

Cassidy, Laureen (SEN)

From: David Wilkinson [REDACTED]
Sent: Monday, 1 September 2008 4:31 PM
To: Committee, Corporations (SEN)
Subject: Enquiry into Franchising

G'day,

Before I met [REDACTED] and the [REDACTED] I was happily married, financially secure and life and the future was pretty rosy.

I now find myself divorced, on the verge of financial ruin and facing a legal system that seems intent on providing the 'morally bankrupt' with the greatest amount of protection.

In short, these people lied to me to get me to invest in their franchise system, treated me appallingly during the time of my franchise agreement, took customers and money from me for their own benefit and then cancelled my licence when I protested.

[REDACTED] endorsed them under their 'Preferred Franchise' lending scheme.

I have attached some documents which go into a bit of detail but I would like to request that I be allowed to give my evidence to the enquiry in person.

Kindly confirm receipt of my email and details of when verbal evidence will be taken.

Yours sincerely

in your area now! [View photos of singles](#)

7th September 2004

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Re: Nothing Ventured Pty Limited

Notice pursuant to Clause 19 of the Franchise Agreement Document.
Background

1. By an agreement commencing 1 May 2000 [REDACTED] (now [REDACTED] Pty Limited) ([REDACTED]) entered into the Franchise Agreement with Nothing Ventured Pty Limited (NV).

Conditions of Sale Agreement

2. Clause 1 of the Franchise Agreement provides:

"The parties will, at all times during the currency of this Agreement act towards each other with the utmost good faith."

3. Clause 7.12 of the Franchise Agreement provides:

"The Franchisor shall charge the same fees and impose the same obligations on the Franchisee as for any other of the Franchisor's franchisees."

4. By letter dated 22 June 2004 [REDACTED] gave notice of its intention to terminate the Franchise Agreement with effect from 22 August 2004.

5. Without admission, but in order to mitigate its loss, NV sought to sell the Franchise as required of it by [REDACTED].

6. NV was unable to sell the franchise. NV is aware that another franchise (being sold by [REDACTED]) in Sydney has been offered for sale for a period longer than that allowed to NV and has not been sold.

7. From 10th August 2004 NV has kept [REDACTED] informed that it had found a prospective purchaser of the 'members' of the NV Franchise and that it intended to 'sell' the members.

8. [REDACTED] allows franchisees to buy and sell members, and has in the past 'sold' members to franchisees itself.

9. On Tuesday 17 August 2004 NV entered into an agreement with another franchisee of [REDACTED] for the sale and purchase of members of NV's franchise in consideration for \$220,000 (the Sale and Purchase Contract).

10. The Sale and Purchase Agreement was in all material respects in the same form as the sale and purchase agreement used by [REDACTED] when it 'sold' members to the purchasing franchisee.

11. By letter of 19 August 2004 (dated 17 August 2004) [REDACTED] purported to impose conditions on the terms of the Sale and Purchase Agreement (the Conditions for Sale Letter).

12. Inter alia, the Conditions for Sale Letter requires:

(a) "a full release from [NV] in favour of [REDACTED] from all causes of actions and claims in respect of the franchise agreement";

(b) "The transfer of membership will not include the members [REDACTED] which will go to Sydney Corporate Office, and the member [REDACTED]."

██████████ which will be transferred to the Sydney CBD Brokerage";

(c) "NV will also provide an amount totalling 10% of the sale price to ██████████ as consideration of the sale, as provided for in the franchise agreement, this being \$22,000 + GST.";

(d) "██████████ reserves the right to impose additional matters".

13. Inter alia the purported conditions are unfair and unconscionable, and not made in good faith because:

(a) the requirement that NV release ██████████ from all claims is not reasonably connected to the Sale and Purchase Agreement;

(b) the exclusion of certain members from the Purchase and Sale Agreement has, or has the prospects of, reducing the value of the consideration paid pursuant to the Purchase and Sale Agreement without compensating NV;

further to (b), ██████████ has provided no explanation for the exclusion of these members from the Purchase and Sale Agreement;

further to (b), the value of the members from the Purchase and Sale Agreement has been transferred to ██████████ without compensation for NV;

(c) clause 15.1(j) of the Franchise Agreement (being the clause under which presumably ██████████ is seeking 10% of the transaction) is expressed to include a sum for the costs to ██████████ of training future franchisees, in circumstances where the Purchase and Sale Agreement is being made to an existing franchisee of ██████████, who does not require that expense;

(d) ██████████ sent the Condition of Sale Letter on 19 August 2004 being two days after the date of the letter and in circumstances where ██████████ has not made itself available to discuss the said Conditions.

14. Further or alternatively, the Conditions of Sale is in breach of the obligation of ██████████ to treat all franchisees equally in circumstances where ██████████ is imposing conditions which are not imposed on other sale and purchase agreements for members, including the agreements used by ██████████ itself.

15. By reason of the matters set out above, if ██████████ fails to consent to the Sale and Purchase Agreement, NV will have suffered loss or damage including but not limited to the consideration of the Sale and Purchase Agreement of \$220,000.

