

South Australia

## **Franchising (South Australia) Bill 2009**

A BILL FOR

An Act to make provision for applying the Franchising Code of Conduct made under the *Trade Practices Act 1974* of the Commonwealth as a law of the State; and for other purposes.

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## The Parliament of South Australia enacts as follows:

### Part 1—Preliminary

#### 1—Short title

This Act may be cited as the *Franchising (South Australia) Act 2009*.

#### 2—Interpretation and application of Act

- 5 (1) In this Act, unless the contrary intention appears—

**Commissioner** means the Commissioner of Franchises appointed under this Act;

**Commonwealth Act** means the *Trade Practices Act 1974* of the Commonwealth;

**Court** means the District Court of South Australia;

*Franchising Code of Conduct* means the code set out in the Schedule of the *Trade Practices (Industry Codes-Franchising) Regulations 1998* made under the Commonwealth Act;

*Franchising (South Australia) Code of Conduct* means the provisions applying because of section 3;

*SA Franchising Law* means this Act and the Franchising (South Australia) Code of Conduct.

- (2) This Act does not affect the right of a party to a franchise agreement to take legal proceedings under the franchise agreement.

## Part 2—Franchising (South Australia) Code of Conduct

### 3—Application in South Australia of Franchising (South Australia) Code of Conduct

- (1) The Franchising Code of Conduct set out in the Schedule of the *Trade Practices (Industry Codes-Franchising) Regulations 1998* of the Commonwealth as in force for the time being—
- (a) applies as a law of South Australia; and
  - (b) as so applying may be referred to as the Franchising (South Australia) Code of Conduct.
- (2) This Act and the Franchising (South Australia) Code of Conduct (the *SA Franchising Law*) apply to—
- (a) a person who is a party to a franchise agreement entered into before or after the commencement of this section; and
  - (b) a person in connection with the person's dealings with a prospective franchisee in relation to the making of a franchise agreement after the commencement of this section.
- (3) It is the intention of the Parliament that the operation of the SA Franchising Law should, so far as possible, include operation in relation to—
- (a) acts, transactions and agreements done or entered into outside South Australia (whether inside or outside Australia); and
  - (b) acts, transactions and agreements (wherever done or entered into) that would, apart from this Act, be governed or otherwise affected by the law of the Commonwealth, another State, a Territory or a foreign country.

### 4—Compliance with SA Franchise Law and acting in good faith

- (1) A person to whom the SA Franchise Law applies must—
- (a) comply with the SA Franchise Law; and
  - (b) at all times, act in good faith in relation to—
    - (i) participation in a franchise; and
    - (ii) entering into, renewing, extending, or any other dealing in connection with, a franchise agreement; and

(iii) the resolution of a dispute relating to—

- (A) participation in a franchise; or
- (B) a franchise agreement.

(2) For the purposes of this section, *acting in good faith* means to act fairly, honestly, reasonably and in a cooperative manner.

## **5—Interpretation of Franchising Code of Conduct**

The *Acts Interpretation Act 1901* of the Commonwealth applies to the Franchising Code of Conduct in its application as a law of South Australia.

## **Part 3—Commissioner of Franchises**

### **6—Appointment of Commissioner**

- (1) There will be a Commissioner of Franchises for the purposes of this Act.
- (2) The Minister will appoint a Public Service employee to be the Commissioner.

### **7—Commissioner's functions**

The Commissioner's functions are—

- (a) to carry out investigations into breaches or possible breaches of the SA Franchise Law; and
- (b) to commence legal proceedings for breaches of the SA Franchise Law; and
- (c) to provide a dispute resolution process in connection with the operation of the Franchising (South Australia) Code of Conduct; and
- (d) to advise the Minister on the administration and operation of the SA Franchise Law.

### **8—Commissioner's power to obtain information**

- (1) For the purposes of the SA Franchise Law, the Commissioner may require a person—
  - (a) to answer any questions, orally or in writing; or
  - (b) to produce documents.
- (2) The Commissioner may, for the purposes of subsection (1), by notice in writing served on a person, require the person to attend at a specified time and place.
- (3) A person must not—
  - (a) refuse or fail to comply with a reasonable requirement under this section; or
  - (b) without reasonable excuse, refuse or fail to attend at the time and place specified in a notice under subsection (2) (or some other time and place allowed by the Commissioner); or
  - (c) knowingly make a statement that is false or misleading in a material particular (whether by reason of the inclusion or omission of a particular) in an answer given or information provided under this section.

Maximum penalty: \$20 000.

- (4) The Commissioner may require that the answer to a question under this section be verified by statutory declaration or given under oath.
- (5) A person is not excused from answering a question or producing a document under this section on the ground that the answer or production of the document would result in or tend to incriminate the person or expose the person to a penalty; but the answer or document is not admissible in evidence against the person in criminal proceedings other than proceedings for an offence against this section.

