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The Principal Research Officer  
Standing Committee on Economics and Industry  
Level 1, 11 Harvest Tce  
WEST PERTH WA 6005



To the Principal Research Officer,

I write in support of the Private Member's Bill (Franchising Bill 2010) proposed by the member for Southern River, Peter Abetz.

Having dealt first hand with a number of franchising issues, 'rogue' franchisors and embattled franchisees in my own electorate, I'm all too familiar with the lack of regulation and protections in the franchising sector; and I appreciate the need for several measures put forward in the Franchising Bill 2010.

Following an inquiry by the Federal Government there has been little action on implementing key recommendations of the review, particularly obligations to negotiate in good faith and monetary penalties for breaches of the code. These are clearly key issues for frustrated franchisees and, among others, are dealt with comprehensively the Franchising Bill 2010.

The Australian Competition and Consumer Commission have been lax in vigorously pursuing potential cases of unconscionable conduct, and in my various discussions with the peak body, it was revealed that there has been a significant underspend on monies allocated to 'test cases'.

Western Australia should not wait patiently while the current Federal Government drags its heels and allows thousands of 'mum and dad' businesses to end up in ruin. In supporting the Franchising Bill 2010, the Barnett Government can send a clear message to Canberra.

I've raised franchising issues several times in the Federal Parliament and I have moved a Private Members Motion calling for industry reform. Associated materials are attached for your reference. I believe Western Australian franchisees need to – and should – get a fair go.

Yours sincerely,

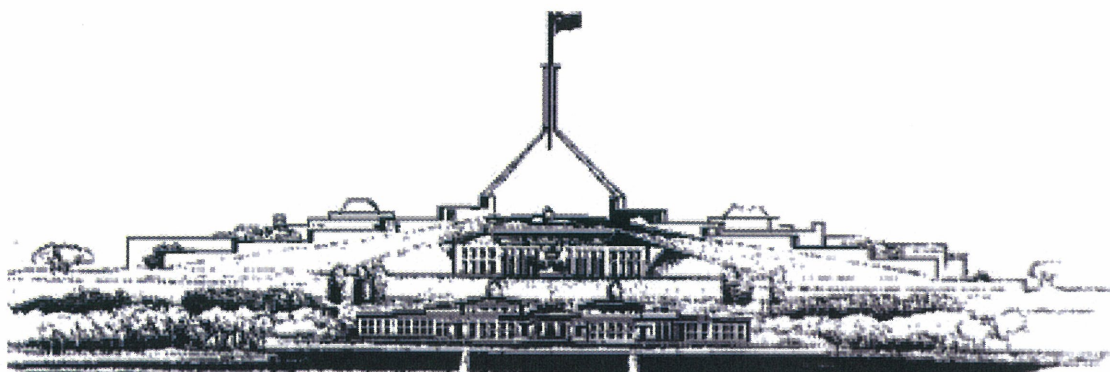
**Don Randall MP**  
**Federal Member for Canning**





COMMONWEALTH OF AUSTRALIA

**PARLIAMENTARY DEBATES**



**HOUSE OF REPRESENTATIVES**

**PROOF**

**Main Committee**

**PRIVATE MEMBERS' BUSINESS**

**Franchising**

**SPEECH**

**Monday, 17 August 2009**

BY AUTHORITY OF THE HOUSE OF REPRESENTATIVES

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## SPEECH

**Date** Monday, 17 August 2009  
**Page** 95  
**Questioner**  
**Speaker** Randall, Don, MP

**Source** House  
**Proof** Yes  
**Responder**  
**Question No.**

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**Mr RANDALL** (Canning) (6.55 pm)—I move:

That the House:

