

## COMMITTEES

### Corporations and Financial Services Committee Report

[Mr ROBERT](#) (Fadden) (10.00 a.m.)—I rise to speak on the Corporations and Financial Services Committee report *Opportunity not opportunism: improving conduct in Australian franchising* as one of the coalition members on the committee that passed down the report. The report builds on the code of conduct reforms implemented under the Howard-Costello government by Minister Bailey. It builds on the Western Australian inquiry into franchising and the South Australian inquiry into franchising, and it delivers 11 recommendations. Each of those recommendations is designed to improve franchising in this country—an industry which, whilst it may only account for some five per cent of small business, still employs tens of thousands of Australians and is one of the seemingly easier ways to enter business.

The first recommendation is that the Franchising Code of Conduct be amended to require that disclosure documents include a clear statement by franchisors of the liabilities and consequences applying to franchisees in the event of franchisor failure. Much has been said about a franchisee failing, things going south for them, but little covers what happens if a franchisor fails. Evidence points to at least 20 franchisor systems failing each year resulting in franchisees in those systems being unsure of next steps.

The second recommendation is that the government investigate the benefits of developing a simple online registration system for Australian franchisors requiring them, on an annual basis, to lodge a statement confirming the nature and extent of their franchising network and providing a guarantee that they are meeting their obligations under the Franchising Code of Conduct. The recommendation seeks to achieve two things: firstly, getting a feel for the size of the franchising industry and being able to understand how government support can be more tailored to assist them and, secondly, getting franchisors to put a statement online—a five-minute exercise—to say ‘we comply with a code of conduct, we put our hand in the air, we let the government of the nation and the Australian people know that we are doing the right thing’.

The third recommendation is that the government review the efficacy of the 1 March 2008 amendment to the disclosure provisions of the Franchising Code of Conduct within two years of their taking effect. The point of the recommendation is quite simple. It always takes time for policy and regulatory changes to move their way through an economy. It will take time to see if the changes that went into the code on 1 March 2008 have been effective. A review in two years is simply good practice, to look at how effective those measures have been.

The fourth recommendation is that the government explore avenues to better balance the rights and liabilities of franchisees and franchisors, again, in the event of franchisor failure. Whilst the code gives franchisors the ability to terminate franchisees, it does not provide any reciprocal termination provisions for franchisees in the event of franchisor failure. Addressing the other side of the equation will make things easier in the unlikely but still happening event of franchisors failing in the current market conditions.

The fifth recommendation is that the code of conduct be amended to require franchisors to disclose, before a franchising agreement is entered, 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.

The issue is: what happens at the end of a relationship? Typical franchise agreements are signed for somewhere between five and 10 years and some with provisions for

extensions. The maximum agreements tend to be, in the case of a McDonalds franchise, up to 20 years. But at the end of that time, whilst common law contract exists which is quite clear that the arrangement ends in 20 years, many franchisees are still unsure as to what exactly happens. If I as a franchisee put all this time, effort, marketing and local awareness into jointly building our business, at the end of the five-year agreement or the 10-year agreement do I simply just walk away? Does a franchisor take over all of my work? What actually happens? There is a degree of uncertainty. Franchisee expectations need to be managed. Everyone needs to be absolutely upfront to say at the end of the term: this is what is going to happen. That is, the franchisor will say, 'We are going to allow you to sell your business within four or five years of the agreement ending so you can maximise your return—we will allow you to do X or allow you to do Y.' Greater transparency with end-of-term provisions in a franchising contract will certainly help franchisees understand what comes next.

The sixth recommendation is to change the name of the Office of the Mediation Adviser to the Office of the Franchising Mediation Adviser. Now, some may argue that throwing in one word may not be one of the boldest recommendations that any committee has indeed made in this hallowed place. However, there is some evidence to suggest that the Office of the Mediation Adviser is not being as fully utilised as we would like to see. Perhaps changing the name and calling it the Office of the Franchising Mediation Adviser, that is, saying that the mediation adviser is just for franchised situations, may help that office be more fully used. If one more person used it then perhaps the recommendation remains a good one.

The seventh recommendation requires the government to require the Australian Bureau of Statistics to develop mechanisms for collecting and publishing statistics on the franchising sector. At present, the FCA sponsors one academic to provide a survey to get an understanding of this quite unique area of Australian business life. There are no real tangible ABS statistics to understand what is happening in the area of franchising in the nation. ABS does a sterling job. There is the opportunity to provide some mechanisms through census collection data or other areas to provide better statistical reporting to allow government to make better decisions.

Recommendation 8, which I think is a fairly substantial one, is to include a new clause in the Franchising Code of Conduct. It will be clause 6, 'Standard of conduct'. The recommended wording is:

Franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement.

The committee took substantial evidence that indicated that courts were already starting to imply good faith existed when franchisees and franchisors worked through disputes. The concept of applying good faith, though, was not universal across the courts. Some Federal Court justices were saying that an implied act of good faith is incumbent upon all parties; other federal justices were not. Its application across the courts at present is not uniform. Some franchisees, like Eagle Boys, actually have in their contracts that they require all parties—franchisors and franchisees—to act in good faith in all aspects of the agreement and the terms of the agreement. And Eagle Boys is to be commended for having that in. But at present it is not uniform. The courts are not uniformly expecting good faith to apply and all contracts are not including the requirement to act in good faith. Simply updating the code of conduct to require all parties to act in good faith will provide the basis for the courts to not only define the basis, the parameter and the extent of good faith but also require them in all aspects of mediation, arbitration and court proceedings, if they occur, to ensure that good faith is applied across all parties.

Recommendation 9 is that the Trade Practices Act 1974 be amended to include pecuniary penalties for breaches of the Franchising Code of Conduct. At present, the Trade Practices Act clearly states what can and cannot occur. But there is no stick to say that if you cross the line, here is the penalty. There is something about the Australian way of life that says that if you drive on the wrong side of the road there is a consequence—another car will hit you. If you break the law there is a consequence. If we remove a consequence from human behaviour, human behaviour has shown that at times and in some circumstances it can go to an extreme.

That behaviour is no different in the corporate world. It is entirely appropriate for pecuniary penalties for breaches of the franchising code to be introduced. It would certainly assist the ACCC in its enforcement role by providing a greater deterrent for contravening the code. Likewise, recommendation 10 asks that consideration be given to amending the Trade Practices Act to provide for pecuniary penalties in relation to a range of other breaches of the section, again to provide ACCC and other organisations with the necessary power to achieve the end result.

The last recommendation is for the ACCC to be given the power to investigate where it receives credible information indicating that a party to an agreement may be engaging in conduct contrary to their obligations under the Franchising Code of Conduct. I would have assumed that the ACCC would have had all available powers in their bailiwick to go forth and investigate as necessary, as per the law, where possible breaches of the code of conduct have occurred. But this is something that the ACCC have specifically asked for and believe will strengthen their powers to apply the law. In that respect, it is supported.

I join the member for Oxley, the chair of the committee, in recommending this report to the government. The inquiry received over a hundred submissions. It covered the nation widely and heard from all stakeholders. I look forward to the government's review and indeed adoption of the recommendations.

Debate (on motion by **Mr Hayes**) adjourned.