- a New Zealand commissioner becoming an ex-officio member of the ACCC, and similarly, an Australian sitting, ex-officio, on the New Zealand Commission
- increased staff transfer
- an enhanced exchange of information.

A formal 'second generation' arrangement, such as that between Australia and the United States, would also be well worth considering.

This could be especially valuable in the regulatory areas of both Acts (that is, for access and pricing matters) where direct experience of others' laws and practices would be very useful.

Conclusion

Clearly, there is a strong similarity between our respective competition laws. By disposition and history, we have bodies of law that are developing an almost perfect congruence. This is something I welcome.

However, there are ways to make our law work better. And on this I would welcome closer links and closer cooperation.

The health of franchising in 2002: an ACCC viewpoint

Following is the edited text of a speech by Commissioner John Martin to the Franchise Council of Australia Annual Conference, 10 September 2002.

Commissioner Martin acknowledged that the Commission's level of interest in and support for the franchising industry is reflected not just in his involvement but by the participation of the following ACCC colleagues:

- *Rose Webb, Regional Director for New South Wales and Aggie Marek, Small Business Manager, both based in Sydney.*
- *Brendan Bailey known to many in the franchising industry as the Commission's national manager overseeing franchising matters from Canberra.*

A question and answer session on enforcement under the Trade Practices Act, with Commission staff and senior representatives of the Franchise Council of Australia participating, also provided information for the delegates.

The franchising industry continues to grow in Australia. The Franchise Council of Australia's (FCA's) submission to the Independent Review of the Trade Practices Act—the Dawson Committee—reminds us that more than 98 per cent of the participants in franchising are small businesses. Australia has some 747 franchise systems with, collectively, 49 400 franchise outlets nationwide. More importantly, the franchising industry employs 700 000 people.

My overall assessment is that franchising in Australia is professional in its operations, optimistic in outlook and, collectively, a significant driving force in the Australian economy.

Administration of the Franchising Code of Conduct

The Commission has statutory responsibilities under the Trade Practices Act to administer the mandatory Franchising Code of Conduct.

On average, during the year ended June 2002, the Commission received 240 inquiries and complaints per quarter on franchising. This is an increase above the 150 per quarter that I reported on last year. The bulk of the increased contacts were clarifications connected with the introduction of a series of amendments to the code effective from 1 October 2001. There were also the continuing difficulties encountered by travel agent franchisees because of the substantial disruptions in the airline industry. Many of those inquiries overlap procedural areas of administration under the Commonwealth's Corporations Act, the province of our colleagues in the separate regulatory area of company law.

The Commission is also receiving more requests for our publications. We are concerned about a recent increase in allegations about misleading and deceptive conduct and these tend to be about anticipated earnings and territorial issues.

The Commission has defined functions including that of a law enforcement agency and a disseminator of information, particularly on compliance with the law. The Commission does not make the law. It does not have responsibility for legislative changes to the Trade Practices Act and the Franchising Code of Conduct. The regular reviews of the Commission's functions and activities

demonstrate that the Commission and the Trade Practices Act are carefully scrutinised.

The Commission's views on legislation are sought but policy agencies such as the Department of the Treasury and the Office of Small Business in the Department of Industry, Tourism and Resources are responsible for advising the relevant ministers and the government on the content of laws such as the Franchising Code of Conduct.

For its part, the Commission provides information on the Trade Practices Act. Your program for this conference is spot-on in stating the Commission believes that 'prevention is better than a cure'.

The Commission moved quickly to have its compliance manual on the franchising code issued as soon as it could to coincide with the raft of amendments effective from 1 October 2001. To do this, we commissioned a consultant from the industry to update the manual. When possible we seek the views of the industry to help us perform our statutory functions.

We have also updated our range of free publications and flyers such as *The franchisees guide* and the generic publication, *Small business and the Trade Practices Act*. We continue to attend franchising and investment expos to interact with your industry and raise awareness of small business of their rights, obligations and remedies under the Trade Practices Act.

At the major expo in Sydney in April this year we were located opposite the FCA. This afforded the opportunity for our organisations to provide complementary assistance while competing vigorously for expo-goers' attention.

