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borrellolegal

property & commercial lawyers

Unit 1/9 Mercer Lane
Joondalup WA 6027

PO Box 304
Joondalup WA 6919

Tel 08 9404 9100
Fax 08 9300 1338

info@borrellolegal.com.au
www.borrellolegal.com.au

Our Ref: GJL:10163
Enquiries: Joe Lazzara
Direct Line:
Email:

24 January 2011

Mr Timothy Hughes
(Principal Research Officer)
Economics and Industry Standing Committee
Level 1
11 Harvest Terrace
WEST PERTH WA 6005

Dear Sirs

Submission to the Economics and Industry Committee in relation to the Inquiry into the Franchising Bill 2010

Borrello Legal Pty Ltd is a member of the WA Franchising Community, and its Principals, Giuseppe ('Joe') Lazzara and Mark Borrello, have been involved in the franchising industry for some time.

Between them, Joe and Mark, have extensive experience in the franchising industry. Joe currently is and has been the Vice President of the WA Chapter of the Franchise Council of Australia for the last 2 years.

Both Joe and Mark have acted for franchisors, master franchisees and franchisees in the establishment of franchise systems, the provision of advice to franchisors, master franchisees and franchisees, and in franchising disputes. They have a broad perspective on the industry and the parties' vested interests.

We have colleagues throughout Australia in the franchising industry, including other franchising lawyers throughout Australia. Our Eastern-states-based colleagues have also voiced their concerns about the introduction of State-based franchising laws.

From this background, we note that we strongly oppose the introduction of State-based legislation in franchising, and we strongly oppose the Franchising Bill 2010 (**Bill**).

We regret that State-based legislation is still being pursued in Western Australia, notwithstanding the recent State and Federal based inquiries have consistently

rejected the idea of State-based legislation for an industry that is, and should properly be, regulated at the Federal level.

Not only that, but given the changes made to the Federal Franchising Code of Conduct commencing 1 July 2010 as a result of the numerous inquiries, it is our strong opinion that it should be the case that there be a proper opportunity for these changes to have an impact before any further changes be proposed (at any level).

We have had the benefit of being provided with a copy of the Queensland Law Society's letter of 8 November 2010 addressed to the Premier (**QLS Letter**) (copy **attached**), and agree with and endorse, the matters addressed in the substantive part of the QLS Letter. We respectfully request that the Committee accept the substantive part of the QLS Letter as part of our Submission.

We are concerned about the introduction of a statutory obligation to "act in good faith", which is by its definition a four-pronged test (clause 11 of the Bill). It is our view that this will, of itself, lead to opportunistic claims.

Only one element of the statutory 'good faith' definition has to be missing for the party in question to be taken not to have acted in good faith and therefore to be in breach of the duties imposed by the Bill which could, in turn, lead to monetary penalties under clause 12 of the Bill, injunctions under clause 13 of the Bill, redress orders under clause 14 of the Bill, or damages for harm under clause 15 of the Bill.

Notwithstanding that a person may be acting fairly, honestly and reasonably, to act "co-operatively" means to act with the interests of the other person in mind and with a view to reaching a mutually acceptable position. This may not always be possible. For example, in our experience, many franchise systems have met with reluctance and reticence on the part of many franchisees to the introduction of new services and products within the franchise system. Whilst the franchisor might be acting in the best interests of the franchise network as a whole, can it be said that the franchisor is acting co-operatively where it acts for the greater good in imposing the obligation upon all franchisees to provide a consistent offering across the franchise network?

The imposition of a good faith obligation in those circumstances, could quite easily be seen to be of benefit to the franchisors to the detriment of the franchisees where the franchisees do not always 'toe the line'.

The cost implications of being in breach of the Bill should also be considered. The inter-relationship between clauses 12, 13, 14 and 15 of the Bill are not addressed nor elaborated upon. Whilst it is the case that a monetary penalty cannot be imposed where a pecuniary penalty has been ordered under the *Trade Practices Act 1974 (Cth)* or *Fair Trading Act 1987 (WA)* (clause 12(2) of the Bill) in relation to the same conduct, where no such other pecuniary penalty has been imposed, then it is conceivable that not only can a monetary burden be imposed under clause 12 of the Bill, but additionally an injunction could be imposed clause 13 of the Bill, other redress orders made under clause 14 of the Bill (which would include monetary compensation to an affected party) as well as the payment of damages (clause 15 of

the Bill). It is not difficult to see that in the circumstances the combination of these factors could quite easily cripple a small franchisor and, indeed, a franchisee if the reverse were to be true.

