

4 September 2008

The Chairman,
Parliamentary Joint Committee on Corporations and Financial Services
Department of the Senate
PO Box 6100 Parliament House
Canberra
ACT 2600

Inquiry into Franchising Code of Conduct

Mr Chairman,

I am submitting this letter as a private individual, not on behalf of my Employer Competitive Foods. I feel so strongly about the subject of the above Inquiry, that I am adamant to have my voice heard! This is my personal viewpoint.

As an employee of Competitive Foods Australia Limited I wish to personally convey my concerns in regards to the current laws relating to Franchise Renewals in WA.

Firstly, however, I would like to provide you with a brief overview I have compiled of CFAL as a company so you can envisage my indignation in regards to our franchisors bullying tactics and franchisor opportunism we are currently experiencing.

CFAL is a private company founded by Jack Cowin in the 1960's, and from what I can ascertain, has largely funded its expansion to its current size through cash flow and the reinvestment of its earnings in the business over the last 40 years. I don't know Jack Cowin well, but his principles and standards cascade through every level of CFAL, making it an employer of choice for thousands of people like myself.

The KFC Division now operates 49 restaurants in WA and the NT and is the only operator of KFC restaurants in these markets. CFAL has consistently been one of the top two ranked KFC franchisees in Australia, the other large operator being Collins Food, which operates over 112 KFC franchises in Queensland. As at 31 December 2006 there were 38 KFC franchisees operating 173 of the 326 KFC restaurants in Australia, with the other 153 being operated as company owned stores.

The Hungry Jack's Division opened its first Hungry Jack's restaurant in 1971 at Innaloo. The franchisor of this brand is Burger King Corporation, based in Miami. CFAL owns 259 Hungry Jack's stores as company owned stores (ie. CFAL as franchisee) and now has 59 Hungry Jack's franchisees (ie. CFAL as franchisor).

In terms of the number of outlets, CFAL is just outside the top 10 franchise systems, which is dominated by Australia Post and Jims Group. However, in terms of the number of employees, CFAL would rank very highly. The aggregate number of employees in the McDonalds system is clearly the largest with 75,000 jobs across all of its franchisees. Yet, with approximately 15,000 direct jobs in a single company, CFAL is larger than each of the other top 10 franchise systems.

Currently, there exists a serious loophole within the current Franchising Code of Conduct as well as the Trade Practices Act and the respective State and Territory Fair Trading Acts.

This loophole I'm referring to is the current non renewal of franchise agreements (KFC) which should be based on "Good Faith" policies. Good Faith renewals should reflect the relational nature of franchising and should also protect franchisees against the improper use of power by franchisors under standard forms of contracts. Furthermore, establishing minimum standards of conduct in relation to franchise renewals, by adopting a good cause procedure that removes the incentive for franchisors to engage in opportunistic conduct and make profits at the expense of their franchisees is imperative to any small business.

As you may be aware, CFAL recently experienced the closure of our KFC Rockingham Restaurant on 19 November 2007 due to their franchise agreement expiring and not being renewed. KFC Rockingham was the 14th KFC restaurant to be opened by CFAL, on 19 November 1977. The initial term of the franchise was 20 years, and this was renewed in 1997 for a further 10 years. During this 30 year period CFAL has made further capital investments in upgrading the restaurant and has paid substantial royalties to [REDACTED].

[REDACTED] plainly wanted the KFC restaurant to continue operating, but wanted it for itself. It was with disbelief, via the media, I found out that [REDACTED] had also lodged a Development Application with the Rockingham City Council to build a new KFC restaurant about 100m down the road from the CFAL site, which the Council rejected.

It was my understanding that CFAL also wanted to keep the restaurant open and offered to enter into various interim arrangements to keep it open whilst discussions took place between [REDACTED] and CFAL. Therefore the restaurant closed needlessly due to three reasons:

- CFAL had no right to keep the restaurant open past the expiry date, no protection under the Franchising Code and no clear rights under s.51AC to bring court proceedings to keep the restaurant open.
- [REDACTED] had no contractual right to acquire the restaurant upon expiry of the franchise contract, nor did it have any contractual right to the goodwill in the

business. Its contractual rights were limited to the goodwill in the trade marks and the intellectual property (cl. 8.1) and the ability to acquiring the stock, signage, equipment and any supplies at cost or written down value (cl. 16.3).