Our twice-yearly satellite broadcasts to more than 100 small business and community locations across Australia continue to raise key issues for debate on trade practices issues. These range from retail tenancy, the supply chain for fresh produce. the travel industry, advertising and selling to warranties and franchising. In the question and answer sessions with our expert panel we are often asked about unconscionable conduct in business transactions.

Franchising is a key aspect in all of these small business-focused activities.

The Commission's processes

The matter of enforcement action by the Commission is certainly topical. We have our critics and our supporters. The Commission's processes and activities are subject to external review by the courts, tribunals, the parliament, independent reviews and the Commonwealth Ombudsman. The Commission is accountable at several levels. It is scrutinised for taking enforcement action and, ironically, sometimes criticised for not taking it.

The Commission is active in handling consumer and small business inquiries and complaints. To put matters in perspective, for the year 2001, the Commission received a total of about 95 000 inquiries and complaints. It has a staff of 500 with about 145 contributing to enforcement matters.

The Commission does not pursue every complaint it receives. For franchising, it litigates only a fraction of 1 per cent of the substantive complaints it receives. It is far more likely to encourage internal dispute resolution or mediation. It often refers callers to the Office of Mediation Advisor and we acknowledge the good work of that service.

The Trade Practices Act recognises that private actions may also be taken. The Commission is not the only party that litigates under the legislation.

As I mentioned last year when speaking to your conference there is an under-current of criticism that the Commission has been overzealous when seeking to clarify the statutory provisions on breaches of the franchising code and unconscionable conduct in business transactions. This was highlighted once again by the FCA Chairman in his FCA news report of July/August 2002 in which he accuses the ACCC of, among other things, having 'contributed to an environment of uncertainty that needs to be addressed'.

Yet the Commission has not singled out franchising. Its actions have only responded to complaints that were well investigated before action was taken. The Commission has also run significant unconscionable conduct cases on retail tenancy and the financial sector. Given the misinformation surrounding some of the franchising court cases, it is worth explaining procedures the Commission follows before deciding to take legal action.

First we discuss the problems with the franchisees and the franchisor to encourage them to resolve them amicably. The Commission makes it clear that its initial role is to hear both sides of the story.

Many of the franchising matters are essentially disagreements over internal management issues. It is reassuring that most parties tend to reach an understanding without any fuss or adverse publicity.

When this is not possible the Commission steps aside to allow the parties to go to mediation. Only

when there is no other option will the Commission take further action such as seeking a court enforceable undertaking from an offending party or, in extreme cases, go to litigation.

Some recent franchising cases have not directly involved breaches of the code but relate to breaches of other sections of the Trade Practices Act. One was mainly a product safety matter, another about alleged misleading, deceptive and unconscionable conduct.

A separate area of serious concern that has come to the Commission's attention is the emergence of some bogus franchising-related scams. These are operators that you would not tolerate in your industry. They are the fly-by-night scam artists who purport to offer a franchise business to simply obtain deposits from gullible investors. Their tricks and excuses represent a blatant disregard for the law and a compelling greed that can swallow up the life savings of their victims.

There may be scope for the franchising industry to consider an industry-based response. It has been suggested that an industry-wide bond scheme be established to enable deposits to be held by an independent stakeholder—or an industry registration process.

For its part the Commission will continue to go in hard whenever it can against those who are improperly trading on the good image of the franchising industry.

The Commission's use of the media

In its submission to the Independent Review of the Trade Practices Act, the Commission outlined its processes and rationale for publicising what it does via the media.

Simply stated, the rationale for why the Commission provides information to the media is because it helps to keep the public informed about an important law and on the operations and role of the Commission. What cannot be denied is that there is keen interest in what the Commission is doing.

The rationale finds its analogy in the long-held principle observed by the courts themselves in recognising that publicity is the soul of justice—it keeps all involved, including judges, under scrutiny.

The Commission does not publicise matters it has under investigation, only ones it is taking action on. Occasionally someone in the media may obtain a tip-off from other parties—sometimes we believe the party under investigation leaks the information—and the Commission is in a difficult position and has to clarify the matter.

The Commission's role is not to judge and as far as possible it must operate transparently. We set a high standard for ourselves. We tell the public what we are doing and what we are alleging. We must then press for an outcome that we believe treats consumers and small business fairly. We achieve this by administrative means and, in some cases, litigation. In litigation we are not the ones to determine the outcome. That is for the courts. Each legal action we take exposes us to public scrutiny and potential costs.