Representations made by ██████████

16. Before entering into the Agreement, ██████████ provided to NV (through its directors) certain information relating to the prospective franchise. That information was contained in part in the "Disclosure Document for Prospective Franchise" dated 1 February 2000 (the Disclosure Document).

17. As a Franchisee of ██████████, NV earned income from introducing and retaining members who utilised a system operated by ██████████ for the exchange of goods and services pursuant to the ██████████ Trading Program.

18. The Franchisee was granted a Franchise over a particular area. The Franchise Agreement provided that:

"3.1 The Franchisor grants to the Franchisee the non-exclusive right and licence to conduct the Franchise within the boundaries of the area delineated. The Franchisee agrees to conduct the Franchise from premises selected and approved by Franchisee.."

14.1 The Franchisor shall not, subject to clause 3.1, grant to any other franchises, or any Franchisor-controlled business that is in competition with the Franchise, a franchise within the boundaries of the Licensed Area.."

19. The Franchisee was also required to "meet the minimum first half year period and thereafter quarterly new Member enrolment levels as specified in the Schedule C.."

20. Self-evidently, a Franchise granted over an area that had been the subject of another, prior, grant of franchise rights would be less capable of generating new members. This is because potential members from the area may have already joined ██████████, or already joined and subsequently left ██████████, having been 'prospected' by another franchisee.

21. Amongst other information contained in the Disclosure Document was a disclosure made in relation to the site or territory the subject of the proposed agreement. Question 11.2 of the Disclosure Document set out the following:

"11.2 Has the territory or site to be franchised been subject to a previous franchise granted by the Franchisor?

No."

22. Amongst other things, the Franchise Code of Conduct required that, if the territory or site had been the subject of a previous franchise, the franchisor was to provide "details of the franchised business, including the circumstances in which the previous franchisee ceased to operate."

23. NV now believes that in fact, the territory or site, or a substantial part of the territory or site, was the subject of a previous franchise. The area covered by the purportedly "new" franchise was previously part of the "Parramatta franchise" then known as the "Sydney Central Franchise".

24. Further or alternatively, the Disclosure Document provided to NV prior to entering into the Franchise also contained an Annexure "B" which contained what was described, without qualification, as "Earning Information".

25. The Franchise Code of Conduct set out certain requirements of the franchisor if Earning information was to be provided.

26. Annexure B of the Franchise Agreement consisted of three tables headed "Broker Profit & Loss / Cashflow" for respectively, "Years 1 to 3".

27. The Earning Information table was a representation as to a future matter within the meaning of section 51A of the Trade Practices Act 1974

28. The Earning Information table represented that a franchisee would earn a profit in its first year, a figure increasing substantially in each subsequent year.

29. In fact in its first year NV made a loss.

30. Contrary to the requirements of the Franchise Code of Conduct the facts and assumptions upon which the Earnings Information were based were not explained to NV or its agents.

31. At no time did ██████████ reveal to NV or its agents that:

(a) the Earning Information was not a true or reliable indicator of performance of franchises in its first three years;

(b) that the area granted under the Franchise Agreement has previously been exploited by ██████████ or its franchisees.

32. But for the Earnings Information and the representation that the

area had not been the subject of a previous franchise, NV would not have entered into the Franchise Agreement.

33. In reliance on the representations made by ██████████ NV:

(a) paid a purchase price of \$100,000 for the Franchise;
(b) expended further sums of approximately \$500,000 in investment in the Franchise and costs in the conduct of the franchise without any or any substantial profit.

34. As a result of the representations by, and by conduct of ██████████ NV has suffered loss or damage including:

(a) the purchase price of \$100,000;
(b) losses in the first year of trading;
(c) losses in subsequent years of approximately \$500,000.

Revetec

35. Clause 1 of the Franchise Agreement provides:

"The parties will, at all times during the currency of this Agreement act towards each other with the utmost good faith."

36. In December 2003 Mr Wilkinson attended a golf day arranged for ██████████ Members. He took with him an existing member, Mr ██████████

During the day Mr Wilkinson introduced Mr ██████████ to a Bartercard employee, a Mr Peter ██████████.

37. At a time unknown to Mr Wilkinson, but within a short time after the golf day, Mr ██████████ used the introduction to approach and sign up a new member to ██████████.

38. The fees and benefits to NV of that particular member were significant. NV estimates that the fees and benefits are, at today's date, in excess of \$200,000.

39. Pursuant to the Franchise Agreement, ██████████ represented that it had produced an Operations and Procedures Manual pursuant to which all Franchisees were to conduct business. The Manual ought to have dealt with these issues. ██████████ never produced that Manual.

40. Upon learning that Mr ██████████ had obtained the benefit of Mr Wilkinson's introduction, Mr Wilkinson made a number of requests to ██████████ to have the Membership assigned to him.

41. ██████████ refused to discuss the issue.

