

Parliamentary Franchising Inquiry - 2018

We, Labib (Fred) and Lynette Bayakly began the process of buying into Pizza Hut (Yum Restaurants International -YRI) in May 2013. Prior to that, Fred had been contracted directly by Yum Restaurants for a period of a year. He had been employed specifically to revive the West Australian market that was in serious decline. He was not told at the time that he was employed that if he was unsuccessful in this, the stores in WA would be debranded and Pizza Hut would leave the WA market. Not only did he successfully turn things around, but his contract was extended and he was approached about becoming a franchisee to help build confidence in the market and open the first new store in the state in something like twenty years. It was a time of great confidence and he was actively encouraged by the leadership of Yum to open a store and become a multi site operator. The leadership promised a significant level of support and even went so far as to put up a \$100,000 incentive for this to go ahead. We did not have any money to put into the venture, but we were repeatedly assured that Yum had contacts in the banking industry and we would be “looked after”. In particular, we were told the Commonwealth Bank and Westpac were both very pro-franchising and Pizza Hut had contacts who would help get us across the line.

(a) the operation and effectiveness of the Franchising Code of Conduct, including the disclosure document and information statement, and the Oil Code of Conduct, in ensuring

full disclosure to potential franchisees of all information necessary to make a fully informed decision when assessing whether to enter a franchise agreement, including information on:

(i) likely financial performance of a franchise and worse-case scenarios,

The level of enthusiasm from Head Office at this time led us to believe there would be significant investment in the WA market and more stores would be opened as soon as possible. We were encouraged by everybody’s thoughts that WA was going to grow and be successful.

We kept telling Head Office that we did not have finance in place and they kept insisting everything would be fine as Yum was a big international brand and banks would be happy to finance us. When it came time to actually apply for finance, this did not play out as they had said it would. We eventually had no option but to seek finance from family as Yum’s contacts did nothing to help us and in actual fact did damage to our credit rating by encouraging us to apply to multiple banks in a short timeframe. We were not aware of this affect before making the applications as encouraged by Yum.

(ii) the contractual rights and obligations of all parties, including termination rights and geographical exclusivity,

This was not an issue at the time of opening the store, but there was an Eagle Boys and a Dominos in a nearby suburb that was within our trade zone and we were told by Yum that if we did not open another store in that area, they would reduce our trade zone and open a store anyway. We had no control over this and investigated the possibility of opening another store.

(iii) the leasing arrangements and any limitations of the franchisee's ability to enforce tenants' rights, and

The franchisor imposed a tri-party agreement in the lease, which gave them the right and access to take over a store at any point if they determined the operator was delinquent in any way. This gave all power to the franchisor.

(iv) the expected running costs, including cost of goods required to be purchased through prescribed suppliers;

We had no control over where we purchased supplies from and every purchase was dictated by Yum. There were many cases where we could have purchased supplies locally at a cheaper price for the same products. If we did not purchase supplies from where Yum told us to, we could and would be breached. We believe this was all about Yum protecting their additional source of income (over and above the royalty payments from franchisees) with supplier relationships and associated rebates, rather than protecting the interests of the franchisees and the commercial viability of their business model.

We were forced to buy the bulk of our orders through Bidvest who had excessive freight charges on all our orders to WA. There was an additional charge of something like 1.5 to 3% added to all purchases on all Bidvest orders due to an agreement between Yum and Bidvest. This was applied to all franchisees towards a fund to cover any franchisees who were in financial difficulty and could not pay the supplier. This eliminated the burden of the franchisor having to pay the supplier as Bidvest were our contracted supplier.

We were forced to buy drinks from Schweppes and Yum got a rebate from them.

We were forced to buy flour from Allied Mills and Yum got a rebate from them.

We were forced to buy all chemicals from Ecolab and Yum got a rebate from them.

We believe there were other rebates in place from other suppliers.

At one point, WA stores were forced to stop buying fresh produce from a WA supplier and instead, buy from an Adelaide supplier under the claim that the same produce was more expensive and lower quality if supplied locally. This was totally incorrect as Yum refused to even try to find another supplier locally. Shipping fresh produce across the Nullarbor makes no sense when all produce required is grown in WA so the only reason that makes any sense is that Yum had something to gain in forcing the issue. There were many times where we were left short supplied or not supplied at all by the Adelaide supplier and we were forced to buy local produce anyway. We argued this case as a collective group in WA, but were ignored.

