ECONOMICS AND INDUSTRY STANDING COMMITTEE

Seventh Report — "Inquiry into the Franchising Bill 2010" — Tabling

Resumed from an earlier stage of the sitting.

MR W.J. JOHNSTON (Cannington) [12.24 pm]: I rise to speak to the seventh report of the Economics and Industry Standing Committee, titled "Inquiry into the Franchising Bill 2010". As the member for Riverton pointed out, I have written a minority report and it is appended to the end of the report.

I start by thanking the committee staff—our principal research officer, Tim Hughes, and our research officers, Kristy Bryden and Foreman Foto. The committee has had a very busy time with the inquiries referred to us by the house, such as the caravan inquiry. In the last 12 months, the gas inquiry dominated our work and caused delay with the reporting date for this bill. The gas inquiry was incredibly complex and although this report is not as detailed as that report, it came immediately afterwards. I know that the chairman shares my view that the staff were under considerable pressure to complete that previous complex report and we needed them to go on leave because of their accrued time. The fact that we are now presenting another report in such short order is a credit to the staff. We appreciate their work and we know that Kristy and Tim are about to disappear on holidays again, understandably given the enormous pressure. Therefore, Foreman will be our foreman for a little while! On behalf of every member of the committee, I want to say how much we appreciate the work that the committee staff has put in to not only this inquiry, but also the previous inquiry. I also thank all the members of the committee for their good humour, including the member for Riverton as the chairman, the members for Collie–Preston, Kingsley and Geraldton, and our co-opted member, the member for Southern River, who is the sponsor of the bill.

I am dissenting from this committee's report because I believe that the bill should be supported in an amended form. No doubt we cannot legislate for good behaviour; however, that does not mean we should legislate in favour of bad behaviour. There is no question that some people who support the bill have overblown the potential benefits of the legislation, but in the same way many people have made overwrought criticisms of the potential negatives of the legislation. It is also absolutely true that federal regulation would be preferable to a state-based regime. I accept that and I made comments in my minority report to that effect. However, after the Ripoll inquiry, which was the seminal piece of work done by a federal committee into the franchising industry, a specific recommendation was made for the term "good faith" to be included in the code of conduct. For whatever reason, that was left out of the federal code and, in my view, that was a mistake. I go into the reasons why it was a mistake in my minority report and I will not repeat all those comments now. However, I will focus on the question of end of agreements.

It is bizarre that at the end of the agreement some franchisors somehow believe that they have no obligation to the continuing business of the franchisee. I understand that the Acting Speaker (Mr A.P. O'Gorman) has a franchise business of his own. Let me make it clear that some of the evidence that we heard is that franchising agreements are commonly becoming shorter and shorter. A famous case in Western Australia is Competitive Foods Australia Ltd and Yum! Restaurant Pty Ltd. Everybody knows about that case because it is a high-profile case. However, people do not understand that many of the so-called mum and dad businesses with franchisors, which are also quite small, have terms of only five years. An important issue needs to be understood; if someone is paying for their franchise for only five years, they must recover the franchise costs over five years. That means the franchisee needs a 20 per cent net return on the cost of their franchise arrangement each year or they lose out on the franchise. In addition to that 20 per cent net return, a franchisee also needs to return the franchise fee, which is often five or six per cent of gross turnover, not net turnover. People are being squeezed more and more. We could amend the code to include a minimum term of, for example, 10 years that would reduce the needed rate of return from 20 per cent to 10 per cent, or we could introduce a perpetual franchise arrangement. Whenever a perpetual franchise arrangement is mentioned to people in the industry, particularly the franchisors, there is apoplexy. Why is it that at the end of a 20-year or 30-year franchise agreement all the goodwill built up by the franchisee suddenly becomes the property of the franchisor? The franchisee makes payments for his franchise agreement during the term of the franchise, and whatever intellectual property or brand contribution the franchisor is making to the business is recovered in those franchise payments. The franchisee is left with his sweat equity at the end of the agreement period. The idea that a franchisor can refuse to renew the franchise arrangement and onsell what is effectively the goodwill content of the franchisee's business to another is, to me, abhorrent. I go into some detail about my views on that in the minority report and will therefore not go over them in great detail here. However, I will comment on the question of redress orders, because the committee rejects the idea of redress orders and I make some comments on them in my report. Paragraph 2.74 of the majority report states —

> Mr Sean O'Donnell advised the Committee that:

> *The form of order appears to subvert the parties' right to contract and allows an agreement to be forced on a party who doesn't want it.*

It does go on; however, the point I make is that, yes, that is what a redress order does. It is what a renewal order does. It is an extraordinary power to grant to a court, but it is not unique. We already have these arrangements in industrial law. As a former union official with nine years' practice in the industrial commission, I do not remember ever winning an unfair dismissal case only to have the employers say, "Gee, that was a good decision." The idea that contracts are restored and everybody is happy about it is not the issue. The issue is whether there is unfairness and how we remedy it. If people can come up with a better remedy than the orders proposed by the Franchising Bill, that is fine, but I am not sure what they are. Remember, the conditions of the order will be a decision of the court; it is neither the franchisee nor the franchisor but the court that determines the conditions. Yes, it is an extraordinary power, but it is not a unique power and it is not an unreasonable power in my view. The committee does not agree with me and, as I state in the minority report, I respect the fact that the committee has, having reviewed the same evidence, come to a different conclusion.

I agree with the member for Riverton; that is, I think some of the claimed benefits for the proposed legislation have been overblown. Many aspects of the relationship between a franchisee and a franchisor will not be significantly affected by the passage of the bill. However, for me, that is an argument for the passage of the bill. I am not saying that the additional rights for a franchisee, and indeed for a franchisor, will be revolutionary; I am saying they will be evolutionary. The fact that the commonwealth Ripoll inquiry supported the inclusion of good faith in franchising agreements is a strong argument. Finally, I will conclude by saying that many people said to us that we should wait until 2013 and let the commonwealth put it into the federal arena. It could be argued that if people are prepared to accept it in 2013, they should be prepared to accept it in 2011. It is not an argument against the sovereign Parliament of Western Australia acting when it can see the need to do so.

MR P. ABETZ (Southern River) [12.33 pm]: The Economics and Industry Stranding Committee was charged to check the validity of the Franchising Bill 2010 and to determine its cost implications and whether it would enhance the Franchising Code of Conduct. As the initiator of the Franchising Bill, I was co-opted to the committee by Parliament and I attended every hearing. However, I did not have any voting rights and thus my name does not appear on either the minority or the majority report. I concur with the minority report that the expert evidence presented to the committee simply does not support some of the recommendations in the majority report; indeed, the recommendations go beyond the committee's terms of reference. Nevertheless, the committee process had a number of useful outcomes.

A review of the findings of previous inquiries into franchising led the committee to accept the premise of the bill; namely, there are serious problems in franchising that need to be addressed. Every inquiry held over the past 10 years recognised the abuse of franchisees by franchisors and made various recommendations. The bill picks up two of the most oft repeated recommendations—that the Franchising Code of Conduct should have a good faith clause and there should be penalties for breaches of the code. I am delighted that the expert evidence available to the committee by way of written legal opinions from Malcolm McCusker, QC, Hon Daryl Williams, QC, Leo Tsaknis, Alan Robertson, SC and now a Federal Court judge, and Peter Quinlan, SC, powerfully repudiated the Franchise Council of Australia's scare and misinformation campaign that was supported by very poorly researched—I use the words loosely—legal research.

Debate interrupted.

[Continued on page 4810.]