- (1) notes that in December 2008 the Parliamentary Joint Committee on Corporations and Financial Services tabled its report entitled *Opportunity not opportunism: improving conduct in Australian franchising*;
- (2) condemns the Minister for Small Business for ignoring the calls of current and former franchisees, the Opposition and his own colleagues to urgently implement the recommendations of the *Opportunity not opportunism: improving conduct in Australian franchising* report;
- (3) acknowledges that adoption of Recommendation 8 to insert a new clause into the Franchising Code of Conduct imposing a good faith requirement on franchisors, franchisees and prospective franchisees to act in good faith in relation to all aspects of a franchise agreement, would impose a standard of behaviour that would discourage opportunistic and unethical conduct in the franchising sector; and
- (4) notes that:
  - (a) amendments to the Trade Practices Act 1974, imposing pecuniary penalties for breaches of the Franchising Code of Conduct, would further act as a deterrent and ensure full compliance with the Code and also discourage opportunistic and unethical conduct in the franchising sector; and
  - (b) while the Minister fails to implement all 11 recommendations, aggrieved franchisees will continue to lose their livelihoods and homes and many will continue to have no means for redress without recourse to expensive and often unaffordable litigation.

I have spoken on several occasions about the plight of hundreds of thousands of franchisees in Australia who have been burned financially and emotionally by rogue and opportunistic franchisors. At the core of fixing the epidemic problem is the need for the government to strengthen the existing laws relating to franchisors. How many times does Minister Emerson need to be told? I raise this business today to call on the minister to fast-track the adoption of the recommendations contained in the report of the inquiry of the Parliamentary Joint Committee on Corporations and Financial Services called *Opportunity not opportunism: improving conduct in Australian franchising*. The title says it all. The chair of that inquiry, Bernie Ripoll, was eager to put bullies on notice when the report was handed down last December. But lacklustre efforts and a lack of government attention have it gathering dust. It is just another example of the government's preference for spin over substance.

In October 2007, Labor's policy was to amend the Franchising Code of Conduct to include a well-defined requirement for, and a definition of, good faith. The government must adopt the recommendations contained in the report and the submissions, rather than simply holding more inquiries, meetings and consultations. The minister received the report in December. It is now August and we are still without any indication of what recommendations, if any, he plans to adopt. While I understand meetings have been conducted with the ACCC and the Franchise Council of Australia, FCA, on the options paper released in June, these processes continue to be of little comfort to franchisees.

The options paper seeks public input on the implementation of the report recommendations. Submissions were called for, but this would appear to be just another in a long line of delaying tactics by the minister. South



Australian Labor MP Mr Piccolo has been highly critical of the minister's impotence, and I can only agree. In fact, I suspect that the options paper was put out in sharp response to public criticism. Even so, Mr Piccolo maintains:

There is no comfort in this document—

in other words, the options paper—

to the hundreds of mum and dad franchisees who have or are being screwed over by franchisors ...

... it is very misleading to call the document an options paper. There are no options discussed in the paper.

He says the minister's handling of the matter would be a great story-line for the *Hollowmen*.

The opportunism and unscrupulous conduct of a number of franchisors has been widely reported. However, there has been little practical redress for franchisees. While statistics are sketchy, figures show that 35 per cent of franchisees report some type of dispute with their franchisor, although I am sure the FCA would disagree with this number. Time is not on the side of the many that have already experienced the torment of losing their livelihoods and starting their lives over again.

We need to implement a system to improve the regulatory framework that protects future franchisees against intimidatory and financially crippling behaviour. We need to have a system that discourages such behaviour. We must raise the bar in this \$128 billion industry. We know that these rogue franchisors exist. The minister does too. No less than three parliamentary inquiries conducted in 2008—in Western Australia, in South Australia and by the federal parliament—heard the sad stories of these franchisees. It does say something when the minister's own colleagues are fed up with the inaction and the lack of an approach to tackling these problems that are ruining the situation for Australian mums and dads who are trying to make a go of it in business.

This is not a partisan issue; this is about making sure people get a fair deal. Mr Piccolo has called for his own minister to give the issue urgent action and has raised concerns about the minister's indication that nothing would eventuate. The member has even gone so far as to suggest implementing state laws in South Australia to ensure greater protections are in place.