We were forced to use a national call centre that was unable to perform as required, but we still had to pay all charges as set by Yum. All costs from the call centre were on-charged to franchisees under a full cost recovery model. This meant that there was no impact to the franchisor when mistakes were made and no accountability. In WA,

there were often cases where the call centre was closed due to the time difference between the East coast and West coast, but we were still charged regardless. There were many disputes as the call centre would often simply reroute calls directly to the stores and yet we would still be charged for their “service”.

The call centre lost us customers and sales on a daily basis, due to incompetent and untrained call centre staff and yet we were still charged the full amount for the “service” with no redress available. We had no option but to connect to the call centre. All complaints to Yum about the service were either ignored or fobbed off with a vague promise that something was being done, but nothing ever improved.

Eventually it was decided to replace the call centre with a call to store model. This was through Optus and all stores were forced to convert to Optus. This was poorly thought out, very poorly executed and was still very expensive as any overflow calls were redirected to a call centre. Once again, WA was short-changed due to the variation in hours from East to West. The franchisees were also hit with the full cost to close the call centre operations.

We were forced to use an online platform that was very substandard and failed to operate as required. This also cost us many sales and customers as well as costing us in remakes and credits due to issues where customers did not get what was ordered. Any issues with this system were borne by the stores and Yum would not take any responsibility for those issues, despite being the operator.

Over the course of our time with Yum, our store was forced to change our dough model from freshly made, in-store to a frozen dough model. This came about because the person at Yum who submitted our original shop-fit plans gave one set of plans to the shopfitter and another set to the local council to be approved. When the Health Inspector came to approve the new shop fit, we were in breach of the law as we did not have a sink with 5 metres of the dough area. It would have cost us around \$20,000 to rectify this issue. The Yum employee responsible took no responsibility and did not resolve the issue. Yum took no responsibility and did nothing to help us. The local council allowed us to open under the plan that it would be rectified. This issue festered for two years before the Health Inspector hit us with a 14 day notice of closure. Finally Yum reacted by forcing us to change to a frozen dough model, which removed our need to install a sink. This meant we had to change many other parts of our operation and it would cost \$30,000. This was money we did not have and could not finance. It became another debt to Yum as we struggled to keep our doors open. Yum refused to factor in the increased costs of the frozen dough model as an ongoing issue. This seriously negatively impacted on our overall costs, both for labour and cost of goods, over and above the \$30,000 in necessary changes to the store and equipment. It also negatively impacted on our quality of product and lost us customers.

(b) the effectiveness of dispute resolution under the Franchising Code of Conduct and the Oil Code of Conduct;

Dispute resolution is a sad, pathetic joke. The franchisor holds all the cards when they have money, power and time available to them while a franchisee is bleeding financially, living under extreme distress and being threatened with penalties or breaches or termination. The franchisee has zero power in this equation and franchisors trade on that fact to bully their franchisees into submission. Most franchisees cannot hold on long enough to get issues resolved. There is also no mechanism to enforce anything once a resolution has been reached and the franchisor can simply go about business as usual with pathetic penalties that mean nothing to mega corporations. If the franchisee wants to complain again, the ridiculous process begins all over again.

We were very open and vocal with Yum and sent many emails and had many phone calls with our local Area Manager and others above him. We documented every issue with relevant information and proof being supplied every time. Yum had full access to our online systems and could easily pull up the same sales data that we were. They knew exactly how their decisions were negatively impacting on franchisees and chose to keep going. Nothing improved and we began to earn a reputation as troublemakers. At the time, most of the franchisees in WA spoke English as a second language and would come to us for advice, ideas and help as they were too scared to speak to the Area Manager. Many conversations went through us and the franchisor determined if they could get rid of us, they could shut up the rest of the network. We were absolutely targeted and bullied by the franchisor on a very regular basis.

