Act 2001* (Cth) s 588G.

⁶⁷ *Corporations Act 2001* (Cth) s 440D, Stay of proceedings

(1) During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:
(a) with the administrator's written consent; or

proceeded with unless the court gives leave under s 440F of the *Corporations Act*.⁶⁸ The appointment of a liquidator triggers a stay of proceedings under s 471B of the *Corporations Act 2001* (Cth). Any stay of proceedings make it difficult for franchisees to commence or continue litigation.

At a more basic level, an additional hurdle for a franchisee seeking damages for breach of contract by the franchisor is that if the franchisor is in administration or insolvent, it is unlikely that there will be money available to meet a judgment.

VI SOLUTIONS

For franchisees, a workable way forward from franchisor failure problem ex ante could take two forms: improved risk assessment, and implied terms.

A *Improved Methodology for Assessing Risk*

It is reasonable to expect that the major legal and commercial risks that a franchisee could face as a consequence of signing the contract would be addressed in the standard contract. The Australian Risk Standard, AS/NZ 4360/2004 ('the Risk Standard') provides a methodology for identifying and managing risk in a business that could be used to determine whether the franchise agreement addressed or needed to address key risk items. One risk assessment matrix is:

Known knowns	Day to day events	How to address in contract
Known unknowns	Franchisor might fail or decide to become insolvent: <ul style="list-style-type: none"> • Genuine • Strategic Franchisee might die Franchisor might delay commission.	Weight with respect to impact. If impact would be severe on either party, include in franchise agreement.
Unknowns	Market for product or service might evaporate.	Cover with 'motherhood' clauses. ⁶⁹

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

(2) Subsection(1) does not apply to:

(a) a criminal proceeding; or

(b) a prescribed proceeding.

440F Suspension of enforcement process

During the administration of a company, no enforcement process in relation to property of the company can be begun or proceeded with, except:

(a) with the leave of the Court; and

(b) in accordance with such terms (if any) as the Court imposes.

⁶⁸ R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 13th ed, 2007) 1374.

⁶⁹ Motherhood clauses impose general obligations such as to cooperate, act reasonably, and in good faith.

In the context of the Risk Standard, franchisor insolvency is a risk that should be evaluated and planned for as a ‘known/ unknown’ ie – it is known that it could occur, but unknown if or when it will occur.

‘Opportunity not opportunism’ recommends that the absence of warnings about franchisor failure should be addressed thus:

Recommendation 1 (para 4.80) The committee recommends that the Franchising Code of Conduct be amended to require that disclosure documents include a clear statement by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure.⁷⁰

This would not be a complete solution but it would put franchisees on notice that the franchisor may fail.

B *Trade Practices Act – Based Solutions*

Part V [of the *Trade Practices Act*] seeks to address information asymmetry in relation to transactions in three different ways ... in relation to supply of goods and services, liability for false representations is imposed on the supplier who is in the best position to know the characteristics of those goods and services.⁷¹

The supply of a franchise business to the franchisee business consumer is similar, theoretically, to any other product that is supplied with a non-negotiable contract, and a projected life span of the number of years denoted in the franchise agreement. A fundamental assumption is that the franchise system will work, to the standard described, through to the end of the term. The disclosure document that franchisors provide to prospective franchisees in compliance with the Code is designed to ensure that franchisees, as business consumers, have access to sufficient information to assess the proposed purchase of the franchise. The same theme applies to consumers under Part V Divisions 2 and 2A, which:

focuses on transactions rather than on the structure of markets. Its aim is to regulate market failure arising from information asymmetry ... The consumer protection provisions are designed to ensure that there is sufficient information available to potential consumers so that consumers will get ‘value for money’.⁷²

When a consumer purchases a product or service in Australia, and the product or service does not meet standards, the consumer has rights to claim against the supplier or manufacturer. These options are currently not available to franchisees that purchase into a franchise network that turns out to be faulty, and fails.

