FB2010 Sub 87

Submission

By

Narelle Walter

To

Economics & Industry Standing Committee

Inquiry into the Franchising Bill

Contents

1. Introduction

Thank you for the opportunity to provide a submission to the inquiry into the Franchising Bill.

I am a former franchisee of Bakers Delight holdings. I have no legal training so will not attempt to discuss the legal aspects, but never the less I believe the lack of workable law is impacting on not only on the quality, but equality in franchising.

It is disappointing that the Federal Government has been completely impotent since the tabling of the Rippol report in 2008. Unfortunately, because of the Federal Government's failure to adequately protect Franchisees from rogue Franchisors, franchisees continue to be destroyed by poor franchise systems, abuse and opportunistic behaviour.

Franchising in its current form is failing franchisees and, for this reason I support the passage of the Franchising Bill in its entirety. I believe that it will serve to enhance the franchising Code of Conduct, which is to regulate the conduct of participants toward each other. This includes helping to stamp out franchise opportunism and stop franchisor abuse.

Neglecting to introduce the bill will encourage rogue franchisors to keep using bullying tactics, sabotage and franchise churn as a way to make money and create the illusion of successful enterprise. I am of the opinion that franchising from the franchisors perspective is about selling businesses, and not products or services. Moreover, if franchisors rely on churning a percentage of their business to survive that their systems should not be allowed to be sold because they are NOT proven systems. The Franchisor should not be allowed to trade with impunity.

2. The FCA

The "peak body", the Franchise Council of Australia (FCA) is not independent or objective and their interests are heavily invested with franchisors/master franchisees, who contribute financially to their existence. The FCA will tell you that all is well within the franchise sector, and there are no systemic problems. The recent WA and SA state and Federal inquiries into franchising contradict the FCAs assertions and recommended sweeping reforms to regulate the industry.

The FCA has strongly opposed every attempt to reform the industry at every inquiry since the dawn of time. Most recently, with the introduction of the proposed WA Franchising Bill they have mounted a fear campaign and suggested that not only will it cost franchisors a fortune to comply with the legislation, but that franchisors will be forced to move their business to other states. This suggestion is ridiculous. Franchisors who are honest and comply with the Franchising Code of Conduct will conduct business as usual. Importantly, it

should be remembered that franchisors need franchisees to invest in their systems- so will always go where the business investment is.

The proposed Bill has been called by members of the FCA "draconian and far exceeding any regulation anywhere in Australia or overseas". The FCA would be aware that because the Federal Government has been impotent in the area of reform, in fact, almost complicit, that at least 3 states are moving to protect franchisees and to introduce fairer regulations. They, the [FCA] would also be aware that franchise opportunism is prolific in some overseas locations, and the Governments there are amending their own laws to reflect a fairer and level playing field.

The FCA will sing the ACCCs praises, and tell us that it is successfully prosecuting its charge; this is because the ACCC are allowing the FCAs members, largely consisting of Franchisors and Master franchisees to continue with their current unethical conduct.

The FCA will back their arguments saying that Franchisees receive over 250 disclosure documents, and that should be enough. This in itself is misleading, as nowhere in the disclosure do franchisors disclose their failures, the number of disputes or the number of franchise units not turning a profit. Effectively potential franchisees cannot reasonably conduct meaningful due diligence critical to their investment.

I acknowledge that state based legislation is not the best way forward and having different laws in each state is not ideal. However the need for each state to take matters into its own hands would be negated if the Federal Government would only do it job and introduce all 11 recommendations of the Rippol inquiry.

3. Good Faith

The Rippol inquiry of 2008 recommended that the Code include an express Good faith obligation. This has not been enacted and therefore leaves participants with uncertainty. I believe the introduction of Good Faith will provide security to franchisees; they will be able to operate with the knowledge that they can expect to be treated fairly, honestly, reasonably with co-operative business partners.

In my own case, there was no requirement for the franchisor to act in good faith- so they did not.

In their dealings with me Bakers Delight has never acted in Good Faith. They (Bakers Delight) have been dishonest, colluded with my bank and other third parties; they did not disclose kickbacks on my shop fit outs, kickbacks to suppliers or properly account for how they spent my money. They have controlled costs through third line forcing and fixed prices to prevent franchisees maintaining the margins necessary to survive.

Bakers Delight Holdings forced me to undertake expensive shop refurbishments with the promise of franchise renewal and threatened to breach me out of the business if I did not comply.

Following completion of the refurbishment and payment of the land lord leasing costs, Bakers Delight reneged on the agreement working with third parties to induce a breach of contract.