The collapse of a franchisor more often than not leads to difficulties for all franchisees, and indeed in some cases to the total collapse of a franchise network. This can have great financial implications on all the franchisees involved, not just the disgruntled franchisee(s) that initiated the action against the franchisor.

It is not true that only "rogue" franchisors will be caught by the application of the Bill. The Bill will increase compliance costs for all franchisors. All franchisors, regardless of whether they believe they are doing the right thing or not, will seek to review their current franchise agreements, and in further detail scrutinise every action they take for fear of being subject to disputation. Increased compliance costs ultimately will be passed on to franchisees and thereafter to consumers.

This is especially so where, for example, under their current franchise agreements (which were disclosed prior to anyone entering into them) the franchisor is entitled not to do something (like grant a new franchise agreement), but under clause 14 of the Bill they may now be required to do so, as it will now be the case that they are not acting 'cooperatively' where they refuse to do something and the franchisee wants the franchisor to do that thing.

Franchising systems should not be viewed as a guarantee of success, and some of these provisions relating for redress orders and damages for harm could be seen as a back-handed way of guaranteeing the success to a franchisee of the franchise system to the absolute detriment of the franchisor.

At the core of many franchise issues is misunderstanding of the franchise relationship and the parties' mutual obligations. This should not be legislated against in a deconstructive way, but rather in a pro-active way. In our view, it should be a requirement that all prospective franchisees must take independent legal and accounting advice before entering into the franchise relationship. They should not have the ability to "opt out" of that requirement. Similarly, they could be required to have accumulated a minimum number of 'education points' relating to business skills before entering into a franchise relationship.

These matters should be legislated at the Federal (not State) level and would avoid most of the franchising disputes that are now seen (even though these are minimal). In our experience when dealing with many franchisee disputes, when we query the franchisees in question as to whether they took advice prior to entering into the franchise relationship, the majority (as many as 80%) would answer in the negative.

In summary, addressing the Committee's terms of reference, we note:

1. *Will the Bill, in its current form, be indirectly inconsistent with the Trade Practices Act 1974 (Cth) and the federal Franchising Code of Conduct?*

   We believe so, for the reasons addressed in the QLS Letter.

2. *Will the Bill, in its current form, enhance the purpose of the Federal Franchising Code of Conduct?*

We believe not, rather it would detract from the Federal Code. The ACCC remains active, and with its new powers granted with effect from 1 January 2011, will be even more so.

The Federal Code together with the *Trade Practices Act 1974 (Cth)* already allow for claims to be founded on misrepresentation, deceptive conduct and unconscionable conduct. New penalty and remedies, rejected at Federal level, do nothing to enhance the current regime at a time when the effect of the 2010 and 2011 changes to the Federal Code have not had a proper chance to be implemented and tested.

The main staple for dispute resolution under the Federal Code remains mediation. Under the Bill, it is our view that the majority of disputes would lead to legal disputation seeking redress orders, injunctions or damages for alleged 'harm', in particular by reference to the proposed new statutory concept of 'good faith' embodied in Clause 11(1) of the Bill . Any refusal by a franchisor or franchisee to accede to the other's request could conceivably be used for a grounding a claim based on not acting 'cooperatively' and hence not acting in good faith.

It would also create more uncertainty which was certainly not the purpose of the Federal Code.

3. *Will the Bill, in its current form, result in a cost impact on the State or participants in franchising?*

Most certainly, for the reasons addressed in the QLS Letter. For the systems currently 'doing business' in WA, and that will come within the purview of the Bill, all current documentation and practices will have to be reviewed. This will add to costs, which in the long-run will be passed on to consumers.

In support of our Submission, we can make ourselves available on sufficient notice and can be contacted via our office (details above).

