

Submission on Private Members Bill
introduced by Mr Peter Abetz, MLA
The Franchising Bill 2010 (WA)

By PoolWerx Corporation Pty Ltd



PoolWerx is a multi awarded franchise system operating in Australia and New Zealand. It operates nationally with a strong presence of Brand and franchisees in WA in the swimming pool and spa after market.

PoolWerx offering includes:

- A Retail Sales of pool and spa equipment, chemicals, above ground pools, spas, and other associated lifestyle products eg solar or gas heating.
- B Pool & Spa servicing including pool cleaning, maintenance and repair, chemical treatments, renovations etc

Business done by us in Western Australia to the retail public:

| | |
|------|-----------|
| 2007 | \$3.5 mil |
| 2008 | \$5.9 mil |
| 2009 | \$7.0 mil |
| 2010 | \$9.2 mil |

This type and level of business is undertaken by 35 franchises located in Western Australia, mostly located in Perth with regional franchisees located in Mandurah in the south and Karratha in the north of the state.

It is our firm belief that the proposed Bill (Franchising Bill 2010 (WA)) currently before the house will create many unintended consequences and duplicate many areas of existing federal legislation.

1 No demonstrated need

There is no clear substantiation of the need for this Bill. The claims made about "rogue franchisors" are not backed up. No rogues are named and no pattern of 'rogue' behaviour is identified.

2 Franchising sector does not want the Bill

There has been no public support of the Bill by any WA franchisors, franchisees or suppliers.

3 Renewal is not a problem

This Bill is really all about contract renewal. The fact is 95% of franchisees renew for a second term; 99% of those who want renewal, get it. We don't need new laws, with big fines, to fix a non-existent problem.

4 Wrong motivation

The Bill's effect coincides with the commercial interests of one very large franchise business owner who is trying to get a new contract for his 50 fast food stores, which he has owned and operated highly profitably for the past 25-30 years.

5 State-based franchising legislation is not wanted nationally or in WA

A FCA survey of franchise brand owners found 95% were against state-based legislation and 90% believed it would lead to a drop in franchise investment. A number of major WA-based systems have said they will consider moving their headquarters interstate if the Bill is enacted. Eg: Snap, Red Rooster, Chicken Treat, Chooks Fresh & Tasty.

6 Jobs likely to be lost

As a result of point 5 (above), hundreds of jobs are at risk in WA (as reported in The West Australian newspaper in November 2010)

7 Franchise business values will fall

The value of franchisee businesses, of which there are about 8,000 in WA, will decrease due to the uncertainty and instability within the franchise sector.

8 Business financing costs will increase

Financing costs will rise because lenders will re-price to take account of the added risk created by uncertainty and the possibility of opportunistic legal action or heavy fines. This means the cost of financing will rise, whether it is for purchase of a new business or funding a capital expense in an existing business.

9 Disputes will increase

The number of disputes will rise as parties test the interpretation of the new laws.

10 Foreign and interstate Investment will be hit

Many franchisors based interstate or overseas will reconsider their plans to expand their operations to the WA market. Investment within the WA economy will be severely affected.

11 Compliance costs will rise sharply

State-based legislation will significantly raise compliance costs for franchisors and franchisees and is contrary to the recommendation of the Bothams Enquiry into Franchising in WA (2007/08).

12 Labor and Liberal Governments have rejected the idea

WA Labor (2008) and Liberal (2009) Governments decided against making the changes suggested in the Franchising Bill 2010. The pressure to make changes has continued because the commercial dispute referred to in point 4 has not been resolved.

13 Experts disagree with the Bill

Respected authorities such as the International Franchise Association and the Queensland Law Society have provided compelling reasons why the legislation should not be introduced. The Government-appointed trade practices Expert Panel rejected the 'good faith' thrust underpinning this Bill.

14 Bill overlaps existing 'good faith' law

The requirement to act in 'good faith' already exists in the Trade Practices Act 1974 and has been recognised by the courts. Creating a new, vague definition will simply create a new platform for costly and unproductive legal argument, where no such platform currently exists. The Bill seeks to elevate 'Good faith' to a virtual proxy for automatic right of contract renewal.

