NRA
Helping Australian Business Grow

Parliament of Western Australia

Inquiry into the Franchising Bill 2010

Preamble

On 18 November 2010, the Franchising Bill 2010 was referred to the Economics and Industry Standing Committee for consideration and report no later than 26 May 2011.

It is understood that the Committee will consider whether the passage of the bill in its current form:

- Would be directly inconsistent with the Trade Practices Act and the Franchising Code of Conduct
- Would enhance the purpose of the Franchising Code of Conduct
- Would result in a cost impact on the State or participants in franchising

National Retail Association

The National Retail Association is Australia's largest and most representative retail organisation with over 3,000 members and affiliates located across all Australian states and territories. In particular our membership includes significant coverage in the retail, fast food and broader service sector and includes a number of franchisor organisations.

Submission

NRA is opposed to the Franchising Bill and asserts that its passage would be counter-productive to the efficient and effective regulation of the franchise sector in Australia. Its passage would also negatively impact on the franchise sector in WA as franchisors limited their involvement in the state in preference to other jurisdictions.

The franchising sector in Australia has been in a state of continual review since 2006. It is difficult to comprehend what new material or what different circumstances justify the tabling of the private members bill. It can be expected to have a disruptive and destabilizing effect on the franchising sector in WA and undermine its competitiveness and growth prospects.

The national franchise code was reviewed in 2006 culminating in a number of changes to the disclosure provisions of the code which came into effect on March 1 2008. In 2008 a comprehensive review of the code was conducted by a Joint Parliamentary Committee. This review resulted in extensive changes to the code with effect from July 1, 2010.

In addition to the national reviews of the code, in April 2008 the WA Labor Government commissioned a state based inquiry into the fairness of franchise agreements. The inquiry was chaired by former franchisee, Chris Bothams.

The terms of reference of the Bothams Inquiry were to:

1. *Review the adequacy of existing legislative provisions, both State and Federal.*
2. *Identify whether emerging trends in the franchising industry disclose patterns of unconscionable conduct that may not be covered under existing laws.*
3. *Examine whether existing remedies available to franchisees are adequate and, where appropriate, recommend changes.*
4. *Review existing practice in other jurisdictions, Australia and internationally, on unconscionable conduct and renewal of licences.*

The Inquiry report included recommendations to improve franchisor disclosure and end of agreement arrangements, review mediation processes for resolving disputes, and establish a dedicated franchising enforcement function within the ACCC.

It is also noted that the report supported the continuation of uniform national regulation of the franchise sector:

"Regulatory changes to the franchising sector should be undertaken by the Commonwealth Government given that franchising often involves national brands operating across Australia. There is the opportunity for the Western Australian Government to provide national leadership and direction to the Commonwealth Government by requesting that they implement all of the recommendations from this Inquiry."

Despite the completion of the 2008 WA review into franchising, after the event further attempts were made to persuade the State Government to legislate in this area. On 27 October 2008, Minister Buswell sought NRA's view in response to draft amendments to s11A of the state Fair Trading Act proposed by Competitive Foods. Those views were provided to the Minister in correspondence dated 5 November 2008.

There is considerable frustration in the franchising sector over a requirement to continually allocate resources to seemingly endless reviews of the franchise sector. These reviews divert resources from other important projects and, in the context of repetitive reviews, may also involve a questionable deployment of public monies. Notwithstanding the overwhelming support for the regulation of the franchise sector by a uniform national code, attempts continue to be made to erode the effective functioning of the code. Surely after two federal reviews, a comprehensive state review and the further consideration given as a consequence of representations by Competitive Foods, the franchise sector in WA should now be able to expect reasonably certainty and stability in its regulatory environment.

It is relevant to note that the recommendations of the Bothams Inquiry have largely been addressed in the federal review. Changes to the national franchise code effective from July 1, 2010, included:

- Changes to the disclosure provisions
- New arrangements to apply at the end of the franchise agreement
- Confirmation of good faith obligations at common law
- New dispute resolution procedures

In addition, on 11 May 2010 the Australian Government announced $2.7 million in funding to support the introduction of the early intervention dispute resolution services and the continuation of formal mediation services under the Franchising Code of Conduct and three other codes.

The desirability of the regulation of the franchise sector by a uniform national code is widely acknowledged. It is counter-productive, in our view, for a state to consider superimposing state regulation on top of the system of federal regulation. We respect the rights of the WA State Governments, but it would be inefficient and counter-productive for the franchise sector to be regulated by both the state and federal jurisdictions. In our submission the COAG processes can be

utilised to enable states to contribute a view about the content of the federal code and to influence regulatory outcomes in the franchise sector.

