

EXPLANATORY MEMORANDUM

Franchising Bill 2010 (EM 162)

(Introduced by Mr Abetz, MLA)

Part 1 – Preliminary matters

Clause 1 – Short title

Provides that the name of the Bill when enacted is the *Franchising Act 2010* (the Act).

Clause 2 – Commencement

Provides that sections 1 and 2 come into operation when the Act receives the Royal Assent and the rest of the Act comes into operation on the next day.

Clause 3 – Terms used

The definitions in the Franchising Code of Conduct (WA) (see section 7) have the same meanings in the Act.

The following terms are defined in subsection (2):

Commissioner – the Commissioner for Consumer Protection as defined in the *Consumer Affairs Act 1971*. This also conforms to the *Fair Trading Act 1987* and s 16(1)(g) of the *Consumer Affairs Act 1971*.

Commonwealth Code – this is the Franchising Code of Conduct set out in the *Trade Practices (Industry Codes – Franchising) Regulations 1998* (Commonwealth) as in force from time to time.

Franchising Code of Conduct (WA) – see section 7.

Renew – this definition refers to two situations:

- (a) to renew or extend a current agreement;
- (b) to enter a new WA franchise agreement which has effect when the current agreement expires, is in favour of the same franchisee and where the business conducted under the current agreement continues under the new agreement.

The definition of “renew” applies broadly, whether or not the renewal is for the first time, whether or not the renewal occurs pursuant to an agreement, whether or not

there is a contractual right of renewal or extension and irrespective of any terms in the agreement to the contrary.

WA franchise agreement – see section 4.

Clause 4 – WA franchise agreement

Provides that a franchise agreement is a WA franchise agreement if the agreement relates to the conduct of a business in, or partly in, WA. It does not matter for this purpose when or where the agreement was made, nor what law governs that agreement.

This is the main connecting factor used in the Act and looks to the existence of a franchise agreement which relates to a WA business.

Clause 5 – Concurrent operation of laws of other places not affected

Provides that the Act does not seek to exclude or limit other Commonwealth laws or the laws of other States or Territories or of places outside Australia. This provision mirrors s 51AEA of the *Trade Practices Act 1974*.

Clause 6 – Extra-territorial application

Provides for the Act to apply to acts, transactions and matters done, entered into or occurring outside WA or Australia in relation to WA franchise agreements. The Act also applies to acts, transactions and matters that would but for the Act be covered by the law of the Commonwealth or another State or Territory or place outside Australia.

Part 2 – Franchising Code of Conduct (WA)

Clause 7 – Commonwealth Code applies in WA

Applies the Commonwealth Code as a law of WA, to be referred to as the Franchising Code of Conduct (WA).

This means that the terms of the Commonwealth Code will apply in WA and seeks to close any potential gaps in the constitutional coverage of the Commonwealth Code.

Clause 8 – Franchising Code of Conduct (WA), interpretation of

Consequential on section 7, applies the *Acts Interpretation Act 1901* (Commonwealth) to the interpretation of the Franchising Code of Conduct (WA), rather than the *Interpretation Act 1984*.

Clause 9 – Contravening Franchising Code of Conduct (WA)

Provides that parties and proposed parties to WA franchise agreements must not contravene the Franchising Code of Conduct (WA), but contravention is not a criminal offence. Instead, remedies are provided in Part 4 of the Bill to address failure by a person to comply with the Franchising Code of Conduct (WA).

Part 3 – Duties of people involved in franchising

Clause 10 – Duties are additional

Provides that the duties under Part 3 are in addition to those under any other law, are in addition to the rights under the WA franchise agreement, and cannot be excluded by contract.

Clause 11 – Good faith, duty to act in

The following term is defined in subsection (1):

Act in good faith – means to act fairly, honestly, reasonably and co-operatively.

This definition provides a clear and concise statement of the norm of conduct required of franchisors and franchisees under the Act, by reference to four key concepts that can be found in the case law and the legal literature in Australia and overseas particularly in a franchising context (see for example the summary of the decision in the case of *JF Keir Pty Ltd v Priority Management Systems Pty Ltd* [2007] NSWSC 789 discussed in the Bothams' Report in May 2008, 'Inquiry into the Operation of Franchise Businesses in Western Australia', p.10, and the discussion in the later report of the Ripoll Committee in December 2008 'Opportunity not Opportunism: Improving Conduct in Australian Franchising', chapter 8).

