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PRIVATE MEMBERS' BUSINESS

Franchising

Mr RANDALL (Canning) (6.55 pm)—I move:

That the House:

(1) notes that in December 2008 the Parliamentary Joint Committee on Corporations and Financial Services tabled its report entitled Opportunity not opportunism: improving conduct in Australian franchising;

(2) condemns the Minister for Small Business for ignoring the calls of current and former franchisees, the Opposition and his own colleagues to urgently implement the recommendations of the Opportunity not opportunism: improving conduct in Australian franchising report;

(3) acknowledges that adoption of Recommendation 8 to insert a new clause into the Franchising Code of Conduct imposing a good faith requirement on franchisors, franchisees and prospective franchisees to act in good faith in relation to all aspects of a franchise agreement, would impose a standard of behaviour that would discourage opportunistic and unethical conduct in the franchising sector; and

(4) notes that:

(a) amendments to the Trade Practices Act 1974, imposing pecuniary penalties for breaches of the Franchising Code of Conduct, would further act as a deterrent and ensure full compliance with the Code and also discourage opportunistic and unethical conduct in the franchising sector; and

(b) while the Minister fails to implement all 11 recommendations, aggrieved franchisees will continue to lose their livelihoods and homes and many will continue to have no means for redress without recourse to expensive and often unaffordable litigation.

I have spoken on several occasions about the plight of hundreds of thousands of franchisees in Australia who have been burned financially and emotionally by rogue and opportunistic franchisors. At the core of fixing the epidemic problem is the need for the government to strengthen the existing laws relating to franchisors. How many times does Minister Emerson need to be told? I raise this business today to call on the minister to fast-track the adoption of the recommendations contained in the report of the inquiry of the Parliamentary Joint Committee on Corporations and Financial Services called *Opportunity not opportunism: improving conduct in Australian franchising*.

The title says it all. The chair of that inquiry, Bernie Ripoll, was eager to put bullies on notice when the report was handed down last December. But lacklustre efforts and a lack of government attention have it gathering dust. It is just another example of the government's preference for spin over substance.

In October 2007, Labor's policy was to amend the Franchising Code of Conduct to include a well-defined requirement for, and a definition of, good faith. The government must adopt the recommendations contained in the report and the submissions, rather than simply holding more inquiries, meetings and consultations. The minister received the report in December. It is now August and we are still without any indication of what recommendations, if any, he plans to adopt.

While I understand meetings have been conducted with the ACCC and the Franchise Council of Australia, FCA, on the options paper released in June, these processes continue to be of little comfort to franchisees.

The options paper seeks public input on the implementation of the report recommendations. Submissions were called for, but this would appear to be just another in a long line of delaying tactics by the minister. South Australian Labor MP Mr Piccolo has been highly critical of the minister's impotence, and I can only agree. In fact, I suspect that the options paper was put out in sharp response to public criticism. Even so, Mr Piccolo maintains:

There is no comfort in this document— in other words, the options paper— to the hundreds of mum and dad franchisees who have or are being screwed over by franchisors it is very misleading to call the document an options paper. There are no options discussed in the paper.

He says the minister's handling of the matter would be a great story-line for the *Hollowmen*.

The opportunism and unscrupulous conduct of a number of franchisors has been widely reported. However, there has been little practical redress for franchisees. While statistics are sketchy, figures show that 35 per cent of franchisees report some type of dispute with their franchisor, although I am sure the FCA would disagree with this number. Time is not on the side of the many that have already experienced the torment of losing their livelihoods and starting their lives over again.

We need to implement a system to improve the regulatory framework that protects future franchisees against intimidatory and financially crippling behaviour. We need to have a system that discourages such behaviour. We must raise the bar in this \$128 billion industry. We know that these rogue franchisors exist. The minister does too.

No less than three parliamentary inquiries conducted in 2008—in Western Australia, in South Australia and by the federal parliament—heard the sad stories of these franchisees. It does say something when the minister's own colleagues are fed up with the inaction and the lack of an approach to tackling these problems that are ruining the situation for Australian mums and dads who are trying to make a go of it in business.

This is not a partisan issue; this is about making sure people get a fair deal. Mr Piccolo has called for his own minister to give the issue urgent action and has raised concerns about the minister's indication that nothing would eventuate. The member has even gone so far as to suggest implementing state laws in South Australia to ensure greater protections are in place.

