FB2010 Sub 94

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31 January 2011

The Chairman
Economics and Industry Standing Committee
Legislative Assembly
Parliament House
PERTH WA 6000

Dear Sir or Madam,

Re: Submission to the WA Franchise Bill Inquiry

Introduction

I make this submission in my capacity as a Solicitor with long experience in franchising related matters, representing both franchisees and franchisors across Australia, including in Western Australia.

I have had the benefit of considering the submission previously made by the Queensland Law Society in relation to the proposed Bill (dated 8 November, 2010). I was not involved in the drafting of that submission although I commend it to the Committee on the basis that it raises a number of concerns about the Bill that should be considered in some detail.

In this submission however I wish to address one critical point - being relevant to terms (b) and (c) of this Committee's terms of reference[i] - and in order to do so I will start with a brief consideration of the issue of 'good faith'.

Why good faith?

Currently there appears to be three separate positions in relation to good faith:

1. Proponents - who argue that 'unconscionable conduct' does not sufficiently regulate the conduct of parties in a franchising relationship, requiring the adoption of 'good faith' alternative standard;

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2. Opponents - whose principal argument seems to be that the introduction of 'good faith' will create unnecessary confusion and lead to an increase in litigation; and

3. The Federal Government who, in the most recent changes to the Franchising Code, acknowledged that 'good faith' could apply to franchising matters but very unhelpfully left the development of the concept to the Courts.

All of these positions are, in my submission, oblique acknowledgements of a more fundamental problem.

Moving forward - but in what direction?

Those seeking to introduce good faith argue that 'unconscionable conduct' is not working as a practical standard in franchising relationships - it is not clear what 'unconscionability' means in day to day business; therefore the solution is to change the standard.

I disagree to the extent that changing the standard *by itself* will not solve the problem - and it may make matters worse.

The arguments of the opponents to good faith are largely generalised and assumptive; although some points are worth considering, one wonders whether diversionary tactics are being employed, drawing attention away from the areas requiring urgent reform.

Opposing changes to the law on the grounds that it might lead to confusion is no argument at all.

Any change to a law will usually result in confusion, to a greater or lesser extent, as the practical effects of the changes work their way through the system. Ironically the Federal Government now finds itself in that very position in its calls for time to assess the effectiveness of the most recent changes to the Code.

A more fundamental problem

The main difficulty with the proposed Bill - and indeed with adopting a 'good faith' standard of conduct - is that there is no improvement in the ability of everyday franchisees and franchisors to access the benefits of the Bill using their own resources.

In essence, it matters little what standard is adopted if it cannot be actually applied to resolve disputes. This has been the problem with 'unconscionability' and it will be the problem with 'good faith'.

Unconscionability has not been fully developed because the Courts have not had the cases to define its parameters. In many ways we (as lawyers) simply do not know whether unconscionable conduct is a sufficient safeguard of franchising conduct.

Adopting a good faith standard without improving access to justice would be a cruel outcome. Franchisees (in particular) who cannot afford to go to Court now would still be unable to have their complaints independently heard or determined, even though they might have been given a stronger argument under the law.

Dispute resolution and enforcement

At this point I wish to highlight an issue that seems misunderstood in many of the debates about franchise reform - dispute resolution is an entirely separate matter to enforcement.

I believe the Federal Government has confused the issue in its recent changes - increasing the powers of the ACCC to investigate Code breaches is not going to be of any assistance in a commercial dispute.

For example, if a commercial tenant has a dispute with the landlord about the colour to paint the walls, the tenant does not go to the police to have the matter resolved - yet this is effectively what is being suggested in relation to franchising; that is, that the ACCC will resolve disputes.

The charter of the ACCC in franchising matters is not, and never was, as a dispute resolution service. Its benefit to the sector is in investigating and enforcing compliance with the Code, not as an arbitrator or mediator.

I am concerned that the proposed Bill also has a tendency in the same direction: civil penalties, redress orders and injunctions are all 'enforcement' issues. The proposed Bill relies upon access to the Courts for private action to be taken; and that access that is currently not available to many franchisees (and not a few franchisors).

2 strikes against the Courts

The reason why access to justice in franchising disputes is so difficult is in two parts: the cost of legal representation and the complexity of the Court system and the law.

The cost of legal representation in franchise litigation is beyond the reach of many franchisees and coupled with the inability of any lawyer to guarantee an outcome (and not forgetting the prospect of an adverse costs Order if the

claim is unsuccessful), the uncertainty is sufficient to keep many complaints out of the Court system.

Some parties just cannot afford to risk the cost - and the other party knows it as well. This also helps explain why the majority of disputes do not proceed to mediation (statistically around 20% of disputes will go to a mediation - but the real figure is much lower) and why mediation does not work as a 'one size fits all' solution to dispute resolution.

Mediation does not fare well when power imbalances of this magnitude exist between the parties. Mediation is a valuable tool, but if it is not attempted, or is unsuccessful, there is virtually no other option currently available to resolve the dispute.

This leads some franchisees to self-represent in Court; their success rate is not high. This is the second part of the issue; the complexity of Court procedure and of the law itself.

Franchising law is difficult at the best of times, because it takes elements from different fields - contract and trade practices law, the Franchising Code and equitable principles are often all involved in even a 'simple' dispute.

The rules of evidence and the Court process can frustrate a self-represented lay person in their attempt to communicate their case and present their argument. Experienced lawyers will almost always have the advantage in these situations.

There are two immediately obvious solutions (whether on a State or Federal level):

1. Create a "franchising causes list" in the existing Court structure with a presumption that each party will pay their own costs and implement a 'fast track' case management system that streamlines the usual Court processes; or

2. Empower a Tribunal to resolve franchising disputes. Traditionally tribunals have been the province of reduced formality and lower costs and there is no reason why a tribunal would not be effective in a large proportion of franchise disputes.

It is my considered submission that the majority of the conduct the proposed Bill wishes to regulate could well be solved by a more accessible dispute resolution forum. Penalties, injunctions, redress orders and damages are all currently available under the Competition and Consumer Act 2010 (the former Trade Practices Act). An expansion of those powers under State legislation

may well be unnecessary if a dispute could be addressed before the point where punitive action becomes required.

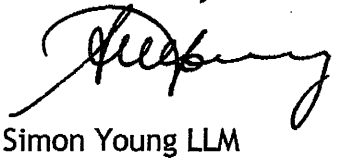
There will always be a need for an industry watchdog and the ACCC's expanded powers may well curb some of the more egregious conduct that we hear of, but as I have already stated, the ACCC cannot regulate conduct that falls within the scope of a 'commercial dispute'.

Conclusion

I have long supported the need for further reform in the franchising industry but remain concerned that the proposed WA Franchise Bill does not, for all of its intended benefits, address that need in its most critical area at the present time.
I suspect it will cure symptoms, rather than the disease, which is the lack of a properly functioning dispute resolution (or alternative dispute resolution) regime under the Franchising Code of Conduct.

I thank the Committee for the opportunity to make this submission. My CV is available upon request.

Yours faithfully



Simon Young LLM
Solicitor

[i] (b) enhance the purpose of the Franchising Code of Conduct, which is to regulate the conduct of participants toward each other; and
(c) result in a cost impact on the State or participants in franchising.