Subsection (2) provides that parties and proposed parties to WA franchise agreements must act in good faith in any dealing or negotiation in connection with entering or renewing the agreement, the agreement itself, or resolution of disputes under the agreement and when acting under the agreement.

This fills a void left in the Commonwealth Code. Recently introduced clause 23A in the Code did not enact the recommendation of the 2008 Ripoll Inquiry that the Code include an express good faith obligation. The inclusion of an express duty in the Act provides certainty for all participants in the franchising industry in WA regarding the nature and scope of that duty.

Subsection (3) provides that a breach of the good faith obligation is not a criminal offence. Instead, remedies are provided in Part 4 of the Bill to address failure by a franchisor or franchisee to act in good faith.

Part 4 – Enforcement and remedies

Clause 12 – Civil monetary penalties

Provides in subsection (1) for the Supreme Court or the District Court to order the payment to the State of a monetary penalty by persons found by the Court on the balance of probabilities to have contravened the Act or attempted to do so, or to have been an accessory to the contravention.

Further provides in subsections (2)-(6):

- No monetary penalty may be ordered if the person has been ordered under the *Trade Practices Act 1974* (Commonwealth) or *Fair Trading Act 1987* to pay a pecuniary penalty for the same act or omission.
- In determining the amount of the monetary penalty the Court must take account of all relevant matters including the nature and extent of the act or omission concerned, any loss or damage suffered as a result, the circumstances in which it occurred, whether the person has previously been found by a court in similar proceedings to have done or not done something similar.
- The maximum monetary penalties under the section are per act or omission \$100,000 for a body corporate and otherwise \$10,000.
- The *Civil Judgments Enforcement Act 2004* applies to such an order as a monetary judgment and the Commissioner or a person authorised by the Treasurer may take proceedings under that Act to enforce the order.
- Any money paid to the State under such an order is to be credited to the Consolidated Account.

Clause 13 – Injunctions

Provides in subsection (1) that the Commissioner or any other person may apply to the Supreme Court or the District Court for an injunction against a person to have contravened the Act or attempted to do so or to have been an accessory to the contravention.

Further provides in subsections (2)-(4):

- Neither the Commissioner nor a franchisee is required to give an undertaking as to damages as a condition of obtaining an injunction.
- The Court has power to grant the injunction on a permanent or interim basis, to issue injunctions in respect of related conduct or by consent.
- The Court may amend or cancel an injunction or interim injunction made under the section.

Clause 14 – Redress orders

The following terms are defined in subsection (1):

Redress order – an order to compensate a person for loss or damage suffered by them or to prevent such loss or damage arising including orders of the kind described in section 87(2) of the *Trade Practices Act 1974* (Commonwealth), a renewal order, and ancillary and consequential orders (including as to the preparation and execution of documents).

Renewal order – an order that the franchisor under an existing WA franchise agreement renew that agreement for a period and on such other terms as the Court considers just having regard to the terms of the old agreement.

This provision ensures that the remedies available to the Court for a breach of the Act mirror the remedies available under section 87(2) of the *Trade Practices Act 1974* (Commonwealth) and also grants the Court a specific power to make a renewal order if appropriate in particular cases such as where there is an absence of good faith in relation to renewals.

Provides in subsections (2)-(4) for applications:

- To be made by a person who has suffered or is likely to suffer loss or damage from acts, omissions or conduct of the kind referred to in sections 12(1) or 13(1) or by the Commissioner on behalf of such persons (with their consent),
- Being (but not required to be) made during proceedings brought under sections 12 or 13,
- To be made within 6 years of the relevant act, omission or conduct.

Further provides in subsections (5) and (6) for the Court on such an application to make a redress order against a contravening person if the person has suffered or is likely to suffer harm as a result of the contravening act, omission or conduct and whether or not it also makes an order under section 12 or 13.

Clause 15 – Damages for harm due to a contravention of this Act

The following term is defined in subsection (1):

Harm – harm of any kind including personal injury (including physical or mental impairment), damage to property or economic loss.

Provides in subsection (2) that a person who suffers harm as a result of an act or omission of another that contravenes the Act has a cause of action against that person for damages for the harm.