I will not delve into the specifics of the many sad cases that have come to me, as I have already done so in this parliament on several occasions. Needless to say, most ex-franchisees remain in exactly the same position they were in when I last spoke about this. They simply cannot afford the legal fees, and for a multitude of reasons the ACCC has not pursued those cases. The inquiry heard that there was resentment and frustration in the industry about the inaction of the ACCC in several cases. While I appreciate that the ACCC needs to be able to substantiate allegations against franchisors, there appears to be a lack of will and a way to vigorously pursue the many cases.

I recently had the opportunity to meet with Professor Frank Zumbo from the University of New South Wales, an eminent authority on the topic of franchising and who I know has been quite outspoken about the adoption of the report's recommendations. Professor Zumbo's comments have gone unheeded by the committees. The Senate Standing Committee on Economics agreed with his definition of 'unconscionable conduct', which is recommended for inclusion in the Trade Practices Act for the purposes of section 51. Senators Xenophon and Joyce also noted in their additional comments:

... the TPA should specifically prohibit bullying, intimidation, physical force ... in ... business relationships ...

This is exactly the type of behaviour my constituents experienced. Furthermore, hefty pecuniary penalties for breaches of the Franchising Code of Conduct must be adopted to act as a deterrent against unethical, unscrupulous and opportunistic conduct.

The insertion of a good faith requirement in the Franchising Code of Conduct is a fundamental recommendation of these reports and one that has attracted fierce debate. Interestingly, New Zealand has been considering the introduction of a good faith requirement. The committee found:

... the optimal way to provide a deterrent against opportunistic conduct in the franchising sector is to explicitly incorporate, in its simplest form, the existing and widely accepted implied duty of parties to a franchise agreement to act in good faith.

We cannot ignore the fact that generally in these situations there is one weaker party. The franchisor is often a powerful national company and the franchisee is typically someone trying to make a change in their lives, admittedly sometimes with a minimum of business experience. The Franchise Council of Australia would have us believe that franchisees that have lost their businesses are 'disgruntled' and too emotional to understand that their business acumen was the reason their franchise did not succeed. This is a slap in the face to hundreds of franchisees. There are more than enough complaints to see that something is not right here. There must be something going on. Where there is smoke, there is obviously fire. As Mr Piccolo said:

The reforms proposed by the parliamentary committees are not about compensating or protecting people who make poor business decisions. They are about ensuring that when franchisors break the law there are effective (rather than theoretical) remedies for franchisees.

Business Review Weekly commentator Jane Lindhe last month wrote that the recent Jack Cowin case brought to the forefront the lack of a good faith requirement. That was the case where KFC franchisees were not renewed because of the decision of the franchisor. The current code does not allow franchisees the same rights to terminate the franchise agreement as franchisors. There is a lack of equality, and, without an explicit duty of good faith, parties are getting away with more. Ms Lindhe reported:

Recent cases such as the collapse of Midas and Kleenmaid have shown that the failure of large franchise groups can have a devastating impact on their franchisees.

A requirement of good faith would act as a deterrent against improper and unethical behaviour. It would explicitly provide an obligation to negotiate in good faith, to make agreements in good faith and to act in good faith at the end of agreements—which was a serious concern brought to the committee's attention. Disclosure at the commencement of franchising agreements about what should happen at the end of the agreement is crucial, as was noted in recommendation 5 of the financial services committee inquiry. Currently, end-of-franchise agreements often seem to be the downfall; however, the problems start well before then, often brewing over a number of months and years, as was the case with the Lenard's franchisees.

Frustration in the industry is rife. Major nationals including Kleenmaid, Kleins and Midas have all bitten the dust. *WA Today* notes:

Franchisees are among those left out-of-pocket by the collapse of their parent companies, and many are irate the Federal Government has yet to move on a joint parliamentary committee's recommendations for reform of the franchising code of conduct.

If the minister continues to sit on his hands he is sending the message, that despite the findings of several inquiries and his own election promise, the government is ignorant or simply does not care about protecting Australia's franchisees and stamping out these industry bullies.

Mr DREYFUS (Isaacs) (7.05 pm)—Franchising is a very popular form of doing business in Australia. I am indebted to the Parliamentary Joint Committee on Corporations and Financial Services, for some statistics from their report of December 2008, entitled *Opportunity not opportunism: improving conduct in Australian franchising*, that give us a bit of the context in which this question should be considered. What they say in the report is that in 2008 there were approximately 1,100 business-

format franchisors in Australia, compared with 960 in 2006 and 850 in 2004. They go on to say that there are an estimated 71,400 franchised units in 2008, turning over \$61 billion in 2007 and employing over 400,000 people. We can see from those statistics just what a large contribution the franchising industry and businesses that are conducted in the form of franchising make to the Australian economy.

