

Your Ref: MSBF2011/000022, eA149522

Our Ref: Franchising Law Committee

17 October 2011

The Hon Tom Koutsantonis MP
Minister for Small Business
GPO Box 2832
Adelaide SA 5001

minister.koutsantonis@sa.gov.au

Dear Minister

SMALL BUSINESS COMMISSIONER BILL 2011 (SA)

Thank you for your letter dated 6 October 2011, received by the Queensland Law Society on 12 October 2011, in response to our letter of 15 September 2011 concerning the *Small Business Commissioner Bill 2011* (the Bill).

In short, the proposals run counter to micro-economic reform. They will both impede the operation of South Australian franchise businesses interstate as well as the operation of interstate franchise businesses in South Australia.

Application of the Bill to industry codes beyond State-based codes

The Explanatory Paper you provided to us was publicly released on 14 February 2011, along with the Exposure Draft of the Bill (the Exposure Draft).

Whilst we acknowledge that there is fleeting mention of “*industry codes*” in the Exposure Draft we direct you to our written submission of 23 March 2011 in particular pages 3 and 4 which deal specifically with the issue of industry codes and the Society’s concerns regarding the potential for an overlap with the Commonwealth mandatory industry code regime particularly in relation to the franchising sector.

The express concern of the Society that the Bill now before Parliament is intended to introduce a power for prescription, regulation, investigation and enforcement of industry codes beyond South-Australian State-based codes that is embodied in our letters of 23 March 2011 and 15 September 2011 continues to be ignored.

In addition the definition of industry code in section 3 of the Exposure Draft is significantly different to that contained in the Bill because of the inclusion of reference to industry codes prescribed by the Commonwealth. The original definition in clause 3 of the Exposure Draft that made no mention of Commonwealth codes was subsequently moved to the proposed amendments to the *Fair Trading Act 1987* contained in Clause 28D.

Ultimately the effect of this significant alteration of the Bill from the Exposure Draft is to allow the Commissioner to investigate compliance with a mandatory industry code of the Commonwealth immediately on the Bill's commencement even though there is no corresponding express function to liaise with the relevant Commonwealth regulatory body.

That new power is significant and the extent of information that the Commissioner could immediately seek from those regulated by a Commonwealth Industry Code (if the Commissioner exercised his powers under clause 12 of the Bill) irrespective of whether a complaint received is of significant and substantial concern to those in the franchising sector, as is the obvious significant direct cost of replying to such a request. There are aspects of the extra-territorial application of the Bill and the amendments to the *Fair Trading Act 1987* which need further consideration and consultation to avoid any form of constitutional challenge that Senator Nick Sherry recently foreshadowed could occur.

There is also no clear obligation requiring the Commissioner to cease taking action to investigate a complaint including where:

- (a) The Commonwealth is proceeding with an investigation or prosecution in relation to a complaint it has received based on the same conduct; or
- (b) The parties to a dispute are engaged in a form of mediation in accordance with Part 4 of the Franchising Code of Conduct.

It appears that the Commissioner also does not have an express function to refer a complaint (received by it from a small business) to the ACCC for consideration.

Consultation and a private briefing

The substantial and significant amendments made to the Exposure Draft should have been released for further sector consultation before the Bill was introduced into parliament *fait accompli*. There are many stakeholders in industries that are now directly affected by this Bill that were denied the opportunity to consider the proposed amendments and to be heard on this significant alteration to the Exposure Draft.

With respect, your offer of a private briefing after the Bill was introduced is not equivalent to timely, meaningful industry wide consultation about such wide sweeping changes to the Exposure Draft to amend the Bill before its introduction.

Similarly the release after the introduction of the Bill to Parliament of the Outcomes Paper denies those who have made submissions to consider, review and further consult with you on the proposed reforms.

It is also relevant that the written submissions concerning the Exposure Draft were not made publicly available other than by way of an FOI request so that the transparency of the extent of support or criticism of the Exposure Draft is not easy to gauge.

Support for introduction of industry codes

You have publicly released letters of support for your initiatives from a number of Industry Associations that clearly indicate their support for the introduction of industry code regime in South Australia. It is relevant that those industries are by and large not already regulated by a complementary mandatory industry code of the Commonwealth. It is clear that those letters of support from industry associations are dated shortly after the Exposure Draft was released but before the expiration of the Consultation Period,

even though those letters of support are predicated on substantial changes being made to the Exposure Draft to include industry code provisions.