One example among many complaints was the fact that Yum asked us to run a local campaign in WA to trial a marketing strategy. We were told we had full control over the campaign and could pull the plug at any point if we as a network felt it was not working. We were told that all of our basic range would be promoted under an \$8 Any promotion and were assured that our expensive Signature Range would not be included. This was agreed to by franchisees, but the franchisor openly lied to us all and included our Signature Range that usually retailed at \$15 each. When we all questioned this, we were told that all marketing had already been done and paid for and it could not be stopped. Our sales jumped dramatically, while our profits nosedived equally dramatically. We begged the franchisor to end the campaign early, but they refused. Our store was losing thousands of dollars a week and the franchisor was fully aware of this fact. Since they make their royalties on sales and not profit, they were happy with how things were going, while knowing full well they were killing us and our cash flow.

We tried as a collective group to raise concerns with the franchisor over many issues and all concerns were ignored. We personally were then targeted by the franchisor and repeatedly threatened with immediate termination.

We tried going to the ACCC with our concerns and were told to get a lawyer. For somebody who is going under and has no money to fight with, how are you supposed to get a lawyer? This was the standard response from the ACCC to any franchise complaints as it was simply too hard for them and they weren't interested in helping any of us. The ACCC is a toothless tiger with no interest in taking on the big boys.

We tried writing to the then Minister for Small Business – Kelly O’Dwyer, to raise our concerns and could not even get a response. After multiple contacts, we had a family member contact Senator Eric Abetz with regards to the issue and he contacted Ms O’Dwyer’s office on our behalf. The reply we got was address to him, not us and was clearly written by a staffer who had not even properly read our letter.

We tried contacting our local member – Christian Porter and got a pathetic response along the lines that there was nothing he could do as parliament cannot interfere in legal issues. We were pleading for somebody to sit up and pay attention to the nightmare that franchising has become in Australia and nobody was listening.

(c) the impact of the Australian consumer law unfair contract provisions on new, renewed and terminated franchise agreements entered into since 12 November 2016, including whether changes to standard franchise agreements have resulted;

(d) whether the provisions of other mandatory industry codes of conduct, such as the Oil Code, contain advantages or disadvantages relevant to franchising relationships in comparison with terms of the Franchising Code of Conduct;

(e) the adequacy and operation of termination provisions in the Franchising Code of Conduct and the Oil Code of Conduct;

The franchisor holds all the power when it comes to termination. We were forced into a corner by the actions of our franchisor and then terminated because of their actions. We repeatedly told them we were drowning as their sales strategy to sell pizzas below cost was killing us. Anybody with any kind of basic mathematical ability knows that when you sell something for less than it costs, you will go broke. We were forced by our franchisor to trade into insolvency. As a high-turnover store, we were especially vulnerable as the more pizzas we sold, the more money we lost and the quicker we lost it. We pleaded with Yum to re-evaluate what they were doing and they knew exactly what they were doing to us. We had no choice but to stop paying royalties as we simply did not have enough money coming in. We paid wages, suppliers, loans and rent in that order. If there was anything left, we paid our marketing fees to Yum. We were forced to cancel our direct debit with Yum as they just took money out of our account with no regard for our cash flow or need to pay wages etc. Many times, we paid wages off our business credit card and repaid it when we could. Yum used this situation to their advantage to threaten us, bully us and finally terminate us. They had created the situation where we were in breach of our contract and then used that fact to terminate our contract. This whole process looked legal while being extremely unethical and totally amoral.

It also later came to our attention that despite the fact that every store in the country was struggling and many were not paying royalties, we were the only store to ever be terminated for non-payment of royalties or any other issue. We received a phone call from _____, the National Operations Manager to tell us personally that he was terminating us. This followed a franchisee meeting in Perth with members of Head

Office staff in attendance, which had gotten very heated. _____ told us he would get us and he did. We were targeted for standing up to the franchisor and telling the truth to Yum representatives and this fact came out in the court case. We have still had no redress to this fact and don't expect we ever will.

The "good faith" clause in contracts is pointless when it cannot be proven in court that anybody did not act in good faith. When a franchisor can force its entire national network to trade towards insolvency and the court says that is not unconscionable or a lack of good faith, what is?

Once again, all the power rests with the franchisor and the franchisee has none at all. The law may say that franchisees have certain protections, but in reality, in the marketplace, they have none whatsoever. If the courts will not uphold the franchisees' rights then they are nothing more than words on paper and mean nothing.