Indeed, it is a much more common form of business than it is in the United States. We read elsewhere in the report that it has been estimated that there is one franchise for every 20,000 citizens in Australia, which is around five times the density of franchise systems in the United States. So we should be in no doubt as to the importance of this sector and we should also be in no doubt that this sector is growing.

It is also important when considering the form of regulation that is appropriate for this industry to consider the fact that the mandatory franchising code was only introduced in 1998 and followed the introduction of a voluntary code in 1993. What we have seen in the years since the first introduction of the voluntary code, and then the introduction of a mandatory code, is increasing popularity of this form of business and a continued expansion of the sector. What also needs to be steadily borne in mind in considering regulation is that most of the franchising businesses in Australia, from the point of view of both franchisors and franchisees, are successful businesses which are conducted in an amicable way.

That said, we all know—every member of this parliament knows—that there are problems in the franchising sector. Every member of this parliament would have received, I would be certain, complaints from people involved in franchising in their electorate offices and those complaints would possibly have been in respect of some very large franchise systems and possibly in respect of some quite small franchise systems. What is also clear is that the problems that members of this parliament have heard from people in the franchising sector are not new.

They did not suddenly come into being in November 2007 on the change of government. Rather, they are problems which have been identified, have been experienced and have been known of for very many years. There is more than a little disingenuousness in the speech that we have just heard from the member for Canning in this area. I would need to put into the history of this matter the Matthews Review, commissioned by the former government, commissioned by the Minister for Small Business in June 2006. I am just going to say a little bit about the history of this matter. In the last full year of the former government—

Mr Randall interjecting—

The DEPUTY SPEAKER—Order! The honourable member for Canning will restrain.

There is a lot of sensitivity from the other side of the chamber because the member for Canning knows very well, Deputy Speaker, that the former government simply failed to act on most of the major problems that arose in this sector, and I would point to what the former Minister for Small Business did, which was to wait until the last full year of the former government, 2006, before she commissioned what was to be called the Matthews review.

She commissioned that in June 2006. It was quite a prompt piece of work by Graeme Matthews, because he reported to the government in October 2006. We had to wait a few months before the

Minister for Small Business got around to responding. She responded in February 2007 because she wanted to be seen to be taking action, it would seem, in the election year. But even that response was not acted on in the form of amendments to the franchising code until August 2007 and, demonstrating the speed with which the former government thought it appropriate to act in this area, were not to come into effect until 1 March 2008.

Mr Randall interjecting—

The DEPUTY SPEAKER—Order! I ask the honourable member for Canning to refrain.

Mr DREYFUS—It all reflects the intense sensitivity on the other side of the House, and I am setting some context here.

Mr Randall interjecting—

The DEPUTY SPEAKER—Order! The honourable member will resume his seat. I would ask the honourable member to treat the House the way it should be treated and I ask him to stop interjecting.

Mr DREYFUS—Thank you, Deputy Speaker. The small number of amendments to the franchising code which were accepted by the former government did not of course come into effect until 1 March 2008, almost two years after Graeme Matthews was commissioned by the former government. So one would not look to the former government, that is the government of which those opposite were members, to see any real track record in undertaking effective reform in this area. It was left to this government to pick up the pieces and embark on some serious reforms and try to legislate in an appropriate manner, which is what is now being engaged in.

The joint standing committee started its inquiry in June last year and it has conducted a number of hearings in Sydney, Brisbane, Canberra and Melbourne—and I see that we have the member for Oxley, the chair of the committee, here with us in the chamber. It conducted these hearings across Australia. It received 159 submissions and, if one looks at the list of submissions, they were from individuals, from academics, from franchisees, from franchisors, trade associations, lawyers and, indeed, from a member of this parliament. You, the member for Lyons, also made a submission to this report.

In June 2009 the government published an options paper and we can expect to see a government response soon.

What is important to note about this, Deputy Speaker, is that this is an industry which is not one—and I have noted the thousands upon thousands of franchised businesses in this country—where one should jump straightaway to instant action, and I repeat, it is more than a little disingenuous for any of those opposite to be suggesting now that there should be instant change.

Mr Randall interjecting—

Mr DREYFUS—What is really striking is to note that the voice expressed opposite, that of the member for Canning, was not heard in 2006 or 2007 crying for change.