### 9—Commissioner's obligation to preserve confidentiality

- (1) The Commissioner must preserve the confidentiality of information gained in the course of the performance of the Commissioner's functions under this Act that—
- (a) could affect the competitive position of a person to whom the SA Franchise Law applies; or
  - (b) is commercially sensitive for some other reason.
- (2) Subsection (1) does not apply to the disclosure of information between persons engaged in the administration of this Act.
- (3) Information classified by the Commissioner as confidential is not liable to disclosure under the *Freedom of Information Act 1991*.

### 10—Delegation

- (1) The Commissioner may delegate a function under this Act to the person for the time being performing particular duties or holding or acting in a particular position.
- (2) A function delegated under this section may, if the instrument of delegation so provides, be further delegated.
- (3) A delegation under this section—
- (a) must be made by instrument in writing; and
  - (b) may be made subject to conditions specified in the instrument of delegation; and
  - (c) is revocable at will and does not prevent the delegator from acting in a matter.

### 11—Dispute resolution

- (1) If, in relation to a dispute to which the Franchising (South Australia) Code of Conduct applies, a certificate has been issued under clause 30A of the Franchising Code of Conduct terminating the mediation of the dispute (a **clause 30A certificate**), any of the parties to the dispute may apply to the Commissioner for resolution of the dispute.
- (2) An application under subsection (1) must—
- (a) be in writing; and
  - (b) be accompanied by—
    - (i) a copy of the clause 30A certificate; and
    - (ii) the prescribed fee.
- (3) The Commissioner must, by notice in writing, call a conference of the parties to the dispute for the purpose of attempting to resolve the dispute.

- (4) The Commissioner may, as the Commissioner thinks fit—
- (a) adjourn a conference from time to time; and
  - (b) terminate a conference at any time.
- (5) Following the termination of a conference, the Commissioner must provide the parties to the dispute with a draft determination with respect to the resolution of the dispute.
- (6) The parties may, within 14 days after receiving a copy of the Commissioner's draft determination, make written representations to the Commissioner as to why the draft determination should be varied or confirmed.
- (7) The Commissioner must—
- (a) if the Commissioner does not receive any written representations from any of the parties to the dispute within the period referred to in subsection (6), make a final determination with respect to the resolution of the dispute by confirming the draft determination; and
  - (b) if the Commissioner does receive written representations from any of the parties to the dispute within the period referred to in subsection (6)—
    - (i) consider the representations; and
    - (ii) make a final determination with respect to the resolution of the dispute by varying or confirming the draft determination as the Commissioner thinks fit.
- (8) A conference may be conducted by telephone or other electronic means (and a person who participates in a conference by such means will, for the purposes of this section, be taken to have attended the conference).
- (9) The following provisions govern representation in proceedings under this section:
- (a) representation of a party by a lawyer will not be permitted unless—
    - (i) another party to the dispute is a lawyer; or
    - (ii) each of the parties to the dispute agrees; or
    - (iii) the Commissioner is of the opinion that the party would be unfairly disadvantaged if not represented by a lawyer;
  - (b) if a party to the dispute is a body corporate, the Commissioner must, if the party seeks to be represented by an officer or employee who is not a lawyer, permit such representation;
  - (c) the Commissioner may permit a party to the dispute to be assisted by a person who is not a lawyer but only if that person is not acting for fee or reward.
- (10) The Commissioner must serve a copy of the final determination with respect to the resolution of a dispute on each of the parties to the dispute (and the parties are bound by the final determination).
- (11) In the event that a party fails to carry out the party's obligations under the final determination, the Commissioner or the other party may apply to the Court for—
- (a) an order enforcing the terms of the determination; and
  - (b) any other order (including an order for compensation) that the Court thinks fit.

- (12) Evidence of anything said or done in the course of proceedings under this section is only admissible in subsequent proceedings by consent of the Commissioner and all parties to the proceedings.
- 5 (13) The Commissioner may take any action under this section even if a party to the dispute fails to attend a conference, or fails to participate in proceedings under this section in any other way.

## 12—Franchising Register

- (1) The Commissioner must establish a register for the purposes of this Act.
- (2) The Commissioner must ensure that the following matters are recorded in the register:
- 10 (a) the name of any franchisor in relation to which proceedings for contravention of the SA Franchising Law have been commenced and the outcome of such proceedings;
- (b) any other matter that, in the opinion of the Commissioner, should be recorded in the register.
- 15 (3) The register will be kept in the form of a computer record and published on a website determined by the Commissioner.
- (4) The register is to be available for inspection, without fee, during ordinary office hours at a public office, or public offices, determined by the Commissioner.
- 20 (5) The Commissioner must ensure that copies of material on the register can be purchased for a reasonable fee at the public office, or public offices, at which the register is kept available for inspection.

