

Solomon Bampton

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Our Ref:

Your Ref:

21 January 2011

Executive Officer
Economic and Finance Committee
Parliament House
North Terrace
ADELAIDE SA 5000
By email: EFC.Assembly@parliament.sa.gov.au

Business & Franchising
Lawyers

Richard Solomon, LLB
Andrew Bampton, LLB

Dear Sir

RE: PROPOSED SA STATE-BASED FRANCHISING LAWS

I am an experienced SA based franchising lawyer.

I confirm that your committee is currently accepting submissions for a re-opened inquiry in respect to proposed SA State-based franchising laws. It is my understanding that your committee is now deciding as to whether the 1 July 2010 amendments to the Franchising Code of Conduct ["Code"] made by the Federal Government do enough to satisfy your committee that its previously held 2008 franchising State-based legislation views should be changed. For the purpose of this submission I shall refer to your re-opened committee inquiries as being in respect to "*proposed SA based franchising laws*".

I wish to make a submission to your committee.

I have watched with interest the continuing proposals of the WA and SA State Governments to introduce their own franchising laws.

I submit as follows:

1. I agree with the previously made responses of the Franchise Council of Australia ["FCA"] comprising:
 - 1.1 the FCA response to the Private Member's Bill introduced by Mr Tony Piccolo – The Franchising (South Australia) Bill 2009;
 - 1.2 the recent FCA response to the currently re-opened SA Parliament Inquiry.
2. My involvement so far in the SA Parliament Inquiry has been very much in the background. I have supported the FCA with:
 - 2.1 their ongoing communications with the Federal Government and their franchising legislative direction commencing with the introduction of the Code effective 1 October 2008 and its various subsequent amendments;
 - 2.2 their ongoing communications with the ACCC;
 - 2.3 their approaches and submissions to each of the SA and WA Governments in opposing their respective proposed State-based franchising laws;

- 2.4 their ongoing emphasis and dedication since the 1980's for their members [franchisors, franchisees, suppliers and advisors] in respect to best business practice and their acting in an ethical, honest and lawful manner;
 - 2.5 their attempts over many years to welcome franchisees [at a significantly reduced charge] as FCA members including their more recent specifically structured franchisee sub-committee;
 - 2.6 their claim to be the peak franchising body in Australia;
 - 2.7 their franchise involvement internationally and their excellent worldwide reputation arising from the Code and the FCA's involvement and support of the Code.
3. I strongly oppose any State-based franchising laws because amongst other things:
- 3.1 it will to some degree duplicate the practical effect of the existing Federal laws including those enacted by the now Competition and Consumer Act [formerly Trade Practices Act] and the Code;
 - 3.2 it will confuse the general public;
 - 3.3 it places too much emphasis on the rights of franchisees and largely ignores the rights of franchisors;
 - 3.4 it will have a negative effect upon non SA and WA based franchise systems wishing to commence or expand their franchisee bases to the effect that franchisors will prefer to give SA and WA "a miss";
 - 3.5 it ignores well recognised and very reliable franchising statistics completed by the University of Southern Queensland **Griffith University** at the instigation of the FCA;
 - 3.6 it ignores that many franchisees who experience problems with their franchise businesses should not have become franchisees in the first place;
 - 3.7 it makes being a franchisor more and more expensive and some of this expense will have to be borne by franchisees which can only have a negative effect on their respective franchisor and franchisee businesses;
 - 3.8 there appears to be a reliance upon a confusing, ambiguous and incomplete definition of "good faith" provided by Mr Frank Zumbo. I understand that he is an NSW academic with no previous practical involvement in business or franchising.
4. My lawyer involvement in franchising since 1989 has been:
- 4.1 acting for franchisors including:
 - 4.1.1 establishing and maintaining their franchise systems and preparation of their Disclosure Documents & Franchise Agreements and assisting with the preparation of their Operation Manuals & other documents; and



