



House of Assembly - Thursday, 10 September 2009, Page 3900

FRANCHISE CODE OF CONDUCT

Mr PICCOLO (Light) (11:31): I seek leave to move this motion in an amended form in order to correct a grammatical error in paragraph (d).

Leave granted.

Mr PICCOLO: I move:

That this house—

(a) notes that the reports of 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 into Franchising in Australia make a range of recommendations to reform the Franchise Code of Conduct;

(b) welcomes the announcement by the federal Minister for Small Business, the Hon. Dr Craig Emerson MP, that he proposes to release a paper that outlines a range of options to address concerns raised by these reports;

(c) calls on the federal minister to undertake a reform of the franchise code as a matter of urgency and such reforms should be broadly consistent with the recommendations made by the two parliamentary reports and be implemented forthwith; and

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

The Hon. I.F. Evans interjecting:

Mr PICCOLO: Well, it does to me; so that's why it is important. I seek the house's support for this motion. I strongly believe that the time has now come for the federal government to tackle this very important issue for both economic and justice reasons. I will seek to elaborate on why I believe the federal government needs to act by explaining each part of the motion, which I understand will receive the support of the opposition.

The issue of reform of the Franchise Code of Conduct has been addressed by three separate inquiries. One is the inquiry undertaken by the government of Western Australia, which was a ministerial inquiry; the second is an inquiry undertaken by the Economic and Finance Committee of this parliament; and, thirdly, the inquiry by the federal Parliamentary Joint Committee on Corporations and Financial Services.

Each inquiry reached similar conclusions. While all three inquiries acknowledged the importance of franchising to the Australian economy and that it is important that we do not interfere with the industry in the sense of stifling that industry, they all concluded that there were weaknesses in the current code of conduct, and that it needed to be reformed. Again, all three inquiries reached the conclusion that those weaknesses in the current code could be addressed without any significant increase in compliance costs or any negative impact on competition. Indeed, most of the inquiries concluded that it would improve competition by increasing transparency in the franchise industry and, importantly, deliver better price outcomes to consumers and, importantly, on the issue of justice, that the reforms would provide mum and dad investors with a reasonable level of protection against unscrupulous operators in the franchise industry.

As I have mentioned in this place on previous occasions, at the moment, people who can invest up to

\$400,000 or \$500,000 in a franchise (often your typical mum and dad investors) have less protection than a person who invests \$20 on the stock market, yet they can actually put their whole livelihood at risk.

The balance to be found in these inquiries and the reform can be demonstrated by looking at the various titles of the reports. The federal inquiry, for example, was entitled 'Opportunity not Opportunism: Improving the Conduct of Australian Franchising'. Again, the report acknowledges the focus of reform on providing a level playing field; in other words, improving competition. The federal parliamentary magazine, when reporting on the federal inquiry, entitled its article 'Hook, Line and Stinker: MPs tackle franchises gone wrong'. Again, the whole emphasis on reform is to improve the industry. It is not to bog the industry down in unnecessary regulation but to have a program of reforms that improve competition and also help innovation in the industry.

Earlier this year, the federal Minister for Small Business, the Hon. Dr Craig Emerson MP, announced that he would issue an options paper which would hopefully recommend some actions to be implemented. It saddens me to say that, when that options paper was released, it was not what I thought it would be. It is really a rehash of the federal inquiry report and did not outline what options the government was looking at or possible options to be actioned, and it called for further consultation. While consultation is important, there have been three inquiries into this industry in the last 18 months, so there is not much more to be inquired into.

The importance of this motion is to communicate to the federal minister that the time for consultation and discussion is over and that it is now time to act. I receive on a regular basis emails and phone calls from people in the industry about whole chains of franchises that have collapsed and left a trail of destruction behind, and I am sure every MP in this chamber has heard a horror story about the failure of a franchising chain. I do not particularly want those today in this place, not only because it may impact a whole range of legal actions but also hurt those people the reform is trying to support.

Within my own electorate, I am aware of ongoing legal actions by franchisees against franchisors who have done the wrong thing. One of the major problems with the current code is that there is no real mechanism to address disputes.

I think the house is right to call on the federal minister to act on this matter as a matter of urgency, and such a reform should be broad and consistent with the recommendations made by the various parliamentary reports.

It is urgent because, as I said, the number of franchise chains which are failing and leaving a trail of destruction is increasing. As we go through the global financial crisis and people lose work, the worst situation would be for people to use their redundancy payments to 'buy a job'; the franchise industry likes to promote itself as a way of buying your own job. It would be a tragedy for a person not only to lose their job but also to lose their redundancy payment and savings in a franchise that has gone bad.