42. Mr ██████████ was not another franchisee, but was employed by ██████████ to operate in a franchisor-controlled business in competition with the Franchisee. The benefits obtained from the introduction were retained by ██████████.

43. In a conversation with the National Sales Director of ██████████ on 14 January 2004 Mr Wilkinson presented the facts as though it were a dispute between independent franchisees. The National Sales Director informed Mr Wilkinson that the franchisee who introduced the member was entitled to the benefits from the new member.

44. On the same day (14 January 2004) Mr Wilkinson sought the advice of the Regional Sales Manager (NSW) of ██████████. The Regional Sales Manager also agreed that in the circumstances, NV was entitled to the benefits from the new member.

45. The issue was taken up with ██████████ by the Association of Reciprocal Trade Brokers Inc (ARTBI), a group which represents franchisees

of ██████████.

46. ██████████ refused to discuss to the complaints.

47. ██████████ has never sought to explain why it allowed its employee to retain for itself the benefits of the Revetec transactions.

48. Inter alia, ██████████ failed to act in good faith in relation to the ██████████ transactions by allowing a franchisor-controlled business to obtain the benefits of the ██████████ transactions.

49. But for ██████████ appropriation of the ██████████ transactions, NV would have earned:

(a) \$200,000 or more in fees from the said memberships and transactions;

(b) future income from ██████████ continued membership with ██████████.

50. By ██████████ breach of the terms of the Franchise Agreement and by conduct of ██████████, NV has suffered that loss or damage.

Failure to act in good faith, unequal treatment

51. Clause 1 of the Franchise Agreement provides:

"The parties will, at all times during the currency of this Agreement act towards each other with the utmost good faith."

52. Clause 7.12 of the Franchise Agreement provides:

"The Franchisor shall charge the same fees and impose the same obligations on the Franchisee as for any other of the Franchisor's franchisees."

53. ██████████ has purported to terminate the Franchise Agreement with NV for breach of clause 8.17 of the Agreement. Clause 8.17 requires a franchisee to meet minimum performance standards set out in Schedule C to the Franchise Agreement, as modified by a Deed of Amendment dated 14 February 2003.

54. In the four years in which NV operated under the Franchise Agreement it received 17 sales or trading awards. On three occasions in 2003 NV was awarded "top trading brokerage" for Sydney. In December 2003 NV was placed 13 out of approximately 50 brokerages across Australia.

55. In a detailed email of 12 January 2004 Mr Wilkinson responded to ██████████ December 'warning letter' in detail. Mr Wilkinson explained various difficulties experienced by NV, in particular related to the retention of sales staff.

56. Mr Wilkinson is aware that during the material times there were a number of other franchises who were performing in a manner equal to or less than that of NV.

57. By letter dated 7 January 2004 ██████████ represented that:

"We are happy to see an upward trend in your sales level towards your minimum requirements and are willing to assist you in any way necessary to improve your position."

58. On at least 8 occasions since January 2004 Mr Wilkinson sought assistance from ██████████ including for sales support and other assistance.

59. The Franchise Agreement further provides:

"7.1 The Franchisor shall use its best endeavours to provide the services to the Franchisee set out in Schedule F.

Schedule F

"Item 5 To Provide on-site assistance for the Franchisee as requested by the Franchisee subject to the availability of the Franchisor's staff."

60. Without explanation, ██████████ has refused to assist.

61. Further, the performance of the Franchise was severely affected by

the refusal of ██████████ to credit the franchise with the new Members and benefits from the ██████████ transactions.

62. If NV is in breach of the Agreement (which is not admitted) NV contends that ██████████ was the cause of that breach. In particular, if the ██████████ members and transactions had been credited to NV (as they should have been) NV would have been in a substantially better position to comply with the performance requirements the subject of the termination notice.

63. In breach of the Franchise Agreement ██████████ has treated NV unequally and has failed to act in good faith, and by conduct of ██████████, NV has suffered loss or damage.

Issues in dispute

64. The issues in this Clause 19 notice may be summarised as:

(a) the imposition of unfair and unconscionable restrictions on the Sale and Purchase Agreement which have prevented, or may prevent, NV from obtaining the benefit of that Agreement;

(b) representations made by ██████████ about the territory and including the Earning Information which were not true and correct;

(c) the failure of ██████████ to assign the new members and benefits from the ██████████ transactions to NV;

(d) the failure of ██████████ to act in good faith and to treat members equally as required by the Franchise Agreement.

Desired outcome

65. NV seeks:

(a) approval of the sale of members pursuant to the Purchase and Sale Agreement as it has been or substantially as it has been agreed;

(b) compensation for the conduct of ██████████ which has misled NV as to the prospects of the franchise;

(c) compensation for the failure of ██████████ to credit NV with benefits properly owing to it from the ██████████ transactions;

(d) compensation for the failure of ██████████ to act in good faith and equally in the matters relied upon by ██████████ as the basis for the termination.

Action required to settle the dispute

66. NV is willing to agree to a mediation of the issues in dispute.

David Wilkinson
Director
Nothing Ventured Pty Limited

cc. David Johnstone