- CFAL was not prepared to give in to bullying behaviour by [REDACTED] and simply hand over the restaurant for [REDACTED] to operate, in circumstance where [REDACTED] was trying to use its right of renewal to exert negotiating leverage to achieve benefits not provided for in the contract – ie. taking over a fully operational restaurant without paying for it, and forcing CFAL to sell its restaurant network to [REDACTED] at a significant discount.

In addition to the closure of KFC Rockingham there are three more restaurants currently scheduled for closure in December 2008 – KFC Beechboro, KFC Whitfords & KFC Thornlie.

CFAL has received immeasurable and ongoing support from our local government and other small businesses to change these outdated franchise laws. In 2007 the ALP election Policy was "Labour believes that the franchise code should include Good Faith obligations as long as the scope of this obligation is well defined. Minister Bailey (2007) promised to "move swiftly if we are returned to government to close off this loophole" (West Australian) in response to Rockingham closure. The South Australian Parliamentary inquiry (2008) recommended amending the code to include good faith and renewal obligation and a definition of unconscionability in s.51AC.

A similar case arose in Australia with the petrol station franchises back in the 1960's – 70's. Commonwealth legislation to resolve this problem is a clear precedent here. The Petroleum Retail Franchise Marketing Act 1980, and Section 17(1), (6) – (12) in particular, is now encapsulated in Clause 32(6)-(9) of the Oil Code Regulations of 2006, and enacted to stop 'franchisor opportunism' with petrol station franchises.

Ample legislation of this type exists in the USA where a number of States have enacted provisions that prevent a franchisor from failing to renew a franchise agreement 'except for good cause',

Franchising is worth approximately \$128 billion to the Australian economy. There are 960 franchise systems, 93 percent Australian based and over 62,000 franchises in Australia. They represent 14 percent of our national GDP and 420,000 people are employed in franchises. It is the fastest growing small business format that the Australian government needs to protect. With this knowledge it is imperative that the following is implemented:

1. Amendments to the Franchise Code of Conduct to include a provision requiring a franchisor to renew the franchise agreement on expiry, unless the franchisor had a good faith reason not to do so, and to include a provision requiring a franchisor to renew the franchise agreement on expiry, unless the franchisor had a good faith reason not to do so.
2. Changes to the Franchise Code of Conduct and the relevant State-based Fair Trading Act that ensures that a franchisee could take legal action to stop a franchisor from

misusing its superior bargaining position and require a franchisor to act reasonably and in good faith in negotiating a renewal of a franchise agreement; and

3. Provisions in either the Franchise Code or the Trade Practices Act and the Fair Trading Act to require a franchisor to compensate a franchisee for the value of the franchise business if the franchise is not renewed.

It is evident that Australia is heavily franchised and as a whole, franchising needs to be conducted successfully for the benefit of the economy and individual franchisors and franchisees. Currently, KFC employ over 1,650 Team Members, 175 Managers and 10 Senior Workers within Western Australia. Our employees include a cross section of students, disabled workers, young people, single parents and other permanent part time workers. On a personal level, I am lucky enough to have worked with the company for over 12 years. For the past 4 years I have been employed as the KFC Secretary for WA/NT, and in that time I have successfully completed a Marketing Degree which the company encouraged me to do. In the near future, I am looking at being promoted to the Marketing Manager which will provide me with stability and security for the future.

The non -renewal of franchise agreements will not only mean a substantial loss of jobs, financial losses for the company and personal hardship but will also create a vast negative impact on Western Australia's economic growth. We have built solid working relationships amongst our local suppliers over the years in which they will be adversely affected by this domino affect.

How can it be fair and just that a franchisee builds up a successful business through brand equity and recognition only for the franchisor to turn around and say I want a piece for that pie, in fact more than that, the whole pie!

The only way that franchisees can receive some form of protection against franchisor opportunism and abuse of power at renewal, is by regulation that applies across the board to set minimum standards of conduct that apply to all franchising relationships. It is critical that new laws are introduced to protect franchisees and small businesses alike.

Mr Chairman, thank you for your time and I look forward to a positive outcome in the very near future that will benefit us all, in short **"A FAIR GO"**.

Kind Regards

Shanell Gooch