Yours faithfully

Giuseppe Lazzara
Director
Borrello Legal Pty Ltd

Mark Borrello
Director
Borrello Legal Pty Ltd

Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001
Tel +61 7 3842 5904 Fax +61 7 3229 4737
president@qls.com.au
ABN 33 423 389 441

Office of the President

Your Ref: Franchising Bill 2010 (WA)

Quote in reply: Franchising Committee:21000864

8 November 2010

The Hon. Colin Barnett MP
Premier of Western Australia
Department of the Premier and Cabinet
197 St George's Terrace
PERTH WA 6000

COPY

By email: wa-government@dpc.wa.gov.au
Premier.Barnett@dpc.wa.gov.au

Dear Premier

FRANCHISING BILL 2010 (WA)

I write to you on behalf of the Franchising Committee of the Queensland Law Society.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote more than 8,500 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide.

The Queensland Law Society assists legal practitioners to continually improve their services, while monitoring their practices to ensure they meet the high standards set for the profession in Queensland. The QLS assists the public by advising government on improvements to laws that may apply in Queensland and throughout Australia, and working to improve their access to the law.

On 13 October 2010 the Franchising Bill 2010 (WA) ("the bill") was introduced in the West Australian Legislative Assembly. The Bill has wide implications for Australian Legal Practitioners not only in Western Australia, but in Queensland and other Australian states and territories.

Our Franchising Committee has perused the Bill and Explanatory Memorandum and wishes to raise some issues of concern regarding the bill.

Our members and the members of the Franchising Committee represent a diverse cross-section of franchisors, master franchisees, franchisees and other suppliers of goods and services to the franchising sector. Therefore the perspective represented in this submission is diverse.

The Society also notes that some components of the Bill may have significant economic implications on parties. It is not the position of the Society to comment on the economic implications of these clauses will have on future franchise agreements, however considers it to be prudent for this issue to be raised for further economic analysis.

1. The Constitutionality of the Bill

1.1 The Society is concerned that the WA Parliament is seeking to legislate to cover areas of law that are already clearly encapsulated within the control and power of the Commonwealth.

1.2 As a result there are many constitutional issues which need to be carefully considered before rushing to enact legislation which may end up being challenged at a later point by the Commonwealth or a person to whom the provisions of the Bill are purported to be enforced. This Bill has only been available for consideration for a short period of time and many people involved in franchising are not aware of the extent of changes it is proposing to introduce.

1.3 Whilst it is acknowledged that the provisions appear to have been designed to complement the existing Commonwealth Code, the Bill does seek to convey the right to apply for the imposition of pecuniary penalties (and other remedial orders and relief) for essentially breaches of the Commonwealth Code even though the right to prosecute for breaches of the Commonwealth Code are clearly and solely within the power of the ACCC. There are extensive rights to relief that already exist in the *Trade Practices Act 1974 (Cth)* (the "TPA").

Double Jeopardy

1.4 The Society is concerned with the prospect of double jeopardy. The idea that you can be prosecuted for a pecuniary penalty for the same act or omission is repugnant to Australian law. This outcome is foreseeable because a franchisor could face prosecution in WA for a breach of the Bill either:

(a) Before the ACCC has commenced its investigation and prosecution; or

(b) At the same time as the ACCC is conducting its investigations or prosecution; or

(c) After the ACCC has finished its investigations and prosecution and resolved the matter to its satisfaction.

1.5 There is no clear requirement for a court hearing an application under the Bill to await the outcome of any investigation or prosecution by the ACCC before it is able to provide relief to an applicant or the commissioner. It can provide relief by remedial orders but simply cannot impose an order for a pecuniary penalty if one has already been obtained by the ACCC.

1.6 The Society is also concerned about the detrimental impact that multiple investigations or prosecutions for the same alleged breach (whether they are simultaneous or follow one another) will have on the franchisor or a franchise network. There are no clear procedural limits or guidelines contained in the Bill or the explanatory memorandum as to how it will interact with investigations and prosecutions under the Commonwealth Code. Clause 5 of the Bill does not assist. It is clearly foreseeable that there can be circumstances where uncertainty as to its operation will arise not only for the parties to the franchise agreement but also to the regulators and courts.

