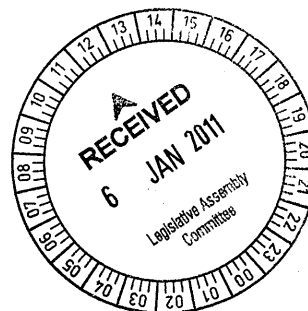


The Principal Research Officer  
 Economics and Industry Standing Committee  
 Western Australia Legislative Assembly  
 laeisc@parliament.wa.gov.au

5 January 2011



Dear Madam / Sir,

**Submission re Parliamentary Inquiry – Franchising Bill 2010.**

My name is Jenny Buchan. I make this submission as an individual.

I am a senior lecturer in the Australian School of Business at the University of New South Wales where I teach business law, including franchising law.

My relevant qualifications: → PhD in law from Queensland University of Technology; awarded in 2010 for my thesis entitled *Franchisor Failure: The Adequacy of the Regulatory Response*. Prior to becoming an academic I was in private practice as a commercial lawyer for 19 years. My client base included franchisors, master franchisees, franchisees and shopping centre owners.

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Submission to Economics and Industry Standing Committee.

**Why I am for or against the main thrust of the Bill**

I am against the main thrust of the Bill.

Whilst I believe that the Commonwealth response to date is inadequate I do not think the way forward is for individual State/Territory jurisdictions to create additional layers of regulation and bureaucracy. A better way forward would be to enshrine greater protection for under protected parties in future amendments to the Australian Consumer Law ('ACL') to address the needs of 'business consumers'. Business consumers were intentionally omitted from the ACL and were set aside for future consideration of their specific needs.

**Indicate whether I am for or against specific measures in the Bill**

I am against the entire Bill, but most particularly:

1. The Bill aims to regulate the conduct of people who are about to enter or are parties to franchise agreements. One of the most problematic areas in franchising is where one party has reneged on its obligations and as a result the agreement has been terminated. This Bill will not apply to the non-breaching 'victim' as the parties will no longer be 'parties to a franchise agreement'.

2. Section 11. Good faith as a concept is already a part of the common law applicable to relational contracts in Australia. Franchise agreements are relational contracts.
3. Section 14 in its current form is fatally flawed.
  - A franchise agreement can be seen as being analogous to a lease -- a contract that is almost without exception entered into for a pre-agreed number of years (the 'term'). At the end of that term the licence to operate as a franchisee under the franchise agreement ends. The economic aspects of the franchise are structured around this fact.
  - Although Mr Abetz stated in his Second Reading speech on 13 October 2010 that 'this Bill is not about changing the structure of franchise agreements' the effect will be to change the economics of the franchise relationship. Section 14 in its proposed form would put franchisees and master franchisees operating in WA into a position where they potentially got something (an unnegotiated renewal) for nothing. A right of renewal that they did not negotiate or pay for when they purchased the licence.
  - The proposed renewal orders could turn a franchise that is currently a licence for an agreed fixed term into a perpetual right potentially exceeding the lives of all parties.
  - This would in turn:
    - i. damage the value of the business to the franchisor
    - ii. make WA a more risky place for franchisors to do business than elsewhere in the world.
    - iii. lead to future franchisees having to pay for that risk as they would be charged more for their franchise as franchisors would have to factor in the risk of losing the site/business to the franchisee in perpetuity.

#### Summary of changes I want and reasons for the changes

If the legislation were to proceed three meaningful changes should be made:

1. Section 11 should be amended by the addition of:
  - Section 11(2) (a) (iv) terminating the agreement. This would require a consequential amendment to the introduction on page 1 as it does not currently contemplate the legislation applying to parties who were parties to a franchise agreement that was terminated prematurely.
2. Section 14 should be amended so it applies only to agreements that were terminated before the end of the contract term in a situation that caused a party loss.
3. It should be clearly stated that the Franchising Bill/Act (WA) applies to administrators and receivers. There is arguably clear common law and insolvency policy to this effect but in practice if a franchisor becomes insolvent its administrators and receivers tend to claim the Franchising Code of Conduct does not apply to them. There is unlikely ever to be sufficient time within the context of an administration or receivership, or money available to franchisees or to administrators or receivers to argue this point in court.

I am available to elaborate on any aspect of this submission if the committee has any questions.

Yours faithfully



Dr Jenny Buchan

University of New South Wales