15 Automatic renewal is against freedom to contract and State leasing laws

Quasi automatic renewal of franchise agreements is against the principles of leasing and of freedom to contract. Why do the proponents not seek to have the same rules apply to leasing? Because they realise that landlords would not have a bar of it. Why then should franchising be singled out?

16 Constitutional practicality of the Bill is questionable

This Bill aims to impose a State regulation with national reach, in an area of law where States have historically had no role. This is constitutionally questionable. There is also doubt about the practicality as there appears to be no inter-Governmental regime to enforce the Bill outside WA.

17 Retrospectivity is dangerous and inappropriate in new laws

The Bill will act retrospectively by applying to existing agreements – not new agreements written after the Bill is introduced. This means 70,000 existing agreements could be subject to the new laws, meaning franchisees and franchisors could face fines of tens of thousands of dollars if they are found guilty of breach of good faith negotiating or even a technical breach of the franchise agreement. This represents a major negative overhang on the sector.

18 Personal injury Damages unprecedented and inappropriate

The Bill allows for damages to be filed against a franchisor or franchisee who breaches the new rules. These damages can include personal injury damages - - for pain and suffering, for example. This is unprecedented and totally inappropriate.

19 Legal defence not allowed

The Bill does not allow the accused to have a lawyer defend them, except in extraordinary circumstances. This is a violation of natural justice.

20 No right of appeal – an offence against natural justice

The Bill does not allow right of appeal against a decision.

21 ‘Good faith’ requirement is being successfully policed right now

The sector does not need more heavy-handed regulation. The ACCC is actively policing the trade practices and franchising regulations. It has achieved more than 50 results correcting bad behaviour over the past decade. A number of prosecutions took place last year.

22 Complaint numbers are not large and are not rising

Complaints to the ACCC have remained steady in recent years at less than 1% of franchisees. Griffith University statistics show disputes within franchise systems are at the same 1% level consistently over the past decade.

23 Positive regulatory changes have already been made

The Federal Government adopted most of the suggestions of the WA and SA inquiries in its package of changes to the Franchising Code and the TPA taking effect from 1 July 2010 and 1 January 2011. These changes need time to take effect and for their impact to be measured before precipitous changes are made.

24 Federal Government says give changes time to take effect

The Federal Government has said there should be a pause on further Code changes while the latest initiatives have had time to take effect. It described the latest changes as “sweeping” and the most significant implemented since the creation of the Franchising Code of Conduct.

25 Federal Government is against state-based legislation

With Opposition support, the Federal Government is pushing for national harmonisation of State laws – not the creation of new state laws in industries which are already successfully nationally regulated. Small Business Minister Nick Sherry has said he will do what he can to stop state-based franchising legislation

26 Extraterritorial nature of Bill is bad

The Bill seeks to apply outside WA as well as inside it. This means the Bill will apply to any franchisor

or supplier engaged in a business transaction with a WA based franchise business. This will effect up to 70,000 franchise contracts nationwide. International franchise agreements will also be effected.

29 Bill will drive businesses to licensing

Franchising provides a safety net for many aspiring business owners. Under this Bill, many business concept owners will choose a licensing model, depriving many potential franchisees of their chance to start their own businesses with the support of franchisor and franchisee colleagues.

30 Small business growth will stall

Franchising is the turbo motor on small business growth. As a result of point 24, small business growth in WA will decrease.

31 Conclusions

PoolWerx Corporation Pty Ltd and its franchisees are not supporters of:

- a legislative regime that will cause duplication with existing Federal Laws with variations and inconsistencies on a state basis;
- increased compliance costs;
- uncertainty in the legal arena which will be promoted as testing the new legislation which will cause banks to reassess risk and increase cost of loans, finance and business costs etc;
- overall this Bill has the earmarks of doing more harm than good in the sector.

PoolWerx fully supports the Franchise Council of Australia and Qld Law Society submissions regarding this Bill.

We are available to appear at the enquiry should that be beneficial.

Yours Faithfully



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