I will not delve into the specifics of the many sad cases that have come to me, as I have already done so in this parliament on several occasions. Needless to say, most ex-franchisees remain in exactly the same position they were in when I last spoke about this. They simply cannot afford the legal fees, and for a multitude of reasons the ACCC has not pursued those cases. The inquiry heard that there was resentment and frustration in the industry about the inaction of the ACCC in several cases. While I appreciate that the ACCC needs to be able to substantiate allegations against franchisors, there appears to be a lack of will and a way to vigorously pursue the many cases.

I recently had the opportunity to meet with Professor Frank Zumbo from the University of New South Wales, an eminent authority on the topic of franchising and who I know has been quite outspoken about the adoption of the report's recommendations. Professor Zumbo's comments have gone unheeded by the committees. The Senate Standing Committee on Economics agreed with his definition of 'unconscionable conduct', which is recommended for inclusion in the Trade Practices Act for the purposes of section 51. Senators Xenophon and Joyce also noted in their additional comments:

... the TPA should specifically prohibit bullying, intimidation, physical force ... in ... business relationships ...

This is exactly the type of behaviour my constituents experienced. Furthermore, hefty pecuniary penalties for breaches of the Franchising Code of Conduct must be adopted to act as a deterrent against unethical, unscrupulous and opportunistic conduct.

The insertion of a good faith requirement in the Franchising Code of Conduct is a fundamental recommendation of these reports and one that has attracted fierce debate. Interestingly, New Zealand has been considering the introduction of a good faith requirement. The committee found:

... the optimal way to provide a deterrent against opportunistic conduct in the franchising sector is to explicitly incorporate, in its simplest form, the existing and widely accepted implied duty of parties to a franchise agreement to act in good faith.

We cannot ignore the fact that generally in these situations there is one weaker party. The franchisor is often a powerful national company and the franchisee is typically someone trying to make a change in their lives,

admittedly sometimes with a minimum of business experience. The Franchise Council of Australia would have us believe that franchisees that have lost their businesses are 'disgruntled' and too emotional to understand that their business acumen was the reason their franchise did not succeed. This is a slap in the face to hundreds of franchisees. There are more than enough complaints to see that something is not right here. There must be something going on. Where there is smoke, there is obviously fire. As Mr Piccolo said:

The reforms proposed by the parliamentary committees are not about compensating or protecting people who make poor business decisions. They are about ensuring that when franchisors break the law there are effective (rather than theoretical) remedies for franchisees.

*Business Review Weekly* commentator Jane Lindhe last month wrote that the recent Jack Cowin case brought to the forefront the lack of a good faith requirement. That was the case where KFC franchisees were not renewed because of the decision of the franchisor. The current code does not allow franchisees the same rights to terminate the franchise agreement as franchisors. There is a lack of equality, and, without an explicit duty of good faith, parties are getting away with more. Ms Lindhe reported:

Recent cases such as the collapse of Midas and Kleenmaid have shown that the failure of large franchise groups can have a devastating impact on their franchisees.

A requirement of good faith would act as a deterrent against improper and unethical behaviour. It would explicitly provide an obligation to negotiate in good faith, to make agreements in good faith and to act in good faith at the end of agreements—which was a serious concern brought to the committee's attention. Disclosure at the commencement of franchising agreements about what should happen at the end of the agreement is crucial, as was noted in recommendation 5 of the financial services committee inquiry. Currently, end-of-franchise agreements often seem to be the downfall; however, the problems start well before then, often brewing over a number of months and years, as was the case with the Lenard's franchisees.

Frustration in the industry is rife. Major nationals including Kleenmaid, Kleins and Midas have all bitten the dust. *WA Today* notes:

Franchisees are among those left out-of-pocket by the collapse of their parent companies, and many are irate the Federal Government has yet to move on a joint parliamentary committee's recommendations for reform of the franchising code of conduct.

If the minister continues to sit on his hands he is sending the message, that despite the findings of several inquiries and his own election promise, the government is ignorant or simply does not care about protecting Australia's franchisees and stamping out these industry bullies.