Consumer policy seeks to address issues that arise during the life of the contract through implying terms and warranties into contracts for the sale of goods and the supply of services through Part V Division 2 (suppliers) and Division 2A (manufacturers). The franchisor failing before the end of the franchise term is arguably analogous to a product

⁷⁰ Joint Committee on Corporations and Financial Services, Australian Senate, above n 9, xiii.

⁷¹ S Corones and P H Clarke, *Consumer Protection and Product Liability Law* (LBC Information Services, 2nd ed, 2002) 5.

⁷² *Ibid.*

or service failing. This idea is not new. The Trade Practices Review Committee (Swanson Committee) identified, in 1976, that:

The most serious problem ... related to losses, not now recoverable at law, arising from the termination of the franchise by the franchisor. Such a provision should be read into every relevant contract, and thus this law would operate on the same lines as Division 2 of Part V of the Act operates to incorporate conditions and warranties in consumer transactions. The sole purpose and effect of the law should be to provide some minimum fair terms of settlement for terminated franchisees.⁷³

Part VA of the *Trade Practices Act 1974* (Cth) concerns damages for defective goods. Under current law, franchisees would be ineligible to claim under Part V Divisions 2 or 2A of the *Trade Practices Act 1974* (Cth) as they are neither ‘consumers’ under s 4B of the *Trade Practices Act 1974* (Cth), nor are they purchasing ‘goods’. They are, however arguably purchasing ‘services’ for the purposes of s 4(1) of the *Trade Practices Act 1974* (Cth). For Part V Divisions 2 and 2A to apply to franchisees of failed franchisors a definition of ‘business consumer’ would need to be added to the *Trade Practices Act 1974* (Cth), and consequential amendments would be required including expressly extending Part V Divisions 2 and 2A to include business consumers.

To provide protection to franchisees the following terms should be implied into all franchise agreements.

- The franchisor will have an obligation to carry on business activities in compliance with all relevant legislation. This is consistent with franchisees’ typical contractual obligations. It would mean that franchisees could sue the franchisor for breach of contract if the franchisor failed to meet its statutory obligations, in the same way as the franchisor can sue the franchisee relying on a typical clause such as that in Part V of this article. Currently franchisees have no direct recourse if a franchisor breaches, for example, the *Corporations Act 2001* (Cth).
- The franchisor must meet all obligations between itself and third parties in a timely manner. This would provide franchisees with a contract-based lever that would otherwise be out of their reach because of the doctrine of privity of contract.
- This would provide franchisees with a contract-based lever that would otherwise be out of their reach because of the doctrine of privity of contract.

A breach of any of these implied terms could give rise to a right for the franchisee to terminate the franchise agreement and sue for damages.

Additional terms should be implied into all franchise agreements to provide consumer protection for franchisees in the event where an administrator is appointed to the franchisor. Recognising that administration is an opportunity for the franchise network to be revived, and that the administrator needs time to attempt a restructuring, it is proposed that the appointment of an administrator would set a two-step process in motion: This would be similar to the current termination opportunity that franchisors have under Regulation 21 of the Code.⁷⁴

⁷³ *Trade Practices Review Committee (Swanson Committee) Report*, PP No 228/1976, (1976) paras 5.1, 5.7, 5.9, 5.12 – 15.

⁷⁴ Franchising Code of Conduct 1998 (Cth) reg 21, Termination — breach by franchisee

- STEP1: when administrator is appointed, franchisees can give notice to the administrator that if a satisfactory resolution (restructuring or sale to appropriate buyer) is not found within x^{75} days, franchisee will have the right to terminate the franchise agreement, without this being a deemed breach by the franchisee and without it compromising any other rights the franchisee may pursue.
- STEP 2: if the administrator does not meet the requirements in x days, the franchisee can terminate the franchise agreement and express its losses as an unsecured creditor in the franchisor's administration/ subsequent insolvency.