The focus of reform has never been on regulating the industry to protect people who make bad decisions. You cannot stop people from making poor choices, and that would be a level of regulation that would be counterproductive. It is about creating a level playing field and transparency; it is about having processes so that, when disputes occur, there is a level playing field for dispute resolution.

I want to highlight the body of evidence which now supports the need for reform. When the then minister for small business, Margaret Quirk, of the Western Australian inquiry announced the findings of those—

Mr Pengilly interjecting:

Mr PICCOLO: Not that I am aware of. When the minister announced the inquiry, she said that the franchise inquiry found that the state of franchising in WA was in good health but there was room for

improvement. She outlined the need for several measures, including the improvement of disclosure and education for would-be franchisors; mandatory dispute resolution; and transparency and accountability in end-of-agreement arrangements. This inquiry did not go as far in terms of its proposed reforms as the South Australian inquiry or the federal inquiry but, to different degrees, all three inquiries made it clear that reform was required in order to ensure that we protect the industry itself from those who wish to make a fast buck and damage the industry.

The South Australian inquiry made a range of recommendations but the important ones, as I see it, were those dealing with penalties for breaching the code. For example, at the moment, there are no financial penalties if a franchisor breaches the code; however, if a franchisee breaches the code or a contract, the franchisor just closes them down. The inquiry also indicated that the dispute resolution needed to be strengthened and that the current process of mediation is quite ineffective.

Given that recent research has shown that about 30 per cent of franchisors report a dispute with their franchisee—and you could imagine that there would be level of underreporting because it is not in the interests of franchisors to report a dispute—the level of disputation is quite high. Given the mechanisms available, invariably most franchisees get the bad end of the deal because there is an imbalance in power between the franchisee and the franchisor, mainly because most franchisees have borrowed heavily to start up the business and they know they cannot outspend the franchisor in the courts to protect themselves.

One of the more contentious but equally important recommendations of both the state and federal inquiries is that the franchisees and franchisors deal with each other in good faith and fair dealing. The courts have already found that there is an implied requirement to deal in good faith and fair dealing, but it is proposed to make that quite explicit. Given that it is implied in law already, I am at a loss to understand why the Franchise Council of Australia, which generally speaks on behalf of the franchisors, is opposed to this. This proposal would create a much more level playing field, so it would certainly be supportive.

Importantly, the provision of a good faith and fair dealing provision in the code is ALP policy, and it is a policy which the now federal Labor government took to the last federal election. In fact, the policy statement announced on 24 October 2007 states that Labor supports improved franchisor disclosure, and Labor believes that the franchise code should include good faith obligations as long as the scope of this obligation is well defined. Clearly, the Labor Party has made a commitment to this sort of reform, so I am at a loss to know why the federal minister has now been viewed as dragging the chain on this reform.

The other important reform required, which would also help the industry, is that it be a requirement in any franchise agreement to detail how an agreement is terminated and under what conditions, particularly around goodwill. This would remove a lot of the disputes at the termination of a contract because, at the moment, there is no requirement to do so, and often most agreements have no provision and, therefore, disputes occur.

Interestingly, the federal inquiry's recommendations mirrored what the South Australian inquiry found. I represented our parliamentary committee at the inquiry. Recommendation 5, which is about the franchising code being amended to require franchisors to disclose (before a franchise agreement is entered into) what process will apply in determining the end of the terms of arrangements, which is very important. Again, they also highlight the need for dispute resolution mechanisms.

Also very importantly, recommendation 6 on the standard of conduct states that franchisors, franchisees and prospective franchisees shall act in good faith in relation to all aspects of a franchise agreement. One would assume that would be good practice and a good way to behave in a civil society; so, again, I am at a loss to know why both the Franchise Council of Australia opposed that and why the federal minister is reluctant to amend the code to incorporate that. Again, the federal inquiry supported the South Australian

position regarding introducing penalties for breach of the code.

The reason I have brought this motion to the house's attention is because the federal report was tabled in the federal parliament on 1 December last year. While the minister has made some moves on this decision, he has not moved enough, and I think we need to send a clear message to the federal parliament and the federal minister that, in the absence of any real action to reform the code, this parliament itself will consider introducing reform at a state level.

I acknowledge that is the less desirable position but, given the choice of complete inaction versus some reform at the state level, I will certainly be supporting reform at the state level. Hopefully, I will get the support of the opposition and minor parties. I urge members of this house to support this motion.