

**HANSARD**  
**FRANCHISING BILL 2010**

Second Reading

9 August 2011

**DR M.D. NAHAN (Riverton)** [5.44 pm]: I will make a few comments on the Franchising Bill 2010 and try to not duplicate too much of what the Minister for Transport has said.

As the minister indicated, I am the Chairman of the Economics and Industry Standing Committee and undertook a review of the bill that is under consideration. The committee was asked to do that by Parliament.

We submitted our report to Parliament during the last sitting. We have yet to get a response from Parliament. It is very hard for Parliament to give a response collectively, but that is the usual process. As the Minister for Transport indicated, we made a range of recommendations with respect to the bill. I have never been involved in a franchising issue before. I was not lobbied by Yum! foods or Competitive Foods Australia.

I came to this issue as a kind of cleanskin. The committee's view is that some of the reasons for the legislation that has evolved in the commonwealth and the state and for the numerous reviews over the last 20 years are still relevant. One is that there are clearly issues of access by franchisees to adjudication and dispute resolution, and they are ongoing issues, in my mind.

Secondly, as the member for Cannington rightly stated, there is an almost necessary power imbalance between particularly the small franchisees and the franchisors. A franchise arrangement is a bit like a marriage. Franchisees and franchisors have to work together. They are actually the joint owners of the business structure. The franchisors—this is a generalisation—also have overriding rights.

For instance, on a national basis, franchisors have responsibility for marketing across nations and have to allocate marketing expenditure. They are responsible for brand name development, maintenance and defence. They are responsible for a lot of collective activity. That gives the franchisors quite a bit of sway over the activities and expenditure of the franchisees. It is a necessary part of the business.

Thirdly, franchisees often, but not always, are small scale, and get into small business because it is easier with a franchise than buying a business. Often they are highly geared and use their house as leverage. So they are vulnerable. If they are in a marriage, it gives one party a bit more power over them, and there are all sorts of difficult disputes.

I congratulate the member for Southern River for raising these types of issues because they are relevant. They are still relevant even though we have had 20 years of reviews and studies.

My view—I am not speaking on behalf of the committee now—is that there is further to go on this issue. As the Minister for Transport stated quite clearly, small businesses around Australia are generally doing it tough. The economy is not good out there, particularly in the retail sector.

However, I think the bill had a couple of major flaws that led to fundamental flaws. First, it did not go through appropriate process; that is, it did not go through the usual channels.

It did not go through the bureaucracy, which has history in, and knowledge of, this issue and has had carriage of the issues for a long time. It did not go through a cabinet process; it did not go through a regulatory review.

I think the Parliament improved the legislation by sending it to the committee for review, but because it was sent there by the Parliament rather than by a minister, it was not incumbent on the Parliament to respond to the committee's findings, which often are fundamental. So it was not put through the appropriate process of development, argument, adjudication and review.

As the Minister for Transport indicated, this thing has had, quite clearly, an origin in a commercial interest between Yum! foods and Competitive Foods Australia. The committee saw that; it was quite obvious. The team for Competitive Foods was in the public gallery most of the time, and, clearly, expenditure was being committed. It was clear to me that Competitive Foods was helping with drafting, promoting, arguing and lobbying, and was very instrumental in that. It is Competitive Foods' right to do so, but given the failure of the bill to go through the process that is designed to add balance to the review so that the views of all sides are put, and checks and balances against undue influence are put together, it was open to the excessive influence of a commercial entity.

This commercial entity was not representing small franchisees; Mr Cowin is one of the largest and most successful franchisees and franchisors in Australia, and good on him. He also made it clear on 6PR that he supported the bill because he thought the inclusion of a good faith clause in a state bill and the associated redress would help him in his commercial dispute with Yum! brands.

That is what Mr Cowin stated. He was promoting the bill to advance his commercial aim. He also thought that it might have collateral benefits to small franchisees, which is what I would like to go through.

One of the problems that I have, and which the Minister for Transport raised a number of times, is that small franchisees have a lot of issues that are ongoing and severe, and they can lead to a great deal of pain and damage to individuals, families and businesses. They are real.

The various proponents of this bill have put together a submission that was made separately to me and to the Economics and Industry Standing Committee about the franchise medium. This is publicly available on the committee's website.

