

FRANCHISING CODE OF CONDUCT

Grievance

MR P. ABETZ (Southern River) [9.29 am]: My grievance is to the Minister for Commerce and it is about franchising. Franchising has become a fast-growing segment of the small business sector, and many franchisees are entering a world in which they will run their own business for the first time. Franchise arrangements certainly have the potential to provide benefits for both franchisors and franchisees. However, there are unscrupulous operators in the marketplace who do various things to rip off the franchisees. There are those who do what is called “churning”; they cancel the contracts for the most trivial of reasons, then resell the business and pocket the purchase price, leaving the original purchaser with a loan to pay and no means to pay it off. This all too often means that mum and dad investors lose everything, through no fault of their own. Others charge massive renewal fees to renew the agreement and so on.

The media almost daily carry reports of improper conduct by franchisors. On 10 August, *WAtoday* carried the story of Mr Coombes of Morley who had an AutoMasters franchise. The Australian Competition and Consumer Commission refused to protect him. He took the matter to court and won the case, but he went bankrupt because the case cost him \$400 000 in legal fees. *The West Australian*, on the same day, carried a story about a Wendy’s franchisee in New South Wales who was locked out of her franchise because she was \$7 000 behind in her payments. Tragically, that franchisee died two days later—no doubt partly due to the stress. The member for Wanneroo tells me that he was recently approached by a constituent who had been ripped off by an unscrupulous franchise. In 2007, the member for Peel, now Warnbro, raised a grievance to the then Labor Premier regarding unfair dealings of a franchisor to a Kentucky Fried Chicken franchisee at the end of the franchise term.

The government of the day initiated the Botham inquiry, and I am told that the contents of the submissions that were received more than demonstrated the desperate need for change—some in fact carried stories of people who committed suicide. The federal members for Tangney, Moore, Canning and Pearce have all made speeches in federal Parliament calling for action on the uneven playing field between franchisors and franchisees. It is true that there is a Franchising Code of Conduct, but there are no financial penalties for breaching it. It is a little bit like putting a voluntary speed limit outside our schools for hooners; nobody would dream of doing it. Federal Labor went to the 2007 election promising to introduce a good faith requirement into the franchising law. It failed to act despite the bipartisan Ripoll inquiry showing that action was needed. South Australia has had an inquiry. All inquiries recommend —

Ms M.M. Quirk: So has Western Australia, member.

Mr P. ABETZ: Yes, I just mentioned the Botham one. All inquiries recommended that “good faith” should be an integral part of the code. Those opposed to reform claim that good faith is too difficult to define, and that including it would create uncertainty for the parties in their business dealings with each other. I find that absolutely disgraceful and dishonest. Our native title legislation has provisions for good faith. Many states in the United States and Canada have provisions for it in their franchising legislation, and it has not created any uncertainty.

The SPEAKER: Order, member for Girrawheen!

Mr P. ABETZ: The South Australian government has decided it can no longer wait for the federal government to act. The South Australia bill defines good faith simply as “to act fairly, honestly reasonably and in a cooperative manner”. Therefore, the assertion that good faith is too difficult to define is simply a lame excuse for inaction. Occasionally, big franchisees have gone to the cost of squaring off in court with franchisors and won, but most mum and dad franchisees do not have the resources to do this.

Another reason given for not acting is that we should have uniform legislation throughout the country. I do not have an issue with that; uniform legislation would be ideal. At the moment, however, we have uniform legislation that enables franchisors to rip off franchisees, and that is simply immoral. If we pass legislation similar to the South Australian measure, we will then set a standard that other states can emulate until we get a federal government that is willing to act.

The time has come for this Parliament to follow through on the recommendations of the various inquiries. I am in the process of having legislation drafted. I have consulted widely with the Retail Traders’ Association, Associate Professor Frank Zumbo and legal people who specialise in franchising work. I have no ambition to introduce a private member’s bill, but I inform the house that I will not sit idly by as franchisees continue to get ripped off by a small number of unscrupulous franchisors.

From what is on the public record, there is support for action right across this house. This Parliament has the power to act, and I am pleased to say that even some franchisors have broken ranks with the Franchise Council

of Australia, including Jim Penman, of Jim's franchising fame, who said, it was time for major franchisors to stand up for what was right. He called for affordable dispute resolution for franchisees, defined penalties for breaches of the code, automatic right of renewal when franchises expire and so on.

Minister and members of the house, I believe that it is immoral for us to sit on our hands when it is in our power to act. I simply refuse to accept that we should leave the situation and continue on for another three years until there might be a change of federal government. I refuse to bow down at the altar of uniform legislation while the lives of franchisees continue to be destroyed.