Mr Randall—Deputy Speaker, I rise on a point of order. The point of order is that the member needs to be accurate and tell the truth. I have been involved in this issue—

The DEPUTY SPEAKER—Order! There is no point of order.

Mr DREYFUS—If this franchising question and the questions raised by this motion are so crucial, why is it that franchising does not get even one mention in the opposition's small business package announced with great fanfare by the Leader of the Opposition on 6 April 2009? I happen to have that here with me, Deputy Speaker, and one can look at this so-called small business package and see that there is a heading about 'Tax loss carryback', a heading about 'Superannuation Guarantee relief', a heading about 'OECD best practice regulatory burden', a heading about 'One-stop-shop regulatory portal', a heading about 'Support for family businesses' and a heading about 'Cabinet-level representation'. This package makes not one single mention of franchising as an area in which reform is needed, notwithstanding that this much-announced and heralded small business package of the opposition came some four months after the report of the joint standing committee.

And when one does go to look at the points in the so-called Small Business Action Plan of the opposition, they too—as does the motion here today—ignore the steps that have been taken to support small business by the Rudd government. So in calling, as the opposition does, for a program to be developed to provide support and advice for family business succession planning and business professionalism, the opposition would ignore the fact that the government has already introduced \$46 million to fund 90 small business advisory services and business enterprise centres, \$10 million in funding for a Small Business Support Line and \$10 million in funding for the Small Business Online program.

The same could be said for each of the other supposed initiatives being announced here in April by the opposition, again not mentioning franchise at all, with the possible exception of the strange suggestion that the opposition is putting forward for superannuation guarantee relief, which would cost some \$5 million over the forward estimates and do nothing for the 1.1 million non-employing small businesses in Australia. As for the suggestion that there should be cabinet level representation, why was that not implemented by the former government? The Minister for Small Business in the former government was never, of course, in cabinet. The motion and the speech we have heard from the member for Canning ignore the need for care in legislating in this area. *(Time expired)*

Mrs GASH (Gilmore) (7.15 pm)—To my colleague the member for Isaacs opposite: I do not care who was in government. It is now the Labor government, so let us get on with fixing the problem. I second the motion of my colleague the member for Canning and thank him once again for continuing to keep this important matter before the parliament and the government. I just hope that the government is listening. It has been over three years since I first brought it to the attention of the House, and when we were in government three years ago I did bring to the House as well the matter of Baker's Delight, which adversely affected a constituent franchisee in my electorate of Gilmore.

Since then there have been a flood of cases, suggesting that all is not well within the Australian franchising sector. Franchisees continue to suffer at the hands of rogue franchisors. Members from both sides of parliament have heard the horror stories about unscrupulous franchisors. We continue to hear stories about the ACCC's inaction. Sadly, some franchisors still engage in questionable and

unethical practices. The ACCC continues to be ineffectual in stamping out the rogue franchisors. Little wonder that franchisees have little faith in the ACCC's ability to protect them from those rogue franchisors. Through the bipartisan approach of members of this House, the government established an inquiry whose report was handed to the minister in December of 2008. There it sits silent while franchisees suffer. Despite the wealth of evidence before the inquiry in support of the hundreds of complaints from franchisees, nothing has emerged since the Ripoll franchising report.

We are looking for leadership on this issue but all we are finding is silence from Minister Emerson. It is not only the opposition calling for urgent action; members on the government side are also calling for action. Franchising transcends political boundaries. It involves real people with real problems, even tragedies, as a result of their dealings with rogue franchisors. We are all waiting for a sign from the minister. We urge the minister to act swiftly on behalf of franchisees. The ACCC must also act. The concerns I raised with the ACCC at the time were never satisfactorily addressed, and this remains the case. For the life of me I cannot see how, despite the many hundreds of complaints lodged, the ACCC can continue to watch. There is something patently lacking when it comes to the ACCC, and I urge the ACCC to act rather than watch.

A key element flowing from the recommendations of the committee was to insert a good faith requirement in the Franchising Code of Conduct. That alone will not be enough. We also need a statutory definition for what constitutes unconscionable conduct under the Trade Practices Act. The good faith provision in the code of conduct can and should include a definition of what is meant by good faith. Such definitions can draw on court decisions and can be easily included. I can only reiterate my earlier call for a dedicated franchise tribunal or ombudsman that has the power to finally settle disputes. To me that is a realistic and practical option and I would encourage the government to pursue that option. I welcome provisions in the Trade Practices Act imposing pecuniary penalties for breaches of the franchising code. They would act as a deterrent, and of course penalties must be meaningful.

