

STATE FRANCHISE BILLS STIR DEBATE

Debate about whether the states should introduce their own laws to govern franchising continues to bubble along.

STORY BY CAMERON BOGGS



Despite the insistence of the Franchise Council of Australia (FCA) and Federal Small Business Minister Nick Sherry that no action is needed, moves to change legislation governing franchising are advancing slowly in two states.

Franchises are currently regulated by the Franchise Code of Conduct (FCoC), which is enforced by the Australian Competition and Consumer Commission (ACCC) under the *Competition and Consumer Act*. The Act allows for compensation to be paid if franchisees or franchisors do not meet their obligations under the code, but University of NSW Associate Professor Frank Zumbo believes different penalties are needed to more effectively regulate the sector.

Zumbo has strongly supported the FCoC from its early days, but feels the lack of monetary penalties for breaches is a problem, as current remedies are a weak disincentive for those who would breach the code. Current remedies, he told *My Business*, are “very much a reactive approach to the issue. What we need is a proactive approach to the enforcement of the code plus we need a clear deterrent against breaches of the code.”

Zumbo's views have support from influential people: West Australian MP Peter Abetz has spoken out on the issue of franchisees suffering at the hands of ‘rogue franchisors’ who he says do not fully comply with the FCoC. South Australian MP Tony Piccolo believes the FCoC needs stronger provisions to ensure good-faith dealing between franchisor and franchisee, stronger penalties for breaches, more certainty around

what happens at the end of a franchise agreement and better dispute resolution processes.

Zumbo assisted both MPs to draft state-based legislation that would deliver the regimes they desire, going against the FCA's oft-stated belief that the industry prefers a single, national set of regulations.

“Of course, these things should be done federally,” Zumbo told *My Business*. “But being enforced in WA and SA doesn't change anything for the simple reason that all these franchisors around Australia already need to comply with the federal franchising code of conduct.” The point of state-based laws is therefore to allow the states to join in enforcement of the FCoC, and also to administer financial penalties. This approach, he said, would mean that the FCoC would simply be “given effect as a state law”.

Zumbo's second point is that state laws could strengthen the statutory duty of good faith, by which it seeks to make clear that franchising participants need to act in good faith towards one another. “In this, they are seeking to mirror that common law duty of good faith where it continues to be a common law duty, but codified and reflected in a law where it is clear as to its applications,” Zumbo said.

State laws move slowly

As *My Business* went to press, the Bills Zumbo helped to create were not faring well.

In South Australia, Piccolo advanced his proposal as a Private Member's Bill last year. Despite saying he feels there is a lot of interest in the Bill passing, it appears not to be progressing through Parliament. Piccolo's most recent

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activity was the establishment of a Facebook page: Franchise Action Now (FAN). At the time of writing, it had attracted just 69 ‘Likes’ and had only one post on its Wall.

West Australia has instigated a parliamentary inquiry into franchising, as a way of further investigating Abetz's reform calls.

The FCA believes neither Bill is needed, arguing that state-based regulation will burden franchisors with extra compliance chores and create a disincentive for them to enter new markets. FCA Managing Director Steve Wright also worries that West Australia's Bill contains retrospectivity clauses that could mean long-held franchising agreements are challenged.

“If there was some kind of offence against this new definition proved, or at least alleged, the damages claim which is made available by both of these Bills would be covering a 30-year period, because it's for the life of the agreement,” Wright said. Adding that “a damages claim applying to an agreement applies to the life of the agreement”.

The WA Bill also includes personal injury claims. To Wright's knowledge, this is the first time the concept of personal injury damages claim has been introduced in a business-to-business contract.

Wright told *My Business* he believes the West Australian Bill also includes provisions designed specifically to address a dispute between a fast food

franchisor and local franchisees. The narrow focus on addressing the issues in that dispute, he feels, means the Bill does not address structural issues and therefore proposes no worthwhile reform.

Zumbo has responded to the FCA's and other opponents' arguments by saying the Bills cannot do any harm to the sector, as all they are trying to do is promote higher standards of conduct.

“The franchising Bill basically gives a legal assurance of industry best practice, and if you fail to comply with that industry best practice, then there are legal consequences under the legislation. But if you are compliant with those industry best standards then you have nothing to fear from this legislation,” says Zumbo.

He also argues that additional regulation is burdensome, unwelcome and cannot be sustained, “because it is exactly the same franchising code of conduct that has been applied. All it does is impose a potential penalty to increase confidence amongst franchisees that WA franchisors involved in a WA franchising agreement will be fully compliant with the code, otherwise they face the possibility of a penalty.”

Franchisors like current arrangements

While the debate rages between MPs and academics, franchisors to whom *My Business* spoke for this story came down on the side of the FCA.



“If you are compliant with those industry best standards, then you have nothing to fear from this [state] legislation”
– Professor Frank Zumbo.

Justin Wilshaw, CEO of women's gym franchisor Contours, said confusion will arise if each state starts to have various legislations that seek to regulate the franchising industry. Compliance costs will increase and this would dissuade investment in those states where it exists. "Western Australia and South Australia are going down a path which will make it more advantageous to franchise in other states," he said.

"I think there are some things in the Bill which make it commercially unviable to operate in those environments. There is talk in the Bill of fines of up to \$100,000 for a franchise — that's denying natural justice in terms of a trial and just being able to impose that kind of fine."

Wilshaw has told Zumbo that that fines may be acceptable and effective for a big franchisor, "but for a low-cost franchise like Contours, who over the life of a franchise agreement doesn't make \$100,000 out of the franchisee, the risk of a \$100,000 fine is a huge one."

With its 150 outlets, Contours likes having a national set of regulations that they need to adhere to and that govern the group. "We view that as being important to protect the franchise industry and to make sure that the franchising industry in Australia stays strong."

"If we have to maintain five separate disclosure documents and operate under five different franchising codes of conduct, which

is some of the things being proposed out in SA and WA, that would be for us quite a significant cost. Probably the most significant cost actually because of that sort of breadth of regulation, particularly when at the moment we've got a very good set of regulations which are monitored by the ACCC, and we think that's appropriate," Wilshaw said.

"Those franchise groups that engage in conduct that isn't fair and equitable don't last very long or certainly come to the attention of the ACCC very quickly."

Wilshaw's position has been repeatedly backed by Federal Minister for Small Business, Senator Nick Sherry, who in 2010 stated that he supports a moratorium on changes to the FCoC until 2013.

Sherry re-iterated that position in a February 2011 speech.

"The South and Western Australian parliaments have recently been asked to consider State-based franchising legislation to deal with issues which some consider — erroneously in my view — remain outstanding from these recent Commonwealth franchising reforms," he told the Small Business Forum. "Separate State-based franchising legislation will create uncertainty for franchise businesses, lead to more duplication and create additional compliance burdens. Franchising requires a national approach and the Australian Government is committed to continuing on the path of a uniform, national system." ■■



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