- 4.1.2 where necessary assisting them to resolve franchisee disputes.
- 4.2 acting for franchisees including:
 - 4.2.1 pre-franchise advice; and
 - 4.2.2 at times assisting them to resolve franchisor disputes.
- 4.3 I have been an FCA member for 22 years and:
 - 4.3.1 a member of the SA Franchising Committee for 20 years;
 - 4.3.2 a member of the FCA's Legal Committee for the last few years.
- 4.4 I have presented many papers on franchising including to the National conventions of the FCA, the South Australian Law Society [their key presenter since 1993], the Real Estate Institute of South Australia, the Institute of Chartered Accountants [SA Division] and other industry bodies;
- 4.5 In February 2009 I was part of the FCA's delegation to the International Franchise Association annual convention held in San Diego, USA;
- 4.6 I have deliberately practised as a franchise lawyer in a small firm since 1992 as it has enabled me to give more personal service to my franchisor and franchisee clients. Until a few years ago my franchising practice had equal emphasis upon acting for franchisors and franchisees. Whilst I now mainly act on behalf of franchisors I have since 1989 advised franchisees from most of the well recognised Australia wide franchise systems. My partner, Andrew Bampton, also acts for franchisors and franchisees and now involves himself in more franchisee disputes that I do;
- 4.7 I would estimate that franchising has represented about 70% of my legal work over the last 22 years;
- 4.8 for further information could you please view the Solomon Bampton Business & Franchising Lawyers website of www.solomonbampton.com.au.
- 5. I make mention of my lawyer franchising involvement in the previous paragraph as I believe that:
 - 5.1 no other franchising lawyer in SA would have any greater or more significant involvement in franchising over the last 20 years than myself; and
 - 5.2 I have the "runs on the board" and consequently, I am very qualified to make these submissions.
- 6. I expand upon my comments in paragraph 3.6 above that "*many franchisees who experience problems with their franchise businesses should not have become franchisees in the first place*". In this respect:
 - 6.1 I have seen too many prospective franchisees seeking my legal advice solely because the franchise systems they were interested in made the obtaining of independent legal advice mandatory. These franchisees had often made their



mind up to proceed prior to seeing me and nothing I said would or could change their mind. They were definitely *"stuck in the ether"*;

- 6.2 I have seen too many prospective franchisees not prepared to spend pre-franchise monies upon obtaining proper legal and accounting advice;
 - 6.3 I have seen too many franchisees who misrepresent themselves to franchisors either in their financial status or their own capabilities or both [and you don't see franchisors taking action against franchisees for misrepresentation but perhaps you should];
 - 6.4 franchisees largely should be far better educated prior to being allowed to make any franchise commitment.
7. I remain concerned that franchising is now such a significant part of the Australian workforce and there are so many people including some media and politicians who are in a position to either influence public thinking on franchising or in the case of politicians make decisions in respect to the same and these people:
- 7.1 do not understand franchising including the necessary special relationship between franchisors and franchisees;
 - 7.2 make no attempt to understand franchising;
 - 7.3 are arrogant to think they do understand franchising when they do not;
 - 7.4 ignore if not defy well recognised franchising statistics;
 - 7.5 quote franchising statistics which are not supported by fact.
8. The SA and WA Governments should spend far more time upon educating prospective franchisees rather than to make it easier for disgruntled franchisees [who are very much of a minority] to seek franchising evolutions—**resolutions** which may be unnecessary expense and not fair to franchisors who are largely hardworking and ethical;
9. The immediate reaction of a lot of people including some senior politicians I know is *"why would you buy a franchise?"*. This reaction sadly is typical and sums up the considerable public ignorance of franchising and its undoubted overall success. It is a classic example of people who not only need franchise education but who should more thoroughly check the overwhelming franchise success stories and well founded statistics before commenting upon something they know nothing about. Some people who are opposing SA State-based legislation will *"shudder"* at these observations as they will not want to upset decision makers. That does not worry me as I believe if you are well qualified to make observations then you should make them without *"fear or favour"*
10. I welcome speaking to any politician who is considering or reconsidering the pluses and minuses of SA State-based franchise legislation whether at my office or elsewhere. As stated I believe I have the *"runs on the board"*.

Yours faithfully,



RICHARD SOLOMON