The Society notes that you have released copies of various letters of support from those industry associations to these initiatives. Of those, there are 2 letters of support from the South Australian Farmers Federation (SAFF) (dated 8 March 2011 and 10 March 2011) which confirm that you and the Honourable Tony Piccolo MP met with the Chief Executive of the SAFF on 22nd of February 2011, a short time after the Exposure Draft was released and some 3 weeks before the end of the Consultation Period.

From our reading of those letters of support, your advisor Associate Professor Frank Zumbo also subsequently discussed the Exposure Draft (and presumably your proposals) with the SAFF Chief Executive. As a result of that discussion 2 days later in its letter of 10 March 2011 the SAFF then stated:

In the South Australian Farmers' Federation's (SAFF) view the legislation could be improved by creating a head power in the proposed Act that would enable the Governor to create industry specific codes of practice through regulation.

This would require a minor amendment to the current draft Bill as Federal industry Codes of Practice are already incorporated.

The letter indicates that your advisor had discussed or suggested amendments being made to the Exposure Draft to empower the prescription of industry codes (including codes or prescribed provisions to regulate industries already subject to Commonwealth industry codes) immediately after the Exposure Draft was released.

It appears that your advisor has sought public support for this initiative even though the Consultation Period and opportunity for consideration of other initiatives and submissions had not expired. It is not surprising that it is this initiative which has been the subject of the most controversy since it unexpectedly appeared in the Bill with the controversial aspects relating to the powers of investigation of and potential adoption (and subsequent enforcement) of Commonwealth industry codes.

The definition of *industry codes* released in the Exposure Draft stated:

***industry code* means a code regulating the conduct of participants in an industry towards other participants in the industry or towards consumers in the industry.**

In the Society's view this initial definition arguably would not have included a prescribed Commonwealth industry code. There is no reference in the Exposure Draft of your stated intention to confer a power on the Small Business Commissioner to investigate or regulate (or provide enforcement powers for) Commonwealth industry codes or any state based industry code that adopted a Commonwealth industry code. There was no provision in the Exposure Draft that referred to a power to prescribe "*industry codes*" rather it simply followed a basic function similar to the Victorian model.

Presumably this is the reason why the definition of *industry code* has been subsequently amended in the final version of the Bill to be:

***industry code* has the same meaning as in Part 3A of the Fair Trading Act 1987 and includes a code whether or not prescribed for the purposes of that Act or any other Act of the State or the Commonwealth.**

The Society is concerned that if this initiative was of such vital concern to you at such an early stage in the Consultation Process then it should have been made clear in the Explanatory Paper (or in a subsequent public statement or supplementary statement) that Commonwealth industry codes were either already incorporated within the relevant definition or that it was your intention to subsequently do so by prescribing industry codes.

That information would have been extremely relevant and beneficial to those making submissions (including the Society) prior to the end of the Consultation Period and prior to when the views of all stakeholders could be known.

In your letter to us dated 6 October 2011 you stated that:

I confirm that the consultation process for the development of the final Bill was taken seriously.

The apparent solicitation of support for making significant and wide sweeping amendments to an Exposure Draft prior to the end of the Consultation Period without providing a significant body of affected parties an opportunity to understand or be heard on that proposal is not appropriate consultation. In addition there have been significant concerns raised by the Law Council of Australia as well as the Law Society of South Australia of this process and the nature and extent of amendments to the Exposure Draft which have been publicly dismissed by you.

Concerns of the franchising sector

We are aware of your public stance (and that of the Honourable Mr Tony Piccolo MP and your advisor Associate Professor Frank Zumbo) regarding your intentions to regulate the franchise sector in South Australia. Associate Professor Frank Zumbo has on numerous occasions publicly described himself as the architect for or has been identified as being significantly involved in the push for state based franchise reforms in South Australia and Western Australia so it naturally follows that the Society is concerned that the consultation process regarding the Exposure Draft has not been as transparent as you indicate in relation to the franchise sector, particularly since the suggestion has consistently been made by you and your department that the Bill would be based on its Victorian equivalent.