I engaged the services of 3 separate lawyers who all tried to negotiate fairly with Baker Delight representatives. In the middle of negotiations Bakers Delight representatives walked into my business, change the locks and stole both businesses. At the time I had not received a termination notice. Bakers Delight contravened the Franchising Code of Conduct and ignored my Notice of Dispute, refused to negotiate in Good Faith and terminated my contracts. Bakers Delight calculated to the day they would terminate my contracts and lock me out of the businesses, waiting until my stores had receipted their Ingredients and had over $30,000.00 in stock on the premises-Bakers Delight never paid for the stock and stole it.

Had Bakers Delight acted in Good Faith, negotiated fairly and not used third parties to deprive me of my business, I would never have lost my businesses, my family's home or my life savings. There should be provision made in the code that all negotiations for franchise renewals are entered into and conducted in good faith.

4. Enforcement and Remedies

There is currently no effective remedy when things go wrong. The Code allows for participants to issue notices of dispute, I have heard personally how some franchisors, like Bakers Delight holdings habitually ignore them.

The Code places reliance on mediation to solve franchise disputes. This can only be achieved if both parties to the agreement act in Good faith. Unfortunately, due the imbalance of power in franchise relationships, by the time a franchisee gets to mediation, if the franchisor lets them, they are emotionally broken and financially cannot afford to go beyond mediation. Some franchisees cannot even afford to go to mediation and simply disappear.

If mediation goes ahead, there is no guarantee that the franchisor or their representatives will attend with the intention to be fair. Some use it as yet another opportunity to bully and make threats.

When mediation fails franchisees can turn to litigation-this is cost prohibitive, because franchisors have vast cash reserves and can maliciously ride a franchisee out. Typically, the cost of litigation can be in the vicinity of $500,000 to get judgement. This, in reality, is out of

reach of the majority of West Australian families who make up the small business sector. This is why there is a 'low disputation' rate.

Franchisees expect to rely on the Franchising Code of Conduct to protect their interests. They [the franchisees] are lulled into a false sense of security believing that they are protected because the Code is mandatory. Whilst the amendments to the franchising Code of Conduct, introduced in July 2010 has introduced penalties for unconscionable conduct, this is a grey area of law. With few franchising cases getting to court, and a regulator who prefers to do nothing or settle. Franchisors are free to wield their power and disregard the Code as they see fit.

The successful passage of the Bill will enhance the Franchising Code of Conduct by providing the deterrent of reasonable penalties for breaches of the Code.

5. The ACCC

The ACCC is responsible for administering and monitoring compliance with the Code. When a franchisee has been treated unconscionably or the Code has been breached, the franchisee can make a complaint to the ACCC. The ACCCs track record is appalling with less than 1% of complaints being investigated. By the time a franchisee makes a complaint they have been completely annihilated, exhausted all other avenues and are looking to the ACCC for justice only to in the majority of cases be sorely disappointed.

The ACCC in my opinion lacks basic investigative skill at any forensic level. More importantly the ACCC consistently hides behind the contract and fails to understand and acknowledge the conduct that often leads to the franchisor inducing a breach of contract, or the contract being breached by the franchisee.

Access to justice is out of reach to franchisees, this is simply not good enough.

6. Cost Impact on participants

The financial cost will continue to impact on franchisees should the passage of the Bill be delayed.

Inducing a breach of contract has become the accepted norm in some franchise systems. Through unethical business practises franchisors can routinely terminate franchise agreements and steal assets. This can be absolutely catastrophic for franchisees. On the flipside, this practise is lucrative for franchisors- particularly those that have run out of ideas and have saturated the market with their product. They [the franchisors] can exploit this loop hole and send the franchisee to the wall.

It is difficult to quantify, but, as a franchising participant, the financial cost to my family has been huge. This includes the loss of the family home, costs associated with bank abuse, legal costs to get an agreement as promised, refurbishment and liquidation costs and my life savings.

The financial impact on franchisees has not improved since the Rippol Inquiry. As recently as last week I was notified by a Bakers Delight franchisee that during negotiations about her franchise renewal, she was issued with termination notices on 3 businesses and threatened with Bankruptcy.

7. Summary

Australian Franchising has been under review for a number of years. It is now time for action.

As the Economics and Industry Committee retire to consider the Franchising Bill and whether it is consistent with the *Trade Practices Act 1974* and will enhance the Franchising Code of Conduct. I ask them to remember that the weaker parties to franchise contracts need immediate protection.

The way forward is to introduce the Franchising Bill in its entirety, with particular attention to civil monetary penalties for breaches of the Code.

Moreover, organisations like the FCA have lobbied aggressively, have hidden agendas, have not done their homework and do not represent the interests of Franchisees.

I ask the committee to recognise that Franchisees are disadvantaged because they do not have their own fully funded organised lobby group representing their interests.

As a final point franchise opportunism is an epidemic throughout Australia. In the absence of Federal legislation the states must move to protect the interests of all franchising participants and not just those with deep pockets. I trust that the West Australian State Government will lead the way.

Narelle Walter

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