Foreword

Franchising is, in the words of Australia's 1997 *Fair Trading Report*, 'an increasingly popular form of economic organisation providing an alternative means of expanding an existing business or an alternative means of entering an industry'. It is a method of business operation which has revolutionised the distribution of goods and services in most industry sectors and has transformed the business landscape of most countries. As franchising increases its influence internationally the issue of its regulation assumes increasing significance. The regulation of entrepreneurial activity – of which franchising is one of the purest expressions – is never straightforward. The regulatory debate – initially in relation to the need for a dedicated regulatory regime and then as to its shape and content – is sustained and often passionate. Dr Spencer's pioneering book makes a valuable contribution to this debate.

The OECD has pointed out that 'entrepreneurship and business activities are shaped not only by markets, but also by regulatory and administrative environments established by governments'. This is particularly true of franchising. In some cases, such as those of China and Vietnam, the introduction of a regulatory regime recognising franchising as a legitimate and viable method of business operation has been a necessary prerequisite to the development of a viable domestic franchise sector. In most cases however the reason for embracing dedicated franchise regulation is to address what the recent Australian *Opportunity not Opportunism* report described as 'differing expectations about the obligations of each party to the agreement' and an 'asymmetric power dynamic within franchise agreements, with potential to lead to abuse of power'. Dr Spencer is not ambivalent in her belief that monitoring and regulation are necessary to address potential areas of abuse to ensure that the economic and welfare objectives promoted by franchising are not frustrated by inappropriate conduct that can result not only in financial and social cost to franchisees, but also lead to costly market inefficiencies. In this she is not alone.

For many years the US was in splendid isolation in imposing a franchise specific regime on its franchise sector to supplement the underlying commercial laws of general application. California – the cradle of business format franchising – was the first jurisdiction to adopt franchise specific regulation. Its 1971 Franchise Investment Law, based on the securities law model, imposed franchisor disclosure and registration requirements and

was followed at the end of that decade by a federal disclosure law. The international community, although quick to embrace the US franchise model, was not enthusiastic about embracing the US manner of its regulation. By the year 2000 only 17 countries had introduced franchise-specific legislation. There has nevertheless been a significant trend to legislation since then and today over 30 countries have dedicated franchise regulation.

The catalyst for legislative intervention has been the increasing recognition that franchise contracts are, in the language of the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*¹ ‘not ordinary commercial contracts’ and that, in the words of Australia’s 2008 *Opportunity not Opportunism* report, abuse of the ‘inherent and necessary imbalance of power in franchise agreements . . . can lead to opportunistic practices’. While there is increasing recognition of the ‘relational’ character of franchising, the extra-legal norms which explain relational contracting in the context of contracting equals are less compelling in the context of the typical business format franchise which is characterised by both an information imbalance and a power imbalance. Judicial developments have not progressed to the stage where the general underlying law provides adequate protection for franchisees. Legislative solutions have been increasingly sought. Yet, while the case for remedying the information imbalance by mandatory prior disclosure is widely accepted today – and is indeed the rationale for UNIDROIT’s *Model Franchise Disclosure Law* – the power imbalance raises more sensitive issues and remains a difficult, and a controversial, issue.

Dr Spencer argues that franchising must be understood in terms of its risks and that the question is not whether to regulate but how to regulate. This sentiment has increasing support internationally. It may have been regarded as radical at an earlier stage in the development of franchising but today has wide and increasing support as domestic sectors struggle with the challenge of regulating this dynamic and unique business relationship. Commercial risk is an inevitable incident of entrepreneurship and business creation in a free enterprise society. The challenge for franchise regulators is to minimise those risks arising from the unique dynamics of the franchising relationship while leaving the commercial risks to the parties themselves. Although there is increasing international recognition of the need to regulate beyond the scope of the underlying business laws of general application, there is no unanimity among the 30 regulated sectors as to the appropriate regulatory tools let alone the extent of their application. Prior disclosure, registration, controls on conduct or dispute resolution are utilised either individually or in a range of combinations and permutations by

¹ [2002] 2 All ER (Comm) 849 at 871.

the regulated regimes and there is little consistency in scope or extent even among those jurisdictions adopting the same regulatory strategy.

Dr. Spencer urges governments to embrace regulatory process that is consultative, identifies the harms and potential solutions, implements appropriate tools, monitors outcomes, and adjusts accordingly. Such process, she suggests, will result in 'increased permeability among layers of governance, and so enhance their effectiveness'. Her belief that, through proper process, all layers of governance can interact more effectively together hinges on collaborative process, a process in which the regulator's new role is not to impose rules, but to promote best regulatory process. This, she notes, is not an easy transition, but it is a significant one.

Dr Spencer has performed a valuable service to the international franchising community in writing this book. Its strength is not simply in making the case for franchise regulation which those who practise franchising in a regulated environment such as Australia readily acknowledge has had a strong and positive influence on sector development for the benefit of all stakeholders. Dr Spencer's comprehensive survey of franchise regulation globally and her conceptual analysis of the regulatory tools applied makes a very important contribution to the regulatory debate. Of particular interest is her argument that alternative regulatory approaches, including self-regulatory mechanisms, should be explored and that legislative intervention where necessary and appropriate should draw on the full range of regulatory tools.

I, like the author, believe that the question for domestic franchise sectors is not whether to regulate but how to regulate and her comprehensive survey and analysis of regulatory strategies and tools will be a valuable resource not only for unregulated sectors which are considering regulation but also for regulated sectors as they refine and reshape their regulatory scheme.

Dr Spencer's hope for her book is that it will lead to a better understanding and harmonisation of franchising regulation. Given the massive political, social, economic and commercial diversity of the international franchising community her hope for harmonisation may be too optimistic: even UNIDROIT's *Model Franchise Disclosure Law* has been influential as a beacon rather than as a template. But, Dr Spencer's hope for a better understanding of franchising regulation will undoubtedly be met. This is the strength of her contribution.

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