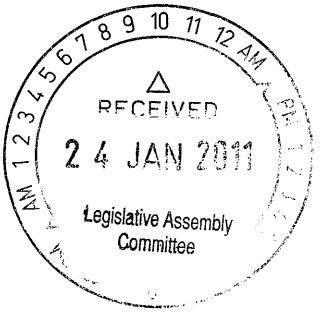
FB2010 Sub 47



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21 January 2010

Mr Timothy Hughes
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Economics and Industry Standing Committee
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Dear Sir

Submission in regards to the Private Member's Bill introduced by Mr Peter Abetz, MLA – The Franchising Bill 2010 (Western Australia)

We are writing to express our strong opposition to the Franchising Bill 2010 ("PMB") introduced by Mr Peter Abetz, MLA.

Snap Franchising Ltd (SFL) operates a franchise system with more than 175 franchise outlets turning over in excess of $150m. Snap has franchisees in China, Ireland and New Zealand as well as 147 in Australia of which 23 are in Western Australia.

Our international corporate headquarters is located at Burswood in Perth and we are proud to have been based in WA for over 100 years.

I wrote to the Premier in late 2010 expressing the concern that the proposed PMB may cause us to relocate our head office away from WA.

This Bill will not only have serious negative consequences for the franchising sector across franchisors and franchisees but also on the general Western Australian business community.

Franchising should continue to be regulated at a Federal level under the Trade Practices (Industry Codes – Franchising) Regulations 1998 ("FCC") and Trade Practices Act 1974 now Competition and Consumer Act 2010 ("TPA") and enforced by the Australian Competition and Consumer Commission ("ACCC"). Throughout 2009 and 2010 a comprehensive review of franchising law and associated matters was conducted by the Federal Government and the current reforms to the FCC were described as "the most sweeping reform of the Franchising Code of Conduct since its inceptions" by Minister Emerson.

Significant changes were made to the FCC in July 2010. As of 1 January 2011, the ACCC has been given additional powers including those of random duties, infringement notices and issuing of Public Warning notices which will strengthen franchisor compliance with the FCC. These initiatives directly addressed many of the issues raised in the context of the WA PMB. National initiatives should be allowed time to take effect and for a period of stability to enable business to understand and properly deal with these changes.

Legislating outside an existing National system and standard will create more bureaucracy and invariably higher compliance costs for franchisors, which in turn impacts franchisees and

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end customers. The PMB claims that greater regulation will not lead to increased compliance costs but it does not take into account the resourcing and time required for all parties in the franchising system (franchisors and franchisees alike) who will be required to understand and measure the impact of these proposals.

Having taxpayer funds directed towards funding a State based system when a Federal one exists and is working well does not make economic sense.

We have not specifically commented on the constitutional aspects of the PMB as this is an area better suited to comments from suitably qualified members of the legal fraternity however, we note the operation of Section 109 of the Commonwealth of Australia Constitutional Act with respect to its precedence where there is an inconsistency between Commonwealth and State Laws.

Clearly, the PMB will also be a disadvantage to a WA based franchisor who operates on a national level or whose franchise agreements are deemed to be WA Franchise Agreements by definition. We are also concerned with the extension of jurisdiction of the PMB on the operations of our international master franchise agreements.

The PMB seeks to impose penalties (and other remedial orders and relief) for breaches of Commonwealth legislation where the right to prosecute for breaches rests clearly with the ACCC.

There is clearly the potential under the PMB for a franchisor or a franchisee to be prosecuted under both the TPA and the PMB for the same act or omission, for example a franchisor facing prosecution for a breach of the PMB may have either a standing investigation by the ACCC, or have had the ACCC investigate and resolve a matter to the ACCC's satisfaction and have a pecuniary penalty applied under the PMB.

The greyness as to how enforcement can co-exist with a State based regulator and the ACCC is also one of our concerns.

Section 13(2) of the PMB does not allow a court to have discretion to determine whether to allow an undertaking as to damages to be sought and given. Snap as a franchisor respects the rights of all parties to a franchise agreement, and for an aggrieved party to seek appropriate resolution. However, there may well be instances where a claim is made without merit, or is frivolous or vexatious, and that such matters may be allowed to progress further than they should. Enabling this discretion will provide procedural fairness.

Under the proposed legislation a third party to a franchise agreement (not the franchisee or franchisor) could make a claim for harm arising from a breach of the PMB. This, from a commercial and risk management perspective is untenable for both a franchisor and a franchisee as it creates a right for suppliers, landlords or any other persons connected with the franchisee or the franchised business to pursue a claim for loss which would not otherwise be available under the FCC or the TPA.