Our system of law recognises that the accused is innocent until proven guilty. The Commission observes that principle. It must, however, explain what it alleges and the issues. In doing so its focus is on accuracy. Without the Commission's public statement there is a risk that curiosity and ill-informed debate may misstate the issues and cause irreparable harm to the business that is the subject of the allegation.

Our media strategy is also part of a wider communications strategy. We use it to disseminate information. In issuing media releases we apply a set of principles. These confine comments on litigation to what is contained in the statement of claim before the court. The media release must be moderately worded and accurate. We observe the court principles on the appropriateness of media releases set out in *TPC v Cue Design Pty Ltd & another* (1996). The Commission's media activities have been examined, favourably I suggest, by the courts in other cases such as *Eva v Southern Motors Box Hill Pty Ltd* (1974–77) and *ACCC v Nationwide News Pty Ltd and others* (1996).

The Commission has a reputation for meeting its critics in open and constructive debate. Few agencies in the Commonwealth are asked to report and account for their actions more than the Commission.

Franchise industry round table

The heightened debate about the accountability of the Commission is relevant to some ideas we have for franchising. I believe it may be timely for the Commission to convene a round table with the franchising industry and other government agencies to exchange views. A national franchising round table would enable the industry to give us its views on administration of the code and the Trade Practices Act in general. In turn, the Commission and other government agencies can offer

comments on how we see effective compliance by business with the laws that we are obliged to enforce.

I would like to see a round table become a regular (say twice-yearly) event. The Franchise Council of Australia is well placed to play a key role in such a process.

Franchising, by definition, shows us what can be achieved by working together for a common goal. The Commission is receptive to the lessons offered and the wisdom contained in the industry and within the Franchise Council of Australia.

The 'living' nature of the franchising code

Change is a two-edged sword. It can be disruptive and it can be constructive.

The Franchising Code of Conduct is working well. Yet there is always scope for improvement. Announcements of changes to the code are, of course, the responsibility of the minister. However, the Commission maintains its interest in reviews and in proposals for legislative changes. The recent failure of a key airline industry player and its impact on franchisees demonstrated the need to reduce the period of notification of a material change, such as in ownership of the franchise, to a shorter period than the 60 days specified in clause 18.

There are also good arguments for enhancing the disclosure requirements when a franchise outlet changes hands. A franchise outlet should never change hands without the consent and knowledge of the franchisor. But there may be scope to amplify the basic requirements under the code at the initial negotiation stage. Franchisors might welcome that proposal because they are the ones who have to attend to the residual complications.

It has also been suggested that the code could be complemented by a voluntary system of accreditation or registration, administered by the FCA. Such a scheme could address fundamental competencies for franchising systems and help isolate fly-by-night operators faster and more effectively. It could also help ensure franchisors are both aware and equipped to comply with other laws such as occupational, health and safety and public policy laws such as those that apply in the food industry.

Franchise experience in Japan

Japan does not have an industry-wide mandatory franchising code. It does, however, have sector-specific regulation of franchising in such areas as retailing.

The *Medium-small Retail Business Promotion Act 1973* (Japan) lays the foundation with disclosure obligations that comprise five main categories supplemented by a ministerial order. The five main categories cover matters such as deposits and entrance fees, key conditions, details of assistance, intellectual property and renewal and termination details.

The additional ministerial order contains 17 items of information to be disclosed. These items include details on solvency, financial statements, the number of outlets, litigation history, restraint clauses, the amount of on-going fee to be paid and the interest rate applicable.

This all sounds rather familiar to us in Australia. It shows the Australian code is not unique in type and detail of information required to be disclosed.

Conclusion

The franchising industry in Australia continues to grow. It has set an enviable benchmark for sound business practices. Your willingness to support the mandatory code shows that the industry overall welcomes transparency and disclosure.

The Commission frequently interacts with other industries and a recurring comment is the favourable position that the franchising industry has achieved through its mandatory code.

As I have indicated I believe it is timely to set up a regular round table between the Commission and the franchising industry. There are clearly some challenges and opportunities that need to be discussed constructively.

The Commission enjoys working with you and seeks to contribute toward prosperity for your industry. In keeping with the theme of this year's conference, may our mutual horizons continue to expand to the benefit of fair competition and consumer satisfaction.