1.7 It would have been preferable that any State based legislation allow for the proper course of any ACCC investigation or prosecution to proceed before any order for a pecuniary penalty be sought under the Bill.

1.8 The provisions dealing with the right to order a pecuniary penalty are incomplete and confusing, particularly in relation to when it can be sought given that the ACCC may have already commenced or be in the process of a prosecution.

1.9 For example it causes immense uncertainty where an order is sought for a pecuniary penalty under the Bill:

(a) Before the ACCC has had the opportunity to obtain an order for a pecuniary penalty, or

(b) Where the ACCC has already made a determination based on the evidence and facts before it that it is not appropriate to seek a pecuniary penalty for a breach by the franchisor of the Commonwealth Code.

1.10 This is because Clause 12(2) of the Bill does not require the applicant to wait for the outcome of any determination by the ACCC to prosecute for a breach of the Commonwealth Code, it only limits the courts power to make an order to circumstances where the person has not already been ordered to pay a pecuniary penalty for that act or omission. This infers that an applicant does not have to wait for the ACCC even if it would be arguably acting in "good faith" if it did wait.

1.11 The Society is concerned that it is extremely likely that a franchisee who may not be happy with either the outcome of an initial ACCC investigation or the speed or progress that investigation or prosecution is taking by the ACCC could use the Bill to "have another go at the franchisor" under the provisions of the WA Bill and seek an order of the court for a pecuniary penalty or remedial order ***BEFORE*** the ACCC is able to obtain an order for that pecuniary penalty or other relief.

1.12 In page 4 of the explanatory memorandum to the Bill it is clearly contemplated that the right of the court to issue and an order for a pecuniary penalty is only intended to apply if the ACCC had not already obtained an order for that breach under the TPA for that act or omission.

1.13 This presupposes that the ACCC has finished its investigation and prosecution although arguably this is not made clear. If the ACCC subsequently obtains an order for a pecuniary penalty for the same act or omission, there is no corresponding right of the party who paid the pecuniary penalty under the Bill to apply to challenge that penalty (or the original prosecution).There is no right to obtain a refund of the penalty paid under the WA Bill if it is required to pay the same or a higher pecuniary penalty to the ACCC.

1.14 It is unlikely the party will be able to raise with the ACCC a right to offset the amount paid under the WA Bill for the same breach.

1.15 The ACCC can always determine to seek remedies other than pecuniary penalties to adequately deal with a breach of the Commonwealth Code including seeking enforceable undertakings. The WA Bill would still allow a prosecution for a pecuniary penalty or other remedial orders even though the ACCC had already adequately dealt with the issue or seek to vary or obtained different orders to those obtained by the ACCC.

1.16 It is possible that the Bill could inadvertently result in procedural abuse. An applicant can make a complaint to the ACCC, who is compelled to consider and if appropriate investigate and act on at the tax payer's expense. The franchisee appears to have the right under the Bill, irrespective of that initial complaint to simultaneously institute separate proceedings such as to obtain an injunction or

apply to have the commissioner commence an application in WA for breach of the WA franchise agreement or contravention of the Bill.

1.17 This could result in forum shopping and lead to procedural abuse to unfairly put immense commercial pressure on the franchisor to settle a claim to the advantage of the franchisee, not because of merit but because of the sheer financial cost of defending two simultaneous actions. It leaves open the potential for abuse of proceedings and the misuse of tax payer funded multiple prosecutions for essentially the same breach.

Uncertainty and Conflict of Codes

1.18 There would be created a genuine uncertainty because of the conflict because of the duplicity of state and commonwealth regulation. This uncertainty would include:

(a) How the ACCC and the state based regulator intend to cooperate with each other and whether they will share information about current or past prosecutions, including the provision of documentation obtained by the ACCC under its existing or new powers, which may not otherwise have been able to have been obtained by the commissioner under the Bill as there is no power to compel production of information or documents.

(b) How they approach enforcement or investigation? Is it going to be a wait and see approach so that the Commonwealth's investigation and prosecution can proceed first before any application for an order for a pecuniary penalty is sought?