We are also aware from the outcomes of numerous inquiries in South Australia and other States that overwhelmingly the franchise sector wishes to remain regulated by the Commonwealth under their mandatory industry code regime. It remains the Society's view that any reforms (regarding investigation, penalty regimes or any other matter), should occur at the Commonwealth level rather than the imposition of an additional layer of state based legislation seeking investigative and enforcement powers over an industry already regulated by a Commonwealth mandatory industry code.

The Honourable Senator Nick Sherry recently advised that the Commonwealth have no intention of reviewing the *Franchising Code of Conduct* before 2013. At that time there will presumably be additional opportunity to consult with the sector on changes (if any) that may need to be made to enforcement powers.

We remain concerned that a number of issues that the Society and indeed our colleagues the Law Society of South Australia and the Law Council of Australia have raised have not been dealt with at all concerning the Bill.

Most importantly the Society is of the view that the valuable initiative of the introduction of a Small Business Commissioner role is being overtaken by a determination to use the Bill as a means to regulate Commonwealth industry code sectors such as the franchising sector without adequate consultation or

support from those industry sectors in a way that fractures the balance reached in Australia at a Commonwealth level to regulate participants in those industries.

Amendment of the Bill

To remove that immediate concern and to allow those industries not currently regulated by an industry code to allow for state based industry codes to be prescribed for their protection, the Society believes that it would be relatively simple to amend the Bill in the definitions of “*industry code*” in clause 3 of the Bill and clause 28D of the proposed amendment to the *Fair Trading Act 1987* as follows:

- (1) In Section 3 of the Bill delete the words “ **or the Commonwealth**” and add the words:

“but does not include an industry code that is prescribed as a mandatory industry code by the Commonwealth under the *Competition and Consumer Act 2010* or any other Act of the Commonwealth.”

- (2) In the proposed amendment to the *Fair Trading Act 1987* – contained in Part 3A – (Industry codes) – 28D - in the definition of **industry code** in 28D after the words “**participants in the industry**” add the words :

“but does not include an industry code that is prescribed as a mandatory industry code by the Commonwealth under the *Competition and Consumer Act 2010* or any other Act of the Commonwealth”.

We understand that all of the functions and the powers of the Small Business Commissioner that you propose under the amendments to the *Fair Trading Act 1987* are linked to an ***industry code or prescribed provisions of an industry code***. These amendments would therefore remove the right for the Small Business Commissioner to investigate compliance with an existing or future Commonwealth prescribed industry code but would preserve the prescription investigation and enforcement of industry codes for those unregulated sectors who sought regulation of their industry in this manner.

This simple amendment would also remove the right to prescribe as an industry code or to prescribe a provision relating to an industry code any existing or future Commonwealth industry code. We understand that this simple amendment may remove the immediate and significant concerns of the franchise sector and enable them to publicly support the creation of the Small Business Commissioner model although we maintain there are still other significant issues that need to be addressed that have already been highlighted.

This amendment would also remove the possibility of a party needing to deal with both Commonwealth and State bodies on an alleged breach of a Commonwealth industry code.

The Society also points out that the functions of the Small Business Commissioner are linked to dealing with “*state and local government bodies*” and to allow representations on behalf of small business although there does not appear to be any express function of the Commissioner to liaise with Commonwealth bodies such as the ACCC who are ultimately charged with the enforcement of the mandatory industry code.

The Society is well aware that it is normal for the States and the Commonwealth to engage in protocols concerning the avoidance of duplication or overlap of legislation. The Society welcomes initiatives undertaken towards the harmonisation of state and commonwealth legislation and removal of

unnecessary “red tape” for small business, however the significant amendments to the Bill which clearly are intended to cover Commonwealth codes departs substantially from that process and initiative.

We also understand the Federal Minister for Small Business, Senator Nick Sherry, recently expressed his concerns regarding the current proposals in South Australia and the immediate and direct effect that the Bill will have on the franchising sector.

I thank you for your letter and trust our response will be of assistance to you and members of the South Australian Parliament in their deliberations concerning this Bill.

We have also sent a copy of your letter and our response to the Law Society of South Australia and the Law Council of Australia as we understand that you may have also written to them, together with members of the Upper House of the South Australian Parliament who are currently considering this Bill.

Yours faithfully

Bruce Doyle
President