



House of Assembly - Thursday, 3 December 2009, Page 5009

FRANCHISING (SOUTH AUSTRALIA) BILL

Mr PICCOLO (Light) (11:18): Obtained leave and introduced a bill for an act to make provision for applying the Franchising Code of Conduct made under the Trade Practices Act 1974 of the Commonwealth as a law of the state; and for other purposes. Read a first time.

Mr PICCOLO (Light) (11:18): I move:

That this bill be now read a second time.

Tuesday 1 December 2009 when I gave notice that I would seek leave to introduce this bill was an important day on the journey to reform franchise law in Australia. Tuesday was one year to the day since the federal parliamentary Joint Committee on Corporations and Financial Services handed down its report on its inquiry into franchising in Australia.

The report was aptly titled, 'Opportunity not opportunism: improving the conduct of Australian franchising.' That is what this bill I am introducing today is all about: it is about giving Australians—mum and dad investors—the opportunity to establish their own business but provide them with sufficient protection from those who wish to prey on them through naked and crude opportunism.

Many of them have used redundancy or retirement savings to buy themselves a 'job' as the sector puts it. Had the federal government responded to the recommendation flowing from the report in a timely and fair manner, I would not be introducing this bill today. At the outset I reaffirm—

Mr Griffiths interjecting:

Mr PICCOLO: Well, let us not talk about federal Liberal at the moment. At the outset I reaffirm that reform of the franchising code of conduct should occur at the national level. As I have said previously in this place and elsewhere, in the absence of action by the commonwealth, the state parliaments are left with little option but to introduce laws at a state level to create a fair, transparent and competitive playing field in the franchising sector.

The federal report followed an inquiry undertaken by the Economic and Finance Committee of this parliament, which handed down its report on 6 May 2008. It received overwhelming bipartisan support from this house. The Western Australian government also looked into franchising in response to the closure of franchises in that state as a result of action by multinational franchisors.

All three inquiries recommended a range of measures to improve the franchise sector and to weed out the rogues and charlatans in the industry. All three inquiries felt that important economic and social equity objectives could be achieved through the reform of the franchising code of conduct.

At the core of the recommendations were objectives to improve competition and fairness in the sector. Both the South Australian and federal inquiries reached the same conclusions in some key policy areas; namely, the sector could be improved by introducing:

- good faith dealing provisions;
- improved dispute resolution mechanisms;
- imposing financial penalties for breaches of the code; and
- compulsory requirement for termination clauses in franchise agreements.

The bill addresses three of the policy areas, as the issue of termination clauses will be addressed by the federal government in the reform package announced on 5 November 2009. Before I address the specific provisions of the bill, I wish to explain why I have chosen to introduce this bill on the last day of the sitting of parliament before the state election. This bill does the following. It honours a motion passed by this house on 10 October 2009 where the house:

- noted the reports by the Western Australian government, the Economic and Finance Committee of the South Australian parliament, and the federal Parliamentary Joint Committee on Corporations and Financial Services inquiry into franchising in Australia;
- welcomed the announcement by the federal government that it would release a paper outlining a range of options to address concerns; and
- called on the federal minister to undertake reform of the franchise code as a matter of urgency, and that such reforms should be broadly consistent with the recommendations made by the two parliamentary reports.

The fourth part of the motion states as follows:

While the house acknowledges that reform is best undertaken at the federal level, it will closely monitor the progress of action and consider state-based legislation in the absence of any real progress made within a reasonable time period.

In my view, and in the view of franchisees (and some franchisors, I might add), the reform package announced on 5 November meets the criteria established in the motion.

The second reason this bill is important is because it outlines the scope of reform and legislative model available to state and territory governments to introduce reforms to franchising should they choose to do so. This reason is particularly important because, if the federal government fails to act, the states should aim for uniform reform across the various jurisdictions, as different codes would create unnecessary compliance costs for the sector, potentially creating an unfair playing field and thus having the ability to reduce competition and create inefficiencies in enforcement activities by regulatory agencies. Additionally, the introduction of the bill keeps the issue of franchise law reform on the political agenda.

The bill will also facilitate further public debate within the sector, and feedback from various stakeholders would, in all probability, lead to a revision of the bill when it is reintroduced after the state election, should I be fortunate enough to be re-elected.

The Franchise Council of Australia, despite its public statements to the contrary, continues to oppose any meaningful reform of the code, which reflects its interest in protecting the big end of town. This bill also flags to the federal government that the states and territories are serious about franchise law reform. Overall, the objectives of the bill are to fill in the gaps that exist in the current Franchising Code of Conduct and other trade practices and consumer law at the national level.

The bill is deliberately constructed to complement existing federal law on the matter, to avoid any possible conflict with section 109 of the Commonwealth Constitution and sections 51ACAA and 51AEA of the Trade Practices Act. In this regard, I am indebted to the advice provided to me by Associate Professor Frank Zumbo from the University of New South Wales. Associate Professor Zumbo is a nationally recognised expert in the area of trade practices and consumer law, and has written widely in this area of the law.

While the policy positions adopted in the bill are mine, it was the advice provided by Associate Professor Zumbo on the structure of the bill that helped me to ensure that it did not fall foul of the commonwealth's wide corporations powers.