(c) How can evidence gathered in the course of an investigation can be used by the other regulator or parties to the dispute.

1.19 The prohibition contained in Clause 13(2) of the Bill is manifestly unfair for franchisor facing a claim from a franchisee who is seeking to obtain an injunction. This provision does not allow a court to have a discretion to determine whether to allow an undertaking as to damages to be sought and given. This can lead to procedural abuse and a manifestly unfair result where franchisees have made claims which are subsequently shown to be frivolous or vexatious or without merit in circumstances where the franchisor cannot be reimbursed for its costs or the loss it would suffer.

1.20 As a matter of procedure fairness it should be therefore left to the absolute discretion of the court to determine whether an undertaking as to damages can be sought or ordered.

1.21 The Bill proposes to confer a statutory cause of action and right to sue in favour of "any person who suffers harm". That provision does not limit that right to those persons who are a party to a franchise agreement. The scope of this right extends much further and arguable could include the creation of a right for suppliers, landlords, financiers and other people connected with the franchisee or its business to pursue claims for loss they have suffered which they currently do not have under the Commonwealth Code or the TPA. This may not and should not have been intended.

1.22 The Bill further proposes to introduce a new right of action for personal injuries sustained as a result of a contravention of the Bill. It is unnecessary to duplicate a cause of action for personal injury where there exists, in all jurisdictions, legislation to facilitate these claims. A further uncertainty

would be introduced where the operation of the personal injuries statutory right of action were to be considered in light of existing civil liability legalisation.

1.23 There is also a serious question whether the Bill would be enforceable against liquidators or other controllers who are appointed to take control of franchisors or franchisees whose rights stem from the Commonwealth Corporations Law and the Corporations Act 2001 (Cth).

1.24 After many years of industry consultation, federal and state government reviews and inquiries it has been well accepted within the franchising sector that:

(a) The Commonwealth has the constitutional power and authority and is best placed to ensure the consistency of regulation in the sector so that franchisors who have franchisees in various states and territories have clear and consistent rules of conduct for operation of their businesses. This is consistent with the conduct and intention of the States and territories to move to a one law approach. This includes the new National Business Name system.

(b) The ACCC is the appropriate entity to enforce the provisions of the Commonwealth Code and to act as the "policeman" of the sector to investigate and prosecute "rogue" franchisors, and to this extent the ACCC has recently been empowered with additional investigatory powers which commence in January 2011 to do so.

(c) The ACCC has been successful in many investigations and prosecutions against franchisors obtaining in many cases significant remedies for the benefit of those franchisees who have suffered loss.

(d) It is possible that the passing of this Bill could lead to a constitutional challenge by the Commonwealth.

Jurisdiction and what agreements are captured under the Bill

1.25 Clauses 4 and 6 of the Bill have a wide application to parties outside Western Australia, as well as having an extra-territorial application.

1.26 The Society is concerned that should this Bill be introduced, it may have practical problems in terms of the jurisdiction of where the dispute would be heard and whether a franchise agreement is subject to it.

1.27 The ambiguous and extremely wide wording of Clause 4 of the Bill is extremely concerning, which may lead to unnecessary and undesirable outcomes as the term "WA franchise agreement" in clause 4(1) of the Bill captures any franchise agreement that "relates to the conduct of a business in or partly in, Western Australia".

1.28 Any uncertainty regarding its interpretation will lead to a undesirable consequence possibly that was never intended.

1.29 By way of example consider:

1.29.1 A national sporting team who is granted a franchise to compete in a national competition which may have its club and membership based in Qld, has signed its franchise agreement

in Qld and sells its team merchandise around Australia. It is a condition of the franchise agreement to field a team in the national competition which involves playing both "*at home or away games.*" That obligation could involve playing one or more games in WA or having merchandise with its intellectual property encapsulated into and sold in WA or participating in some form of sharing of receipts from the gate takings at the event.

(a) The franchise agreement would arguably fall within the definition of a WA franchise agreement simply because it is conducting its business "partly in Western Australia." The test outlined in the Bill does not even seek to limit that test to a business that may be materially or substantially associated with or connected to Western Australia by virtue of having its office there or predominantly supplying goods or services there.