The PMB confers a new right of action for personal injuries sustained as a result of a breach of the PMB. This is a duplication of current legislation and is not required. The costs of insuring against public liability and relevant other insurances would escalate dramatically. We would also expect to see an increase in denial for insurable events, and or a cap to claim limits. This adds to the cost of doing business in WA.

The principle of good faith is already recognised within the FCC within clause 23A. Further, the TPA protects the notion of Good Faith in Section 52(1) and 51AC(1) by legislating the requirement for corporations to not behave in a misleading or deceptive manner or in an unconscionable way.

Imposing a statutory definition of good faith will in our view create more uncertainty as it relies on the 4 key terms of "fairly", "honestly" "reasonably" and "co-operatively" which would in itself lead to further legal debate as to their meaning and scope (and hence more costs for the franchising community).

Retrospectivity of application of sections14(4) and 14(5) on past and present "WA Franchise Agreements" is a major concern across a number of fronts, as aggrieved parties are able to make applications for redress orders and compensation within 6 years after the date on which the act or omission in section 12(1) or 13(1) occurs.

Retrospectively opening up parties to claims of harm (which *includes but is not limited* to property damage, economic loss, personal injury, including impairment of a person's physical or mental condition) where the claims are uncapped as to limits is a commercially and legally unreasonable.

Furthermore, the rights of parties to a franchise agreement will be severely undermined under the proposed redress order clause, section 14 as this section confers a right (for the benefit of one party to a contract) to one or more indefinite renewals of a franchise agreement despite the express terms of that agreement.

Franchise agreements have an initial term and renewal terms (if appropriate) which are appropriately and fully disclosed to a prospective franchisee before entering into the franchise relationship. There is already a detailed process under the FCC for expiring franchise agreements. Following amendments to the FCC last July, a franchisor is now required to provide a specified renewal notice to a franchisee who has entered into an agreement on or after 1 July 2010. A franchisee who fails to properly and validly exercise their right to renew should not have (as in the case with any other contract) an automatic right of renewal. A contracting party should not be disadvantaged by the failure of the other party to perform its obligations.

For a court to set aside a new franchise agreement with new parties or to enforce a renewal is fundamentally at odds with what franchising is about which is the conditional grant of the use of a system/licence for a limited period of time.

The protection and growth of our brand is inexplicably connected to our capacity to enforce uniformity and standards within our franchise system. This is compromised if a franchisee is given a righty to enforce a renewal irrespective of their ability/capacity to operate in conformance to this system. Having a court directed renewal of an old agreement would be detrimental for franchisors who need to adapt and change their franchise agreements to meet the ever changing business and compliance landscape.

Commercially, the rights of a third party (who in good faith entered into franchise agreements for a territory after expiration or termination of an existing agreement) would be diminished materially as they would be subject to a continuing interest by a former franchisee. The presence of such redress provisions would undermine business confidence and investment. The other aspect that also needs to be considered is the impact of this erosion of confidence on lending values determined by funding institutions and or banks who lend to franchisees.

Snap has been headquartered in Perth for more than 100 years, and we remain proud of our WA heritage. One of Snap's core values is "being good people to work with". We take this business

philosophy very seriously, and understand and support the need for a compliance system that provides a fair and consistent platform for all parties.

The key to a healthy, sustainable and profitable franchising sector for franchisors and franchisees alike (as in any other business) is a working compliance system that is supported through education. At the 2010 National Franchising Conference held in October 2010, the Deputy Chair of the ACCC, Dr. Michael Schaper commented towards the end of his presentation paper on the ACCC's Plans and Intentions for Enforcements and Audits that the compliance to the FCC and the TPA was generally quite high, and that education to prevent a breach is preferable to having to take action after a breach has occurred. Education should not only be directed towards franchisees but also franchisors.

Snap's view is that the introduction of the PMB will significantly increase the cost of doing business in Western Australia for both franchisors and franchisees (and ultimately the end consumers). Regulation is best suited at a national level with the FCC and the TPA (now the Competition and Consumer Act (2010)) with the focus on facilitating change and enhancement through one compliance system. Any state based legislation will result in confusion and conflict.

Thank you for considering Snap's submission to the Parliamentary Subcommittee.

Yours sincerely

Grant Vernon.

Grant Vernon
Chief Executive Officer