I also thank parliamentary counsel for their advice and fine tuning of the bill. I accept personal responsibility for any policy errors in the bill, of course. Additionally, I acknowledge the research assistance provided by the parliamentary library.

To arrive at this point today has been a long and tortuous journey. On 5 February 2007 I first raised concerns about the state of franchising in this state as a result of complaints to my office from constituents of mine. I was able to convince the Economic and Finance Committee to undertake an inquiry into this sector. Simultaneously, I liaised with the WA inquiry. On 6 May 2008 the Economic and Finance Committee of parliament handed down its report. On behalf of the committee I gave evidence to the federal inquiry.

When the federal inquiry handed down its report on 1 December 2008, I thought the light was finally appearing at the end of the tunnel. Then the darkness descended. A glimmer of light shone on 31 May 2009 when the federal minister announced that the government would hold targeted consultation to seek final input into options for reform. The fog descended onto the reform process almost as fast as it partially rose. On 21 June 2009, the federal minister announced that he would seek comments on an options paper he was releasing. It was an extensive and finely tuned paper. It only lacked one thing—options.

On 5 November 2009 the minister announced a range of reforms. In my view, those reforms were inadequate. The reforms to policy proposed in my bill have the support of the South Australian Premier. I understand that he has communicated with the federal government the view that it would be desirable for the federal government to lead this reform process, as the state government is committed to a cooperative federalism and the COAG reform process which are achieving significant advances in harmonising business regulation nationally.

This bill overcomes constitutional restrictions by applying the Franchising Code of Conduct set out in the Trade Practices Act Regulations 1988 of the commonwealth as a law of South Australia. I seek leave to insert the remainder of the explanation in *Hansard* without my reading it.

Leave granted.

Secondly, the act will be given broad coverage to ensure that franchisors do not seek to shift the jurisdiction in which the franchise agreements are entered into. Importantly, section 4 of the bill requires all parties to an agreement to 'act in good faith' in their dealings with each other. Acting in good faith means to act fairly, honestly, reasonably and in a cooperative manner.

This is the provision that the FCA strongly opposes. It stated its opposition to this provision in evidence to the SA parliamentary committee. The FCA states that the provision would give rise to widespread litigation. In my view this is a complete nonsense. The FCA and other critics acknowledge that the courts have already found that an 'implied duty to deal in good faith' already exists. A number of Canadian provinces have good faith dealing provisions in their franchising codes without a flood of litigation occurring.

In evidence to the SA franchise inquiry Professor Andrew Terry, who can, I think in fairness, be referred to as a close friend of the FCA, said the following: 'I should mention that very few franchise countries have in their franchise agreement a right to fair dealing. Canada is the best example...'

When I asked the question, 'Do you think that we should have similar provisions in our code?', Professor Terry responded: 'I think that, in the whole issue of franchise regulation, this sort of issue is the most important to me. I have no problem with the right of fair dealing being included in a code...'

The Manitoba Law Reform Commission in its final report on franchising in May 2008 said: 'the statutory provisions [for good faith dealing] essentially codify the common law duty of good faith in the franchise context.'

The bill creates the office of commissioner of franchises. The commissioner would have the power to mediate, conciliate

and to arbitrate. The office of commissioner of franchise s would provide an efficient, effective and low cost mechanism for parties to a franchise agreement to resolve their disputes. It would overcome the deficiencies in the existing mediation provision provided for by the current franchising code of conduct.

Part 3 of the bill outlines the commissioner ' s powers and obligations under the bill, including the right to collect and publish certain information. The current lack of reliable information regarding franchise disputes covers up the market failure that is occurring in the sector.

Part 4 of the bill provides for pecuniary penalties to be applied against parties who the courts find have breached the code. Section 15 ensures that there is no doubling up of liabilities . So, a person who is liable to pay a pecuniary penalty under commonwealth law would not be liable to pay a pecuniary penalty under the proposed SA law.

Section 17 enables a court to impose orders for compensation while section 18 facilitates action for damages.

Section 19 of the bill gives power to the Governor to make regulations contemplated by the act, or as necessary or expedient for the purposes of the act.

The bill will create in South Australia a fairer, more efficient and competitive environment for franchising to flourish in. The duty to act in good faith will, in my opinion, foster a more ethical approach to business in the franchise sector.

In my speech to this House on 10 October 2009 I outlined the reasons why franchise law reform is necessary. I do not intend to repeat those comments today. Mr Speaker, a week does not go past that I do not receive details from a franchisee who has been treated badly by their franchisor. When a franchise fails it is usually the franchisee who suffers. The human toll is at times beyond comprehension. Assertions by some FCA spokespersons that franchises only fail because of lazy or incompetent franchisees are insulting and distressing to those franchisees who have lost their homes, savings, and at times their families, because of the unfair and unreasonable behaviour of some franchisors.

Mr Speaker, this bill will not help those who make poor business decisions. It will not help those who do not exercise due diligence before signing a franchise agreement —you can not legislate for that —however, let us promote opportunity and not opportunism. I commend the bill to the house.

Debate adjourned on motion of Mr Griffiths.