(b) The Bill should clearly never apply to that franchise agreement simply because of a contractual right or obligation to do something that is only in a limited respect connected to WA.

1.29.2 An overseas franchisor grants the Australian master licence to a person who grants sub franchises on the east coast of Australia even though the rights to Western Australia are only part of the overall rights. The whole agreement arguably then becomes subject to the WA Bill even if the rights in WA have not been exercised and there are no franchisees in Western Australia. However a master franchisee could take advantage of this fact and seek to rely on the Bill in circumstances where it only holds rights to that state but has not commenced in any real respect any business there. This is because the definition of a WA franchise agreement is tied to a vague test of whether "*the agreement relates to the conduct of a business*", rights granted may relate to the conduct of a business even if they are not acted upon or able to be acted upon (because for example they have not yet commenced as they are subject to a condition which must be satisfied before the commence).

(a) This application is too wide and a better test should be applied to tighten the nexus than the current test. If this is not changed this will have a significant financial burden on franchisors and master franchisees.

(b) Presumably now if it becomes law there will be a significant change in practice where overseas franchisors would now presumably move to offer separate licences for master franchises in Australia, namely one for WA and another for other jurisdictions in Australia to ensure that rights to be exercised in other states or territories are not subject to that law. This leads to confusion and additional cost.

1.30 The Society is extremely concerned that there is a significant and important drafting flaw in the Bill which will cause immense uncertainty on its application. This is dealt with in more detail in section 2. The Bill inadvertently now captures agreements that may not otherwise have been intended to be caught.

1.31 As a result of this error, significant uncertainty will arise in relation to the application of the Bill which could result in a constitutional challenge.

1.32 The uncertainty arises from how the Bill is structured. It adopts the Commonwealth Code which stands next to the Bill as a code prescribing conduct (without any penalty and enforcement rights in

itself), in a way similar to the TPA, clauses 7 and 9 of the Bill contain the enforceable obligation that, a person who is a party to a WA franchise agreement must not contravene the WA Code.

2. Good Faith

2.1 In addition to adopting the Commonwealth Code as its own, in Part 3 of the Bill, clause 10 and 11 impose a duty of good faith on parties to WA franchise agreements.

2.2 There is no express qualification or exception in the Bill as to the application of that duty only being imposed on franchise agreements that are subject to the operation of the WA Code.

2.3 The duty is imposed on parties to a WA franchise agreement, and not more appropriately, on parties to a WA franchise agreement that is regulated by the WA Code.

2.4 This distinction is vital as relief available does not just extend to contraventions of the WA Code, it extends to contraventions of the Bill including for breaching a duty of good faith which has been imposed on all WA franchise agreements irrespective of whether the WA Code applies to them.

2.5 The definition of a "*WA franchise agreement*" in clause 4(1) seeks to adopt the definition of a "franchise agreement" using the definition in clause 4 of the Commonwealth Code to determine what franchise agreements are subject to the WA Code. The Bill then imposes a separate statutory duty to act in good faith on the parties to a WA franchise agreement and give additional rights of relief for breach of that duty under the Bill. Those rights are therefore not included in the WA Code but sit next to it in a way supposedly similar to the TPA.

2.6 Accordingly if an agreement meets the test of being a franchise agreement under clause 4 of the Commonwealth Code then it is automatically a WA franchise agreement and the WA Code and the Bill applies to it. However this method of application is simplistic as it is based on a fundamental flawed assumption that every agreement that falls within the definition of a franchise agreement under clause 4 of the Commonwealth Code is actually regulated by the Commonwealth Code.

2.7 Even though the Bill adopts the contents of the Commonwealth Code to form the Franchising Code of Conduct (WA) (clause 7 of the Bill), the Bill does not contain in clause 4(2) any form of express exclusion for those types of agreements which the Commonwealth intended would not be covered by the Commonwealth Code such as those prescribed under another mandatory industry code (Oilcode) or that are fractional franchise agreements for the purposes of Regulation 5(3)(b) of the Commonwealth Code ("fractional franchise agreements").