(f) the imposition of restraints of trade on former franchisees following the termination of a franchise agreement;

When our business was terminated, we still had seven years to go on our lease. We briefly considered opening a non-branded pizza business or a kebab business since we had all the equipment. We were in serious debt and needed to keep going somehow. Two things stopped us.

We were forced to close on a Friday. We heard via another franchisee that the Area Manager had approached him with the plan to sell him our business for \$10,000 and keep the store trading, starting on the Monday. This was especially important to Yum as our store was amongst the highest trading stores in Australia and was also the flagship store of WA and the State Training Store.

The lease was in our name and all equipment was either ours or being paid off by us. Yum had no legal right to the business equipment, but we knew that wouldn't stop them. We made the decision to pull out all of the equipment over the weekend to thwart the franchisor's plan. This made it extremely difficult to consider trading in any other format.

Yum also tipped off Bidvest of their version of events and Bidvest made a demand for full and immediate payment on the Monday morning for an account that was not due for another month. We had accrued sales of more than \$800,000 through this supplier and had paid all previous accounts in full. It was clear that Yum had been in contact and contaminated this relationship. Bidvest then lodged a caveat over our house.

Secondly, we knew that Yum was vindictive enough to make trouble for us if we tried trading as a pizza business or any other kind of business. We ultimately had no choice to continue with this idea and we lost the opportunity to trade in any other manner, all because the franchisor had proven themselves unethical and vindictive.

(g) the enforcement of breaches of the Franchising Code of Conduct and the Oil Code of Conduct and other applicable laws, such as the Competition and Consumer Act 2010, and franchisors; and

There is next to no enforcement of breaches because the ACCC and the government has shown no interest in this area until this inquiry. The Diab vs Yum case which included nearly 100% of the Pizza Hut franchisees in Australia presented undisputable evidence of repeated unconscionable conduct on the part of the franchisor, proof that the franchisor used the Australian market as a guinea pig market with no regard for the negative impact on franchisees and proof that franchisor representatives repeatedly perjured themselves and yet we lost the case. This outcome just proves what we all know – franchisors in Australia are outside the law and cannot be touched.

(h) any related matter.

During the time we begged Yum to look at what they were doing to all of us, we were repeatedly told that we were the only store with a problem and it was simply bad management on our part with over staffing and excess labour costs. Every other franchisee in WA was blamed in the same manner and Yum refused to allow us to have a group meeting to discuss this issue to try to separate and divide the network and stop us from challenging them. We had previously been the State Training Store and our manager had won awards during her many years with Yum, so it clearly wasn't the case that we didn't know what we were doing. We were compliant with all of Yum's operational standards and the advice we were given at times conflicted with their own operational standards. Eg. our Area Manager gave us a roster from another store and told us to copy it in our store. The roster was not compliant with Yum's own standards in any way, including only having one staff member rostered on at times and no delivery drivers available. Fred also went to this store to observe and was horrified at the poor level of customer service. If we had complied with this directive we would have destroyed our own business. This is where Yum told us they were trying to help us and we weren't listening to their advice. They used this against us on many occasions.

Our sales went through the roof when Yum reduced pizzas to \$4.95 each and we were struggling to physically keep up with producing orders. On a Friday night we would do 80% of our day's sales in a very small window of time. This meant we had to have extra staff rostered on to prep before our peak period and to cover over that peak period. Our delivery estimate time could blow out to two hours and people would still be ordering. The only thing we ever got from our franchisor Area Manager and other Head Office staff was that we needed to cut wages. It quickly got to the point where Lyn was working 30+ hours per week, unpaid, on top of working a fulltime job to pay the bills. For every cut we made on the roster to save wages, it was simply made up by Lyn working for nothing. By the time we closed the store, we had personally accrued nearly \$80,000 in unpaid wages on a basic rate equal to our adult staff and superannuation on top of that. The franchisor knew all about this and still would not listen to us.

When it became apparent that our relationship with the franchisor was beyond repair, it was suggested by our Area Manager that we sell the store. We asked for him to find

us a buyer and he could not. As already outlined above, he was complicit in a secret plan to sell our business, which they had no legal right to do, onto another inexperienced franchisee that they felt they could manipulate, for the sum of \$10,000. This store was turning over \$1.5 million in sales at that point, but could still not make a profit due to the franchisor's business model.