When I think of the millions of dollars involved in churning, the sanctions need to be significant. Of course access to justice is essential. That is why a tribunal or ombudsman has been an attraction for me. The longer this minister procrastinates, the more people will get harmed through churning and other unethical practices by rogue franchisors. The longer this minister procrastinates, the more we will be encouraging the very type of behaviour this House is trying to stop. Australian franchisees deserve decisive action from this government. The minister's immediate interest is needed. The minister must act, and if after eight months he still has no plan in place, let him to step aside for someone else who will act decisively. People's lives have been ruined and it is still happening.

Again I call on the minister to act now and once again investigate the reasons for the non-action by the ACCC.

Mr RIPOLL (Oxley) (7.20 pm)—Firstly, I would like to say it is great to see people in this House actually taking an interest in franchising and I congratulate all those involved. I think it is a bipartisan issue and a matter which is serious and important. It is one about which all members of parliament, in one form or another, have genuine concerns and views and they are all heading in the same direction. We all want to improve franchising and we all believe it is a good, strong, business model. It involves a whole heap of ordinary mums and dads, mostly, but generally people who are involved in small business and have taken that very big risk not just to employ themselves but to start a small

business in a unique partnership with someone else. It can be a very difficult partnership and it has often been referred to in the franchising world as almost like a marriage—a partnership that can be very good and fulfilling but also one that can be very complex, especially when the marriage may get into strife and there needs to be some sort of a separation.

Franchising in this country is about 30 years old. It started in America, came to Australia and went through an evolutionary period in this country, where there were no rules. There was just common law, the law of contract and so forth. It was almost a laissez-faire type environment. It was not big; it was only just beginning. That progressed through a regulatory regime where successive governments saw the need to regulate, to provide a better environment—some consumer protection and so forth—to people in franchising, including franchisors, as well as to consumers.

That has evolved from voluntary codes of conduct to mandatory codes of conduct, to what we saw in the Matthews review and in franchising reviews in Western Australian and South Australia—a whole range of jurisdictions were taking an interest. All of that culminated in what we ended up seeing in the Commonwealth parliament since the election of the Rudd government; that is, a full review. I have to say it was well supported by the opposition as well. It was a review of the overall franchising environment and it has led to the system that we find ourselves with today. It is a good system and I think we all agree with that, and that is what the reviews have found. But it does have some problems. It is not a perfect system.

I and the rest of my committee were very conscious that, in developing our eleven recommendations and in looking at what could be done, we needed to employ a carefully thought out, properly structured, strong process.

It would need to hear the views of everyone involved in franchising, from the representative peak bodies—who may have a particular view—to people who have had good experiences and those who have had shocking experiences, as we have heard many times in this place. We all have those constituents and we all want to do something for them. I congratulate the minister, which is very much different to some members. The minister, the department and the committee have been working through a distinctive process to try and come to a workable, feasible outcome that is acceptable to the sector, acceptable to the people who have put their money on the table and risked their own capital—the franchisees—to provide something that in the end will benefit all.

Some may say that this has all gone a bit slow. I disagree. I think we will soon see the fruits of that process and the benefits from giving proper consideration to the situation we are dealing with. The committee was very conscious of the need to make good, sound, solid recommendations, because we all understood the need to get the right balance between regulation—and the cost of regulation—and allowing franchisees and franchisors to go about their own business, to follow the terms and agreements within their own contracts. We all support that but there is abuse in the sector by some and that needs to be dealt with. We need to find proper mechanisms. There has been good development over the years; we just need to take the next progressive logical step. We identified a number of key points in the report. I will not go through all of them but I think it is important to acknowledge the pre-contractual agreements about disclosure and the proper giving of information, particularly regarding end-of franchise agreements.

A big issue for the committee was the good faith provisions. I will not get political in the short time that I have but I do have to say that the previous government actually rejected this particular view when it came before them only recently. We should all give some consideration to where we need to go to provide the right regulatory environment.

We need to find a solution for end-of-contract agreements. I agree with the member for Gilmore in terms of harsher penalties for those that do the wrong thing—and in the end that is what we are striving to implement. I am very supportive of the report my committee presented and I am very supportive of what the minister and the department are doing in cooperation and partnership with the industry.

The DEPUTY SPEAKER (Hon. DGH Adams)—Order! The time allotted for this debate has expired. The debate is adjourned and the resumption of the debate will be made an order of the day for the next sitting.