Finally, a willingness by the State Government to intervene in the regulation of the sector will inevitably promote the unsavoury practice of jurisdiction shopping by particular interest groups. When this behaviour is replicated across the six states, a chaotic regulatory environment is created. The Australian franchise sector deserves better than this.

The efficacy of these continuing reviews into the franchise sector is also questioned. An ACCC report card on franchising issues provided by John Martin, Commissioner, on 11 October 2007, does not support a view that the Franchising Code is in need of significant change or that current available remedies are not working effectively. The report card states that:

To this point, the level of reported disputes in the franchising sector remains relatively low. Substantial disputes (those referred by franchisors/franchisees to external dispute resolution methods i.e. mediation) were experienced by 35% of participating franchise systems in the past 12 months, but most were with only two franchisees. Both, the survey data and the ACCC database show that mediation is being used extensively as a means of resolving dispute.

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In the 12 months to 30 June, the ACCC recorded 855 contacts related to franchising (525 complaints, 330 inquiries). This represents just 1.65% of the total contacts recorded in the national database over that period

The Franchising Bill 2010

We wish to make particular comment on the content of the Franchising Bill 2010. This bill, if adopted, will have serious consequences for the business community generally. Much of the change proposed is unprecedented in terms of regulation of the business sector.

- The concept of good faith included in the bill substantially extends the implied duty of good faith determined by the common law.

- The effect of the Bill will be to undermine the operation of the franchise agreement because no term of the franchise agreement will be secure from challenge. That is, notwithstanding that the parties to the franchise agreement have entered into what would otherwise be legally binding commitments, these express terms can be subject to challenge on the basis of a vague proposition that, in retrospect, the franchisor may have acted unreasonably or other than in a co-operative manner.

- The bill, in an unprecedented manner, interferes with the freedom of contract

- The bill, in effect, over-rides the fundamental rights of parties to agree on a duration of contract and in defined circumstances purports to force a franchisor to offer the franchise in perpetuity.

- The bill is a powerful stimulant for litigation. It has the effect of diminishing accountability and transfers to the courts the obligation to determine the terms of contract. Therefore, notwithstanding the effectiveness of disclosure provisions, notwithstanding the extensiveness of due diligence, notwithstanding the manifest understanding of the parties to the contract about what the contract says and means, a Court can be invited to intervene and essentially re-write the obligations of the parties.

Moreover the proponents of the bill do not appear to comprehend the cost of the proposed changes to the business community, the economy of WA, and also to franchisees.

It is, we think, inevitable that the increased risk of entering into franchise agreements in WA will be passed on to franchisees by way of a higher cost of entry. The management of the risk will result in an increased cost of the franchise product as franchisors build in the cost of uncertainty, litigation, damage to the brand, and loss of productivity which will result from the proposed new compliance and regulatory regime.

From the franchisor's perspective, the bill has the potential to render franchise agreements made in WA unenforceable, or to substantially diminish confidence in the enforceability of the franchise contract. This will mean that, given any choice, franchisors will avoid entering into franchise agreements in WA.

Alternatively, if franchise agreements are made, the risk and cost of unenforceability, will be factored into the cost of the franchise. Consequently small business men and women in WA will pay more to enter into a franchise arrangement than their counterparts will in other states.

It is argued that if the WA Parliament passes the proposed legislation, the resulting regulatory regime will deter and limit franchisors from investing or expanding their activities in WA and will encourage franchisors to favour investment in other parts of Australia where there is more certainty and stability in the regulatory or legislative regime and where the cost of compliance is much less onerous.

In summary NRA opposes the Franchising Bill 2010. The question of fairness in franchising in WA has been extensively assessed by the Bothams Inquiry. The overall operation of the national code has been under constant review since 2006. It is in the best interests of the franchise sector that it continue to be regulated by uniform national law. Responsible, sound and balanced government would not, in our view, support the passage of the Franchising Bill.

It is also pointed out that the explanatory memorandum accompanying the Franchising Bill is inaccurate or misleading in its dealing with the concept of good faith. In particular we point out that the proposed definition of good faith is not consistent with the findings or recommendations of the Joint Parliamentary Committee nor does it reflect the main body of Australian and overseas case law.

Lodged By:

Gary Black
Executive Director
National Retail Association Limited
PO Box 1544
Coorparoo Qld 4151
Phone: 07 32400100
Mobile: 0413 046 614