During the time that Yum was forcing us all to sell pizzas below cost, we were sent a new delivery driver model that was supposedly going to help us all. It was basically an illegal contract model where contracted drivers would be illegally underpaid. Yum actively promoted this model with franchisees and then denied all knowledge of it when issues became public and franchising came under scrutiny. We paid award wages or above to all of our staff, but were forced into not paying super when it was due as our cash flow had been hamstrung by the franchisor. Our staff were aware of this and we had hoped to eventually remedy this when sanity prevailed and Yum lifted our prices to a profitable margin. This never happened for us.

We used to have a franchisee representative committee that acted on our behalf, especially with regards to marketing. When things went sour with Yum and the franchisees, this committee resigned en masse in protest and because Yum was legally required to have a committee, they handpicked the representatives after the franchisees nominated their new representatives. The person chosen by the WA franchisees was rejected by Yum and they put in their own person and then silenced the representatives with a non-disclosure order. This meant that franchisees were not really represented and were blocked from having any feedback from the meetings at all. Everything was done in secret from that point on with regards to the franchisees' marketing money.

We began this franchising journey with high hopes and the expectation we would need to work hard to reap the rewards. We knew it takes time to build a business from scratch and we were prepared for that. We were not prepared for a change in leadership of the franchise that ushered in sheer insanity and a franchisor who actively attacked us.

We still cannot understand how anybody in corporate management could ever think it was reasonable to force an entire national network to sell their products below cost and force us all to trade into insolvency.

We are still in shock that the court system utterly failed to deliver any justice. We were warned by others from Bakers Delight and other franchises who have gone through failed litigation against a franchisor that franchisors are untouchable in Australia. They were right and our court case has set legal precedent that tells franchisees to not even bother seeking justice or redress. Nobody cares.

We are astounded that the Australian Taxation Office was willing to pursue us into bankruptcy and yet completely ignore the appeal process of the case against Yum when the ATO is the single biggest unsecured creditor in the whole mess. We pleaded with the government to pay attention, if for no other reason than taxes were not being paid. We estimated there would be \$40 million in taxes owed to the ATO from the Pizza Hut debacle alone. Now multiply that by every other franchise that is currently in trouble in Australia and the figure is huge, but the ATO apparently doesn't care.

This franchising nightmare has still not finished for us. When our store was forced closed, we tried to pay the business debts from our own income. If we had known the legal system would utterly fail us all, we would have declared bankruptcy the next day and saved ourselves a world of pain and financial deprivation. Instead, we spent fifteen months trying to pay what we owed and trying to do the right thing while living under daily threats and increasing harassment. Our credit rating and reputation has been completely destroyed.

When we found the court failed to help us, the ATO pounced and we had no choice but to declare bankruptcy. As such, we have been placed in a position where:

- Our house could be sold any day. It's only the fact we had borrowed against it and had no equity left that is hasn't. We cannot pay any extra on our home loan as it increases the equity and exposes us to the threat of it being sold so we pay more interest than we should be.
- We cannot get access to anything on credit, not even a mobile phone. We will never have access to credit of any kind ever again.
- We have to beg for permission to leave the country or be arrested.
- We have to provide any information the Trustee asks for or face imprisonment.
- We will have our wages garnished for three years and not one cent has gone to our creditors. It all goes to cover the Trustee's fees.
- Bankruptcy affects our ability to pursue any further business aspirations and hence our ability to recover.
- It affects employment opportunities.
- It impacts on our retirement, as we do not have much time to recover.
- We still feel the negative impact of having unpaid debts, even knowing they will be erased at some point.
- It has negatively impacted on our health.
- It has negatively impacted on our children.
- The stigma of bankruptcy will never be erased, even when we are discharged.
- We place the blame for this situation squarely on Yum's corrupt and unconscionable behaviour.

Being a Pizza Hut franchisee in Australia is the single biggest regret of our lives as well as the most expensive. It has been a nightmare and we will be bearing the scars forever. We implore the people reading this, with the power to do something to wake up! Franchising in Australia is in a very, very sick state. Successive governments have been complicit in allowing this state of affairs to reach the level it has by not monitoring and reining in franchisors and the abuse of power. It is time for that to stop.