The terms should not incentivise the administrator to 'fast track' a decision to recommend the franchisor entity be wound up. The rights thus granted to franchisees would be supported by three consequential rights.

- On the appointment of the administrator, all future periodic payments by the franchisees to the franchisor (royalties, advertising, rent) cease to be payable unless the administrator delivers the subject service.
- Premises rent and any other payments payable to the franchisor for on-payment to landlords or other suppliers would become payable direct to the suppliers. This second change would not disadvantage the administrator but would help franchisees demonstrate to third party suppliers whether the franchisees could have viable businesses as independent operators.
- Third; the franchisee would have the right to terminate the franchise agreement and to file a proof of debt as a creditor for a pro-rated amount of its initial investment if the franchisor was placed into liquidation.

These consequential amendments would provide an incentive for the administrator to recognise the franchisee as a party with rights, shifting the emphasis off the franchise agreements and premises leases only as assets or liabilities. It would enable the administrator to keep the franchise network together if a viable buyer was found quickly, but would avoid an administrator subjecting franchisees to a prolonged period in limbo.

Implying the proposed terms into all franchise agreements via the *Trade Practices Act 1974* (Cth) would mean current asymmetrical provisions that give franchisors, the right to terminate the franchise agreement, without notice, relying on regulation 23 (b) of the Code if the franchisee 'becomes bankrupt, insolvent under administration or an externally administered body corporate' be removed from franchise agreements.

(1) This clause applies if:

- a franchisee breaches a franchise agreement; and
- the franchisor proposes to terminate the franchise agreement; and
- clause 23 does not apply.

(2) The franchisor must:

- give to the franchisee reasonable notice that the franchisor proposes to terminate the franchise agreement because of the breach; and
- tell the franchisee what the franchisor requires to be done to remedy the breach; and
- allow the franchisee a reasonable time to remedy the breach.

(3) For paragraph (2) (c), the franchisor does not have to allow more than 30 days.

⁷⁵ The number x could vary with type of business. For example, it is relatively inexpensive to keep a lawn mowing business in operation, whereas a franchisee that sold wedding dresses which are paid for now and enjoyed in the future may have trouble attracting customers as soon as the franchisor's financial woes became public knowledge.

Removing current contract and Code-based asymmetrical provisions that provide rights for franchisors on franchisor administration or insolvency but not corresponding rights for franchisees would mean franchise agreements would be shorter, and fairer.

VII CONCLUSION

Either because current regulation is piecemeal or more fundamentally, because franchise relationships are too complex to reduce to precise statutory terms, the heart of franchising's legal structure is still contract.⁷⁶ Contracts are pivotal to the relationship between a franchisor and its franchisees. In the context of economics, contract terms play a dual role; 'creating the correct marginal incentives on a contractually specified measure of (or proxy for) performance, and ... the creation of rents sufficient to make the relationship self-enforcing.'⁷⁷ But, the marginal incentives created within the standard form franchise agreement are not sufficient to enable the franchisee to protect its interests if the franchisor operates its business so poorly or so cynically that an administrator or liquidator is appointed. It has been demonstrated that all 76 000 franchise agreements in Australia cannot, for a range of reasons, be expected to contain negotiated terms providing for franchisor failure. In theory, franchisees can negotiate some protection into the franchise agreement. In practice, most franchisees cannot do so.

The nature of the franchise agreement, the difficulty of conducting adequate affordable due diligence, the legitimacy of strategic insolvency, the fact that the Code may not bind administrators and the stay on proceedings during administration and insolvency mean that the most certain avenue forward for franchisees is for terms to be implied into all franchise agreements via the *Trade Practices Act 1974* (Cth).

⁷⁶ Hadfield, above n 14, 939.

⁷⁷ B Klein, 'The Economics of Franchise Contracts', (1995) 2 *Journal of Corporate Finance* 9, 19 reprinted in F Lafontaine, (ed) *Franchise Contracting and Organization* (Edward Elgar, 2005) 323.