2.8 Therefore the WA Bill seeks to go further than the Commonwealth has and will now seek to regulate other agreements. Even though the WA Code (similar to Regulation 5 of the Commonwealth Code) contains a provision which tries to exclude the operation of the WA Code to those agreements it may have been expressly overridden by the wording in the Bill.

2.9 Unfortunately there is an inconsistency in the wording of Regulation 9(1) of the Bill which seems to override Regulation 5 of the Commonwealth Code because it provides:

> *"a person who proposes to be or is a party to a WA franchise agreement must not contravene the Franchising Code of Conduct WA".*

2.10 It clearly presupposes that every WA franchise Agreement is therefore subject to the WA Code.

2.11 Irrespective of the uncertainty between regulation 5 and Clause 9 of the Bill, the statutory duty of good faith and other right to relief will apply to all franchise agreements that fall within the definition of a WA franchise agreement, because that duty and rights for relief are not included in the body of the WA Code but are separate legislative provisions that sit next to it and apply irrespective of whether the WA Code applies.

2.12 Traditionally some dealerships such as agricultural farming machinery dealerships and marine dealerships which have been known as "fractional franchise agreements" mainly because the owner operates multiple dealerships or the franchise is only an adjunct to and not the principal part of the business. This is because to get the benefit of that exemption the businesses operated under the franchise must pass 3 tests one of which is a threshold revenue test. The revenue attributable to that franchise must account for no more than 20% of the total revenue of the business to be excluded from the operation of the Commonwealth Code by virtue of regulation 5(3)(b) of the Commonwealth Code.

2.13 Therefore any agreement which may either meet the 4 tests in the definition of a franchise agreement in clause 4(1) (a) to (d) of the Commonwealth Code or otherwise be deemed to be a franchise agreement under clause 4(2) will be a WA franchise agreement.

2.14 The Commonwealth Code expressed a clear legislative intent not to regulate these types of agreements under the Commonwealth Code and as a result they are either subject to a different mandatory industry code (Oilcode) or not subject to direct regulation at all.

2.15 This will create uncertainty amongst those who operate under these agreements. If the WA parliament intended not to cover these agreements then clause 4(2) of the Bill should be amended to add an express exclusion similar in effect to regulation 5(3)(a) and (b) and take into account the claw back provision in Regulation 5(4).

2.16 That amendment should make it clear that not only does the WA Code not apply to them but the other terms of the Bill as well.

2.17 We presume that the WA parliament does not intend to regulate franchise agreements that are governed by Oilcode because the Bill only seeks to adopt the Franchising Code of Conduct as its own code and not Oilcode in Regulation 3(2).

2.18 It would therefore be misleading to suggest that the Bill only covers agreements governed by the Franchising Code of Conduct as it clearly goes further.

2.19 The poor drafting of the Bill therefore appears to apply to those agreements regulated by Oilcode and fractional franchise agreements, as the wording adopted in the Code relates to the Commonwealth Code.

2.20 Furthermore the application of the Bill in clause 6 which deals with extra territorial application simply means that the Bill "applies to ....WA franchise agreements", irrespective of whether they should not covered.

2.21 The Society is concerned that if the Bill becomes law, under Clause 9 of the Bill a person who is a party to a franchise agreement that is regulated under Oilcode and not the Commonwealth Code could breach the Bill simply because that person does not comply with the WA Code because that person complies with Oilcode. This inconsistency needs to be addressed and clearly the Bill should also exempt those forms of agreements.

2.22 The Society therefore would strongly recommend that if the Bill is to proceed, the test of whether a franchise agreement is a WA franchise agreement or otherwise subject to the application of the Bill should be based on some clearer unambiguous language that does not inadvertently capture agreements that indirectly refer to something that must be done in WA but which clearly do not require the business or the franchisee to operate in that State.

2.23 The Bill clearly seeks to cover the jurisdiction of the WA supreme and district courts to consider breaches and to prosecute accordingly. This is likely to result in a significant cost burden for franchisors who are not in that jurisdiction.