Basically, they give assessments, most of which are media reports and some reports from business journals, stating some of the problems. I am not in any way disputing the reality, the pain or the arguments of either party—I am not in a position to do so—but it is absolutely misleading to say that this bill will in any way address the problems highlighted in this submission.

Most of the problems arise from a franchisor going bankrupt—going bust for whatever reasons. This bill will do nothing for that; in fact, 75 per cent of these examples deal with bankruptcy.

A number of them deal with franchisees getting into difficult financial positions and not being able to meet their requirements under the franchise agreement. Another issue is when the franchisor's business goes bankrupt and they walk away, or it is the inability to comply with marketing and brand name requirements.

This bill will not help in those circumstances. As the Minister for Transport indicated quite clearly, we are gilding the lily badly, and it will be incumbent on us, when the franchisees go forth and the proponents of the bill say they have produced a bill that modernises franchising and gives redress to franchisees for all sorts of things, including the stories included in this submission.

We are misleading people and we will be held accountable for that. I want to express my strong view that this bill misleads and it will not deliver as promised or very much at all, and there are better ways for the pursuit of this.

One of the other issues is that the proponents of the bill have said that WA is not alone in this and that South Australia is pursuing a similar route. Tony Piccolo, the member for Light, who is now Parliamentary Secretary to the Premier, right before the last South Australian election —

**Mr M. McGowan:** Which Premier?

**Dr M.D. NAHAN:** The current one; he has not changed. I think they change on 20 October. It is a few days before his tenth anniversary as Premier, and he is a bit despondent about that.

I will get back to the issue. Piccolo is in the position that the bill he had carriage of was caught by the prorogation of Parliament before the last South Australian election. South Australia has had the powers, the time, the inclination and the commitment to put together a similar bill and it has decided not to do so.

**Mr P. Abetz:** It was introduced.

**Dr M.D. NAHAN:** They have gone forward and used it to establish a Small Business Development Commission along the lines of the Victorian model. With the advice of the ex-Victorian Small Business Development Commissioner, now retired, that bill is picking up some issues that we should consider in our own commission. In my view, that would be a better route.

The reason South Australia is doing this is the same reason that the Economics and Industry Standing Committee gave: it thought it was best to do it at the commonwealth level. The commonwealth is committed to a review of all its legislation in 2013, and, in its report, the Economics and Industry Standing Committee saw no problem with the commonwealth putting in a good faith clause in its own Franchising Code of Conduct. If we are going to lobby, it is agreed that national legislation is the best way.

The commonwealth has committed to a review in 2013. A consensus is developing that a good faith clause could be included. Graeme Samuel, who was the Chairman of the Australian Competition and Consumer Commission, was against this for various reasons—I am not criticising him. He has left and there is a new chairman, Mr Sims, and the ACCC is the place to do it. That is the way to do it if we want clean legislation. Putting in a good faith clause is not earth shattering. As the member for Cannington said, it has been included in many other bills. I actually think I support the member for Cannington. I cannot think why the Minister for Trade, Hon Dr Craig Emerson—who by the way is an old friend of mine; we did our PhDs together—resisted so much.

**Mr T.R. Buswell:** Did you go to any parties with him?

**Dr M.D. NAHAN:** Yes; he liked to party.

South Australia is not following the same route. It has often been said by the people supporting the bill that the commonwealth has not acted. It has not acted on good faith and it did not put penalties in the code, no doubt, and that is, essentially, what this bill proposes to do, but to say that the commonwealth has not acted is not understanding the huge increase in changes designed to facilitate the problems associated with franchisees in this country over the past 15 years.

The commonwealth has changed the code repeatedly. It has totally changed Australian consumer law, which just recently came into place and which addresses many of the issues. It changed the Competition and Consumer Act and the Trade Practices Act, all in part designed to improve access of small franchisees to the law. It has also beefed up a the ACCC's enforcement power and its penalties powers. One of the complaints has been that the ACCC has failed to act.

I think that the ACCC has not given this top priority, but to say it has failed to act is simply not true. It has looked at many things and many times it has acted.

It has looked at issues and could not substantiate the claims. Like all, let us say, regulatory bodies, the ACCC has to look at the case and find out whether it has a reasonable prospect of getting a conviction and also that the case it is pursuing sets a precedent. The ACCC has had two recent cases.

