Queensland Law Society

Your Ref: Small Business Commissioner Bill 2011

Quote in reply: Business Law & Franchising Law Committees

15 September 2011

The Hon Anastasious Koutsantonis
Minister for Mineral Resources Development
GPO Box 2832
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By email: westtorrens@parliament.sa.gov.au

Dear Minister

SMALL BUSINESS COMMISSIONER BILL 2011 (SA)

I write on behalf of the Business Law Committee and Franchising Law Committee of the Queensland Law Society.

The Society confirms its support for the concept of the introduction of a Small Business Commissioner role for small businesses in South Australia. However the Society cannot support the *Small Business Commissioner Bill 2011* (SA) in its amended form because of its significant and inexplicable departure from the February 2011 Exposure Draft which now includes controversial provisions that in turn has significant implications for small businesses and franchises throughout Australia.

Lack of Consultation

The Society is concerned about the absence of any meaningful public or industry sector consultation on the significant changes that were made to the Exposure Draft which now incorporates the introduction of the power to prescribe, regulate and prosecute for breaches of "industry codes" by the introduction of extensive amendments to the *Fair Trading Act 1987.*

The Minister has chosen to ignore key recommendations and concerns raised by the Society's submission, the Law Society of South Australia's submission and the Law Council of Australia's submission concerning the need for the South Australian government to engage with the Commonwealth over the proposed function of the *Small Business Commissioner Bill 2011* (SA) which included the power to monitor and investigate industry codes (including the Commonwealth Industry Codes).

The likely negative outcomes and problems that would occur as a result of the overlap of State and Commonwealth regulation of franchising has been extensively raised many times before in both SA and WA attempts to regulate franchising at state level.

The introduction of the Bill now also raises the immediate and likely possibility that the Minister could prescribe for example either or both of the existing Commonwealth mandatory franchising industry codes, namely the Franchising Code of Conduct or Oil Code as "industry codes" for the purposes of Part 3A of the amendments to the *Fair Trading Act 1987*. As a result there would be a significant and detrimental shift in the balance of national regulation of franchising in Australia.

It is unlikely that the large number of participants currently regulated by those mandatory industry codes have been afforded any reasonable opportunity to comment on the likely negative outcomes to them if this occurred and in fact many may not be aware of the impending likelihood this will occur. The Consultation Outcomes Paper states that only 57 written submissions on the Exposure Draft were received. That is hardly reflective of any form of overwhelming support for the Bill given the size of these industry sectors. It would therefore also appear to be inaccurate to suggest that there has been extensive industry wide consultation about the Bill in its current form.

The Society is disappointed with the absence of transparency in the Consultation Process where the Society (and presumably other persons invited to make comment on the Exposure Draft) were not provided with the Consultation Outcomes Paper after the Minister had introduced the Bill into Parliament. The Society was therefore not afforded the courtesy of any opportunity to make supplemental submissions on the significant changes to the Exposure Draft before the Bill was introduced in amended form into the SA Parliament.

The Society does not accept that there was any reasonable or meaningful opportunity afforded for consultation by sector stakeholders at all regarding the amendments to the Exposure Draft or the obvious proposal now for the Minister to move to State Based franchising regulation.

The Society is concerned that despite the Bill not including one reference to the word "franchise" the Minister and Tony Piccolo MP have publicly indicated that this Bill is the underpinning legislation that will allow them to regulate franchising in South Australia despite an extensive and expensive review by the South Australian Economics Committee which did not recommend state based legislation be introduced at this time.

The Society is concerned that the Consultation Outcomes Paper published by the Projects Team makes it clear that the Minister thought it was critical to have the power to prescribe industry codes. The Society is concerned that if that was the position of the Minister at the time the Exposure Draft was released, then why was that power not expressly included in the Exposure Draft to enable a thorough review.

Our concerns regarding the Bill

Despite assurances being made by the Minister that the Bill follows the Victorian Model, the Bill goes much further and departs significantly from that model in many important respects including those respects that the Society highlighted in its Submission.

The Society remains concerned about the significant administrative and financial costs that businesses are likely to incur as a result of the overlap between regulation by the States of industries that are currently subject to existing Commonwealth industry codes. The Society believes that this cost and administrative burden is unwarranted and does not appear to have industry wide support in South Australia at this time.

There appears to be a direct inconsistency between the Bill and the outcome of the recommendations that flowed from the reopening of the recent SA Parliamentary enquiry into Franchising.

