FB2010 Sub 89

FLAMIN' SHARP

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Submission to the Economics and Industry Committee in relation to the Inquiry into the Franchising Bill 2010.

Dear Sir

Content of submission

Firstly, as a cover note we write to the Standing Committee to make our submission however we are not a member of the franchise community.

We were however due to launch our business as a franchise in 2010 both here in SA and in WA, and it was the introduction of this Bill as well as similar actions in South Australia that convinced us not to proceed with franchising as a business model. Instead we will pursue a different business format and avoid the seemingly and increasingly litigious over regulated platform that exists or is potentially probable in the franchise sector. It seems to us that all of the sound business merit that sits within the current franchise business model for both Franchisor and Franchisee alike is being significantly diluted by the proposed introductions of State based Regulation/Legislation.

Please therefore accept the following pages as being the key content of our submission.

Yours faithfully

Robert (Bob) Turner
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Managing Director
19th January 2011

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Specifically in relation to Part 3, clauses 10 and 11.

Our concern with the term 'good faith' is, we are advised, that it cannot be defined at law. The Trade Practices Act as amended and Common Law already provide significant remedy for any matters that this might be attempting to deal with, along with the federal Franchising Code of Conduct for irregular conduct in matters of trade between businesses large and small in the franchise sector. We do not need a further layer of ill or undefined terminology. The outcome will surely be an increase in confusion between parties and the resultant increase in potential legal argument and court actions over what are mostly frivolous matters or matters of misunderstandings between the parties.

Our research into franchising as a business model indicated that disputation between franchisors and franchises is consistently at or around 1% and this to us seems very low and as an indicator tells us that the current laws are working well for all parties. Certainly from our knowledge this has changed dramatically since the federal franchise Code was introduced in 1998.

There are bound to be individual and rare cases where parties remain unhappy with certain outcomes. This is totally consistent with all forms of business relationships and cannot in any way be taken as an indicator of the need for further legislation. How could this work where multiple jurisdictions might have cause to act on the same matter? Crazy.

What exists in federal legislation/regulation is working very well as we see it and any attempt to add a State based form of Legislation would simply make it too complex and unworkable or at best without any degree of certainty as to the real position of either party in the management of their relationship and business matters generally.

Part 1 clause 3.

Not being a lawyer we sought advice and our advice is that this clause provides perpetuity to franchise agreements. This is in conflict with the nature of the franchise business relationship and its defined Term. If a franchisor feels the desire to provide an unlimited Term to the relationship then this can be done within the current legal framework – it should not however be deemed so by regulators and most certainly not retrospectively.

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Markets, businesses and indeed people change over time and it is of paramount importance in a franchise relationship that at certain intervals the relationship comes to an end and then the parties each would consider their position for the future and whether or not franchising is in fact a suitable business model for the future given the then known changes in matters that would impact in the future?

Automatic renewal is simply non-commercial and flawed in principle. Just imagine a retail franchisee having rights forever or for a term beyond the property Lease Term and yet the landlord chooses NOT to provide a further Term of Lease. This would be totally unworkable and flawed in its underlying commercial fundamentals.

To provide exacting commentary to other specific items and clauses would require us to seek extensive written legal advice at great expense that we could then annexe to this submission. This we will not do and we provide this brief submission because we consider the WA Franchise Bill inappropriate..

We are however informally advised that the following other elements are either unclear or clearly improper or inappropriate in respect to their application to the entrepreneurial and commercial business relationship that binds two parties in a franchise agreement in Australia.

1. Territorial application. We understand that the proposed Bill may or will have application across other states? How can this be? Especially if this is replicated by other States in a different but perhaps similar form? Where is the certainty in that as a concept?

2. Any party in a commercial dispute that leads to legal and/or court action should have the right to Legal Representation in all circumstances and where necessary a Right of Appeal. Not to have these fundamentals in place 'at will' would be un-Australian, undemocratic and morally improper – for either party of a franchise relationship.

3. Mediation is an element of the federal Franchising Code of Conduct and again the statistics that we have gleaned support the fact that it works and avoids unnecessary cost and unpleasant or unnecessary court action. It makes no sense to us that this Bill does not include it as a compulsory element and process.

4. We understand that the Federal Government Minister for Small Business is against State based regulation and one can understand why when at least the foregoing points are considered.

5. Compliance costs are too often an unnecessary impost on the profitability of all businesses. Layer upon layer of Legislation across multiple States and Federally will surely add to this significant fact and have a direct impact on the viability of many.

6. Most business values have fallen over the past decade and this additional layer of regulation will in our view slow business growth and cause a further fall in business values. This is one of the key reasons why we have chosen to utilise a license model rather than a franchise. Our growth will still be slower (but not as slow as we would contemplate with State based Legislation overarching the Franchising Code of Conduct), but our compliance and regulatory matters will be significantly lower. Our commercial landscape and legal framework will be stable or as stable as one can expect in business.

7. In discussion with our bankers we understand that this sector too is concerned about the proposed State based legislation and its affect on growth plans, as it may well render some businesses non-viable in the long term?

Our decision not to franchise has been taken and is sadly not reversible in the short term and yet one ponders as to how many other businesses will choose to avoid franchising and for all of the aforementioned reasons as well as others that we have not even considered.