One is Allphones, which is a phone franchisee that got into some problems in the early 2000s, and the ACCC finally got an indictment on unconscionable conduct and the fine, from memory was \$3 million, against Allphones. By the way, it took nine years and many millions of dollars to achieve that. The ACCC pursued a couple of other cases. The ACCC is doing things, although not enough, and it has expanded its powers.

I might add that one of the findings that disrupted me so much as a member of the committee is that this bill proposes to shift the responsibility for enforcement in WA of the Franchising Code of Conduct, a commonwealth code adopted by the states, from the ACCC and the commonwealth to the state. If the bill does not do that, then it does nothing. If there is no enforcement under this bill by the franchisees, either on their own behalf or by the state, nothing will happen; it will do nothing. The bill proposes a shift of regulatory responsibility from the ACCC to the state, and a shift of the cost from the commonwealth to the state.

Quite honestly, there is a cost involved. Many of the proponents say it is not costly; it is cost-free. It is not; it cannot be. If it is cost-free, we are doing nothing and therefore the bill achieves nothing. Personally, I do not think the bodies that will be in charge of enforcing this bill, whether it is the Commissioner for Consumer Protection or the Small Business Commissioner, will have any more ability, expertise or resources than the ACCC.

I might add that I think all the evidence we had pointed to the fact that the real problem that small franchisees face is access to justice, decision making and adjudication. This bill will still require them to front up and take an action against the franchisor in the courts at great cost. Hundreds of thousands of dollars will be required. Small franchisees cannot afford that. They need low-cost adjudication. That is what the various departments advised the committee.

That is what they should have been listening to in the formation of the bill. The Commissioner for Consumer Protection advised the committee of her concerns about the potential number of cases. We essentially asked her whether this will make a difference. Depending on the resources given, she said that she would be constrained by the number of cases that she could take up. Consumer protection locally has a reputation that generally we try to conciliate, educate and deal with every single matter that is presented to us as a formal complaint.

It tries to deal with them all. Obviously from time to time it has to act in the public interest. If we put this on the commissioner, she would have to take her resources away from addressing everybody at a low cost to running expensive long-winded test cases. The report states —

*It could be argued that the Franchising Bill could potentially provide grounds for these franchisees to bring action against the franchisors.*

It could provide a mechanism for franchisees to take franchisors on. It continues —

*However ... it could be argued that these issues appear prima facie to relate to misrepresentation ...*

It is very difficult for a franchisee to utilise this bill because it would still be incurring very large cost imposts. Indeed, the conclusion of the majority of the committee was that the bill would not address the primary problems facing franchisees. We asked officers of the department how much it would cost, and they said, "How much do you want us to do? That is an executive decision. How much are you going to give us?" They came up with an estimate of about \$4 million.

If they wanted to do it more expeditiously over more cases, it would cost more. They also said that when there is a clause of good faith, there is the problem of having to define it. Having developed case law, there is a problem of defining it. There is a lot of case law defining good faith and unconscionable conduct provisions but we were advised that it is uncertain whether that is transferable. The bill has a narrow definition of good faith and it would have to develop case law to redefine that. It would not only impose a cost bearer to take action, but create uncertainty and the development of a precedent would take a great deal of time.

There are a couple of issues that we will deal with during consideration in detail relating to the recommendation of the committee. The committee has a number of recommendations. If Parliament was to agree to the bill, it would make changes and amendments. We did not vote on those individually, at least in the report, but some of them need to be addressed now. The first is the good faith clause.

This bill has a very narrow—indeed, unique—good faith clause. I am no expert on it. We had a large degree of disagreement on this but the consensus with the lawyers—let us say the lawyers who were not hired by other participants or people with arguments in the debate—generally of the opinion that that is a very narrow definition. They were uncertain about how judges would interpret it.

The general conclusion was that if we are going to put one in, we should have a general undefined one and allow the judges to decide—to tease the issue. The issue was put to regulators that good faith depends on the context of the case.

Issues such as being cooperative and honest are open to a great deal of debate and might not even reduce the amount of debate time by lawyers. A series of remedies were put forward in the bill. The Minister for Transport mentioned the redress order.