



Sharon Grierson MP
Federal Member for Newcastle

2 December 2008

COMMITTEE REPORTS

FRANCHISING INQUIRY

Ms GRIERSON (Newcastle) (8.19 p.m.)—I also rise to speak as a member of the Parliamentary Joint Committee on Corporations and Financial Services on the committee's report *Opportunity not opportunism: improving conduct in Australian franchising*, which was tabled in the House last night. I commend this report to the House. I also commend the work of the committee, particularly its chair, the member for Oxley, who has just spoken on this matter, and the secretariat, who very adequately supported our work.

The report follows a five-month inquiry that held four public hearings and received more than 150 submissions from franchisees, franchisors, representative organisations and academic and legal experts. The committee has made 11 recommendations, all of which are aimed at raising the standard of conduct in Australian franchising. They get the balance right between regulation and encouraging free enterprise.

The franchising relationship is based on a prescribed business model which is offered by the franchisor and carried out under their guidance and oversight by franchise owners. Many franchise agreements have, of course, resulted in highly successful and profitable ongoing business relationships. There is little doubt that the franchising model has become increasingly popular in Australia. At best, franchise agreements for businesses should offer an extra degree of protection for new entrants and particularly some stability and backup for those people going into small business for the first time. To know they are part of an established supply chain under an established brand—a well-marketed brand, in some cases—can offer a degree of comfort to new businesses.

A recent industry survey commissioned by the Franchise Council of Australia suggests that franchise systems enjoyed a 14.6 per cent growth rate between 2006 and mid-2008 and that franchises now represent 3.7 per cent of all small business in Australia, employing an estimated 413,500 people. So they are a significant contributor to our economy and the small business sector. Notwithstanding the rapid growth of franchises in Australia over the last decade, the lack of independent, reliable data has remained a significant issue for this sector, and I think everyone will welcome the committee's recommendation that the ABS develop mechanisms for collecting and publishing relevant statistics on the franchising sector.

Despite the success of many franchise agreements, evidence presented to the committee also served to highlight the conflicts that currently exist between some franchisors and franchisees. The committee notes that issues arising during the term of the agreements can and do cause tensions and that these issues have the potential to escalate into major disputes. Disputes most frequently arise as a result of differing expectations and understandings about the obligations of each party to the agreement and asymmetric power dynamics within franchise agreements, with the potential to lead to an abuse of power.

Improved collection of franchising statistics, with a focus on disputes and dispute related unit franchise turnover, will help us to develop a better understanding of just how extensive disputation truly is. To have this data publicly available as a source of information for those contemplating entry into a franchise arrangement would allow them to identify any trends or patterns of conflict. A reduction in disputes is nonetheless the most desirable outcome for all, and the committee noted a number of suggestions to improve dispute resolution outcomes, including an increased focus on premediation strategies, the creation of a tribunal to make determinations and the introduction of a franchising ombudsman.

But it is the committee's view that many of the issues which lead to disputes and the need for mediation or alternative dispute resolution mechanisms would be mitigated by the introduction of an explicit obligation into the code of conduct for all parties to a franchise agreement to act in good faith. Several of our recommendations also are about clarification of disclosure—the sort of information parties to a franchise agreement should be in possession of. That includes clear statements of liabilities and consequences applying to franchisees in the event of failure.

We recommended that government explore avenues to better balance the rights and liabilities of franchisees and franchisors in the event of franchisor failure. We also recommended that the Franchising Code of Conduct be amended to require franchisors to disclose to a franchisee, before a franchising agreement is entered into, what process will apply in determining end-of-term arrangements. That process should give due regard to the potential transferability of equity in the value of the business as a going concern. Our preferred course of action was to emphasise the good-faith angle of both negotiations and entering into any contractual arrangement. The committee believes that acting in good faith at all stages of the franchise relationship provides a deterrent against opportunistic conduct in the franchising sector.

There is no denying that the treatment of some franchisees when their contract ends has been truly appalling. The committee heard disturbing evidence of some franchisors who had exploited and abused their market power and position, had taken advantage of their dominance within the partnership and had shown little regard for the regulatory system or for the outcomes and potential loss to the franchisee. I know that as MPs we have all had cases in our electorates brought to our attention. I have worked with one such case in my electorate for more than three years now; it is still not completely resolved. The trauma experienced by mum-and-dad franchisees who at the end of their contracts have walked away with nothing, and continue to live in fear of losing the roof

over their heads, speaks volumes for the need for this inquiry and for the recommendations it has put forward.

In dealing with the cases that I have in my electorate, I want to thank the franchise sector representative groups. They have been very helpful. I also point out that, in these agreements, frequently the franchisor's bank is the bank that enters into the agreement as financier for the franchisee. I think that is a less than desirable situation, but it is not something that came across sufficiently in our inquiry. But it does seem that, just as in purchasing a home one might use a different bank than the vendor; the franchisee should perhaps have a very separate bank arrangement. I also take this opportunity to point out that there is a high degree of ignorance of people's rights in the banking sector. There are customer advocates at our major banks, and they are there to be advocates for the customer. In cases of major sums of money, there is also a banking ombudsman. Those sorts of facilities and avenues of redress should be made available, because often the situation is that a franchise business does not return enough to make payments owed to banks for that contract. I think there are issues that we could not deal with in this report but that still exist.

As this report makes clear, though, franchise agreements should clearly stipulate what the end-of-term arrangements and processes are. These arrangements should be fully and transparently disclosed to prospective franchisees. To reduce disputation around end-of-term arrangements, the committee recommended that those disclosure provisions in the code of conduct be amended to increase transparency, before the start of a franchise agreement, about what process will apply at the end. Unfortunately, people go in with a very optimistic viewpoint. They rarely contemplate the worst-case scenario or consider that there will be an element of failure or financial risk. The committee also recommends the introduction of pecuniary penalties and enhancement of the ACCC's proactive investigative powers in relation to potential breaches of the code. I take this opportunity to congratulate Graeme Samuel. Under the new government, I have seen much greater interest in protecting small business and in representation for small business when they are in a dispute with a major business. I recommend that course of action and I am very pleased to see the ACCC taking up that challenge.

In conclusion, I commend this report to the House. I look forward to working with the government to ensure ongoing improvements in the standard of conduct in the Australian franchising sector. I hope that the relevant ministers will take up our recommendations, put them into effect and be very open to representation by the franchise sector for any further reforms. I think this report builds on a long period of action and responses, but they have not been completely effective. The adding of penalties, the strengthening of legislation and the role of the ACCC and, in particular, changing the code of conduct—basing it on good faith and adding clarity to it—will, if adopted, make sure that this sector is a vibrant and successful one and one where we would certainly like to see a reduction in disputes.