## 13—Annual report

- (1) The Commissioner must, on or before 31 October in each year, forward to the Minister a report on his or her work and operations under this Act for the preceding financial year.
- 25 (2) The Minister must, within 12 sitting days after receiving a report under this section, have copies of the report laid before both Houses of Parliament.

## Part 4—Enforcement and remedies

### 14—Pecuniary penalties

- 30 (1) If the Court is satisfied that a person—
- (a) has contravened the SA Franchising Law; or
- (b) has attempted to contravene the SA Franchising Law; or
- (c) has aided, abetted, counselled or procured a person to contravene the SA Franchising Law; or
- 35 (d) has induced, or attempted to induce, a person, whether by threats or promises or otherwise, to contravene the SA Franchising Law; or
- (e) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the SA Franchising Law; or
- (f) has conspired with others to contravene the SA Franchising Law,

the Court may order the person to pay such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters, including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission,  
5 the circumstances in which the act or omission took place and whether the person has previously been found by a court, in proceedings for contravention of the SA Franchising Law or the Franchising Code of Conduct, to have engaged in any similar conduct.

(2) The pecuniary penalty payable under this section—

- 10 (a) by a body corporate—must not exceed \$100 000 for each act or omission to which this section applies;
- (b) by any other person—must not exceed \$10 000 for each act or omission to which this section applies.

### **15—No doubling-up of liabilities**

15 If a person has been ordered to pay a pecuniary penalty under the Commonwealth Act, the person is not liable to a pecuniary penalty under this Act in respect of the same conduct.

### **16—Injunctions**

20 (1) If the Court is satisfied, on the application of the Commissioner or any other person, that a person has engaged or proposes to engage, in conduct that constitutes or would constitute—

- 25 (a) a contravention of the SA Franchising Law; or
- (b) an attempt to contravene the SA Franchising Law; or
- (c) aiding, abetting, counselling or procuring a person to contravene the SA Franchising Law; or
- (d) inducing, or attempting to induce, a person, whether by threats or promises or otherwise, to contravene the SA Franchising Law; or
- (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of the SA Franchising Law; or
- 30 (f) conspiring with others to contravene the SA Franchising Law,

the Court may grant an injunction in such terms as the Court determines to be appropriate.

(2) An interim injunction may be granted under this section pending final determination of the application.

35 (3) A final injunction may, by consent of the parties, be granted under this section without proof that proper grounds for the injunction exist.

(4) If the Commissioner applies for an injunction under this section, no undertaking as to damages will be required.

(5) An injunction under this section may be rescinded or varied at any time.

## 17—Orders for compensation

- 5 (1) If in proceedings for a breach of the SA Franchising Law or failure to carry out an obligation under section 11, the Court is satisfied that a person has suffered, or is likely to suffer, loss or damage by reason of the breach or failure, then whether or not any other order is made or relief granted in those proceedings, the Court may, for the purpose of compensating that person or preventing or reducing the extent of the loss or damage, make orders under this section against the person who committed the breach, a person involved in the breach, a person who failed to carry out an obligation, or a person involved in the failure.
- 10 (2) Whether or not other proceedings have been instituted for a breach of the SA Franchising Law or failure to carry out obligations under section 11, the Court may—
- 15 (a) on the application of a person who has suffered, or is likely to suffer, loss or damage by reason of the contravention; or
- (b) on the application of the Commissioner on behalf of 1 or more such persons made with the written consent of each such person,
- make orders under this section, for the purpose of compensating such a person or preventing or reducing the extent of the loss or damage, against the person who committed the breach, a person involved in the breach, a person who failed to carry out an obligation, or a person involved in the failure.
- 20 (3) An application under subsection (2) may be commenced at any time within 2 years after the day on which the cause of action arose.
- (4) The orders that may be made under this section are of the following kinds:
- 25 (a) an order for payment of the amount of the loss or damage;
- (b) an order avoiding, in whole or part, a contract or instrument;
- (c) an order for the variation of a contract or instrument;
- (d) an order directing the refund of money or the return of property.

## 18—Action for damages

- 30 (1) A person who suffers loss or damage by conduct of another in contravention of the SA Franchising Law may recover the amount of the loss or damage by action against that other person or any other person involved in the contravention.
- (2) An action under subsection (1) may be commenced at any time within 6 years after the date on which the cause of action accrued.

## Part 5—Regulations

### 19—Regulations

- 35 The Governor may make regulations as contemplated by this Act, or as necessary or expedient for the purposes of this Act.