

Committee Secretary
Parliamentary Joint Committee on Corporations and Finance
Department Senate
P.O. Box 6100
Parliament House
Canberra ACT 2600
Australia

13 November 2008

Supplementary Submission-GD&AE Brown

To the Committee,

I recently made a submission to your Inquiry into the Franchising Code of Conduct, submission number 49. I wish to provide the following supplementary comments to be read in conjunction with it.

I have read the Proof Committee Hansard in relation to the Melbourne Public Hearing into the Franchising Code of Conduct inquiry dated 05 November 2008. Of particular interest to me is the presentation made by Mr. Stephen Giles, the Legal Committee Chair of the Franchise Council of Australia, and partner at Deacons law firm

"In Australia, if a franchisor makes a statement as to a future event, for example, 'I think you could earn \$10,000 a week out of this store', then that reverses the burden of proof and gives the franchisee an even stronger case, effectively as a matter of law, to take that on. That is where a lot of cases have been run."

I believe I meet the "burden of proof" as stated by Stephen Giles. I have written evidence to support the analogy that Stephen Giles presents as does my banker. My former franchisor, [REDACTED] made earnings claims to me that were misleading. They made the same misrepresentations to my banker, who kept notes of their conversations.

Importantly, the ACCC failed to recognise that the burden of proof had been established in my case specifically.

This is one area where I have real concerns that the ACCC is failing in their duty to protect franchisees. I would emphasise, that my Franchisor, [REDACTED], was investigated by the ACCC and, that the ACCC failed to find anything. The ACCC continues to reinforce poor franchisor conduct and perpetuate franchisee failure by permitting franchisors to hide behind their unfair contracts.

Stephen Giles did not relay to the Committee in his example that franchisors are protected when they make these misleading projections by unfair contracts clauses. I

believe the comment made by Stephen Giles was deliberately misleading. A classic example is the [REDACTED] contract which reads as follows:

Part 15 – Miscellaneous Clauses

Acknowledgements by you

73. You further acknowledge that: (f) we have not made any statements of representations to you that have induced you to enter into this Agreement apart from those recorded in item 17.

Entire agreement

74. This agreement records our entire agreement as to the subject matter of this agreement. Any prior discussions or negotiations not recorded in this agreement are deemed to be of no effect.

This effectively means that the franchisor can intentionally mislead the franchisee and the franchisees credit provider by lying and are protected by the lack of unfair contract laws. It also means that franchisors of dubious quality can dream up cash flow projections and lie about the financial viability of their product and be protected by the 'sanctity of the contract'. This remark is often used by Stephen Giles when he is arguing that no changes should be made to the current regulations.

This Committee has a real opportunity to address the imbalance in the franchise relationship by amending current regulations to introduce an unfair contracts provision. Unfair contracts should be made void if a contract that is clearly heavily weighted in favour of the franchisor is abused to their advantage.

This will go some way to protect franchisees that are currently not covered by consumer or investment laws, and are instead allowed to fall through the cracks.

Regards,

Graeme Brown