The Society reiterates its concerns that were raised in its Submission of the divergence of the functions of the Small Business Commissioner from the Victorian model that they represented that they were basing it on.

The Society also believes that there are a number of technical problems with the provisions of the Bill. For example:

- The Bill now contains 2 quite different definitions of "industry codes". There is a definition of "industry codes" that appears in clause 14 of the Bill which is the definition of "industry code" to be inserted into the *Fair Trading Act 1987*. Under new section 28F of that Act, the regulations may prescribe an industry code and declare whether the Commissioner for Consumer Affairs or the Small Business Commissioner is to be responsible for the administration of this Part in relation to the code or provisions. However, under clause 3 of the Small Business Commissioner Bill, the definition includes not only those included under the Fair Trading Act but any other code whether or not prescribed for the purposes of that Act or any other Act of the State of the Commonwealth. These two quite different definitions being inserted in the one piece of legislation is certain to cause confusion. There has been no explanation as to why they are different.

- The need to introduce a codified duty of good faith into franchise relationships has been proposed by both the Minister and the Honourable Tony Piccolo MP. Whilst the Bill does not seek to define good faith it does include a reference to it in clause 5(2) of the Bill. It has been suggested by proponents for state based franchising reform that the concept of good faith could easily be defined to enable the inclusion of a statutory duty of good faith in every franchise relationship. The definition put forward by those proponents is based upon a suggested common meaning, namely an obligation to act "fairly, honestly reasonably and in a cooperative manner". The Society reiterates that a full and complete definition of good faith is not in the interests of the any industry. Further, the clause itself is ambiguous. Is it the "relationships" or the "dealings" that are to be conducted fairly and in good faith? Or perhaps it is the performance by the Commissioner of his functions that must be conducted fairly and in good faith.

There are a number of issues with proposed clause 8F and clause 28 of the Bill:

- There is no provision in the Bill in regard to matters that have already been dealt with by the Australian Competition and Consumer Commission (ACCC) under Division 5 of Part XI of the Competition and Consumer Law 2010. In other words, a party can be issued with an Infringement Notice by the ACCC and pay the fine to the ACCC. Then the party can be issued with a civil expiation notice in regard to the same facts or circumstances and be liable to pay an expiation fee. There should be provisions inserted to ensure this type of action can not occur and an obligation on the Commissioner to withdraw the notice if the ACCC has issued a like notice.

- Under proposed clause 86H, even if a party has paid the expiation fee, if the Commissioner decides that proceedings should be commenced for a civil penalty order, then the civil expiation

notice may be withdrawn but the expiation fee paid must be refunded. This is totally opposite to section 134D(3) of the *Competition and Consumer Act* which provides that no proceedings may be started or continued against the person. It seems to lack an element of fairness that a party receives an expiation notice, pays the fee and then the Commissioner may withdraw that notice and take proceedings. The payment of the fee should be the end of the matter.

- Further unfairness is evident in clause 86H(6) where an expiation notice cannot be withdrawn under subclause (5) if it becomes apparent that the person never received the notice as a result of an error on the part of the Commissioner or failure of the postal system. The effect could be that a notice is issued and for example: wrongly addressed by the Commissioner. Proceedings are commenced by the Commissioner because the fee has not been paid. Those proceedings cannot then be withdrawn even though it was the fault of the Commissioner that the notice was never received. This lacks the requirement for natural justice.

- Clause 86H(8) then provides that if the Commissioner has made another error and at the time of withdrawal of the notice failed to notify the person that it was being withdrawn for the purposes of commencing proceedings, then proceedings cannot be commenced until yet another civil expiation notice is withdrawn. This means that a person can receive a notice, pay the fee, have the notice withdrawn and the fee refunded and then get issued a further notice etc. Again the clause lacks fairness. This also conflicts with clause 86B(4)(b) where a person is not liable to pay more than 1 amount as a civil penalty in respect of the same conduct.

Regulations

The Society is also very concerned that clause 28F of the Bill allows the Minister to prescribe and later amend an industry code by Regulation. Subordinate legislation is not subject to as much scrutiny and consultation as Acts of Parliament. The Society has extreme reservations about allowing such amendments by regulation.

The Society calls for an urgent review of the Bill, with special consideration of our concerns expressed above.

Please do not hesitate to contact either myself or have a member of your staff contact our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au if you wish to discuss these concepts further.

Yours faithfully

Bruce Doyle
President