MR W.R. MARMION (Nedlands — Minister for Commerce) [9.36 am]: I thank the member for Southern River for raising this issue. Running a small business is not easy; in fact, small businesses face a lot of challenges. Like my Liberal–National colleagues, I share the member for Southern River's deep commitment to giving all small businesses the best possible opportunity to maximise their potential through hard work and innovation. As members know, I ran a small business for seven years. This government also recognises that to achieve this commitment, we must create and protect the business and regulatory environment that gives small businesses the certainty to make plans and develop their businesses. We must remove red tape and the regulatory burden that strangles so many small businesses so that we have a system that encourages the investment in small businesses that is crucial to their ability to grow and flourish. I am mindful of these important principles when I consider the issue the member has raised today regarding the regulation of franchise agreements.

It would be helpful for all members if I provided them with some background information on this important issue, firstly, on regulation of the sector. The regulation of franchisees, as members know, occurs at the commonwealth level. In particular, unconscionable conduct provisions of the Trade Practices Act 1974 and the Franchising Code of Conduct, made through regulations under the TPA, regulate the franchise sector nationally. The Australian Competition and Consumer Commission is the agency charged with policing this area. As members know, there have been a number of inquiries. Since 2007, the need to introduce changes to address issues relating to unfair practices under franchising agreements has been investigated by two state inquiries and one federal inquiry. The Western Australian Botham inquiry into the operation of franchising reported to the former government in April 2008, and found that although improvements could be made to the regulation of franchising, the sector was generally functioning pretty well in this state. The inquiry also acknowledged that any changes to franchising regulations should continue to be made at the national level.

Although some people were disappointed that the federal government did not insert a general good faith clause into the Franchising Code of Conduct, I believe it is extremely important to appreciate the complexity of this issue and to consider the potential unintended consequences of such a provision.

Mr E.S. Ripper: Are you saying that you will not support state legislation?

Mr W.R. MARMION: I will get to that.

It is also important to be mindful of recent amendments to the code of conduct in the Trade Practices Act that deal directly with a number of the issues considered by the various inquiries into the franchising industry.

I have no doubt that the member for Southern River is well meaning in his intentions to introduce a good faith clause, but it is fraught with problems. I acknowledge that in December 2008, the federal Parliamentary Joint Committee on Corporations and Financial Services reported on the Franchising Code of Conduct and recommended that the code be amended to impose a general obligation on franchisors and franchisees to act in good faith in relation to all aspects of a franchising agreement. However, this recommendation was considered and further consulted on by the commonwealth government. Ultimately it decided that such a clause would be detrimental to the franchising sector and would result in increased uncertainty, particularly for franchisees, because neither franchisors nor franchisees would have certainty about the occurrence of a breach. In addition, past cases have indicated that each party's perspective of what amounts to acting in good faith is different. The case law on good faith for franchising agreements is still evolving, and a single definition or standard set of behaviours is yet to be developed. In this context, it was considered unhelpful to include a broad general requirement.

Instead of implementing a general good faith requirement, the commonwealth government has amended the Franchising Code of Conduct to clarify that nothing in the code of conduct limits any common law requirements of good faith in relation to a franchising agreement. The amendment addresses eight issues of concern relating to the lack of information in franchising agreements about end-of-term arrangements; information on dispute resolution costs; unforeseen significant capital expenditure; unilateral variations to agreements; changes to franchise agreements when a franchisee is trying to transfer the franchise; foreseeable reoccurring or isolated payments that prospective franchisees may incur; the scope of confidentiality obligations; and proposals by a franchisor to amend the scope of an agreement.

As a result, the code now specifies new requirements for all franchising agreements entered into, renewed or extended after 1 July 2010. For example, in relation to end-of-term arrangements, the code now requires franchisors to provide information to franchisees about their intention of renewing a franchise agreement at the end of the agreement's term. This must be provided at least six months before the end of the term, or for contracts of less than six months, it must be provided one month before the end of the term. Also, the code provides specified details of the processes for determining the arrangements to apply at the end of an agreement, including options for renewing or extending agreements, and the determination of exit payment entitlements, particularly details relating to payments for unpaid stock, marketing material, equipment and other assets purchased by a franchisee when an agreement was entered into.

The commonwealth Trade Practices Act has also been amended to give the Australian Competition and Consumer Commission a range of new enforcement powers, and has increased the pecuniary penalties that will apply for franchisors or franchisees who engage in unconscionable conduct or who make false or misleading representations in their dealings with each other. Under its new enforcement powers, the ACCC will be able to conduct random audits, take on matters for franchisees when franchisors fail to comply with the new requirements, and use its public warning power to alert the public to rogue or unscrupulous franchisors. Lastly, additional amendments to the Trade Practices Act are proposed that will amend the unconscionable conduct provisions to provide a list of interpretative principles and unify the consumer and business-related provisions prohibiting unconscionable conduct.