2.24 In relation to the statutory rights conferred on a party to seek to obtain either a renewal order or a remedial order, it appears that the parties can still seek to do so outside of WA (even though that court may still apply the WA law). Many franchise agreements contain dispute resolution provisions which may require the hearing of a dispute (irrespective of the relevant applicable governing law) to take place in a jurisdiction outside of WA but within Australia.

2.25 The Society would be concerned that any existing contractual right to do so, conveyed under an existing franchise agreement, should not be affected by any retrospective element.

3 Retrospectivity and Remedial Orders

3.1 Although the Bill anticipates the relevant provisions will come into force one day after the date of royal assent, the Society is concerned that clauses 14(4) and 14(5) of the Bill could have a significant retrospective application on past and present "WA Franchise Agreements."

3.2 The operation of these clauses allow aggrieved parties to make applications for redress orders (and compensation) within "6 years after the date on which the act or omission described in section 12(1) or 13(1) occurs."

3.3 The Society is particularly concerned that clauses 4(2)(a), 14(4) and 14(5)of the Bill, do not have sufficient regard to the rights and liberties of individuals on the basis that:

(a) it is inconsistent with the principles of natural justice; and

(b) it adversely affects rights and liberties retrospectively.

3.4 Clause 4(2)(a) has a wide application encapsulating all WA Franchise Agreements, whether made before or after the commencement date of the proposed Bill. It is inconsistent with the principles of natural justice by retrospectively exposing parties to a WA Franchise Agreement to civil suit by opening the floodgates to personal injury claims (clauses 14 and 15) in the event of a retrospective contravention of the Bill, resulting in any type of harm (which includes, but is not limited to property damage, economic loss and physical and psychological harm.)

3.5 In addition, on a strict interpretation of clauses 14 and 15, the clauses appear to have significant implications on insurance claims by retrospectively allowing parties to apply for redress orders and compensation within six years of the date of the act or omission.

3.6 The Bill also adversely affects rights and liberties of parties to a franchise agreement with the application of clause 14 providing less certainty to parties in a WA Franchise Agreement. The changes proposed would affect the contractual certainty of those agreements and unfairly convey a right to apply for one or more indefinite periods of renewal of that agreement for the benefit one of the contracting parties despite the express contractual terms of that agreement.

3.7 Furthermore the Bill would mean that parties may be faced with the threat of any renewal agreements or new franchise agreements with new parties being set aside by the Courts. Clause 14 has the potential to have significant repercussions on innocent third parties and fails to take into account the complex and dynamic nature of a franchise relationship, which may include additional parties such as lessors and lessees and lease agreements.

3.8 A franchise agreement and disclosure document may have already clearly stated that there is no right to renew conveyed and that there is no express or implied obligation imposed on a franchisor to enter into negotiations for a new agreement. If it did so then the franchisee proceeding with the franchise has accepted those terms. It is well accepted law in other forms of contracts such as leases that there is no automatic right or expectation to get a renewal and the parties are clearly entitled to negotiate for and include contractual rights to renew if they want it.

3.9 It appears unfair that only franchise agreements would be singled out to change this well established principal of law. It potentially will open the floodgates to lead to a change in interpretation of this contractual right to apply to other agreements.

3.10 In relation to site based franchises, there is interestingly no right under the Bill to enable a franchisee or the commissioner to apply to the court for an order to require a landlord to grant a new lease for the same period. If the franchisor holds the head lease and subleases or licences the premises to the franchisee there is no ability of the court to also make an order that the landlord renew the lease of the premises even though that may be essential to the ongoing operation of the franchised business (clause 14(5) of the Bill).

3.11 As a result of the Bill, a basic legal principal for certainty of the terms of a contract will now significantly be undermined because of the application of Part 3 Clause 10 - "*The duties under this Part.....are in addition to any rights or obligations under the WA Franchise Agreement and apply irrespective of any terms in the WA franchise agreement to the contrary*".

3.12 Many practitioners are extremely concerned that the Bill is deliberately trying to entrench a right to automatic renewal of a franchise agreement. It appears that a franchisor who does not automatically renew a franchise agreement (even if there is no contractual right to do so) or who does not enter into negotiations with a franchisee to enter into a new agreement would be considered to be "*not acting in good faith*". The right to apply for a renewal order is clearly contemplated to be based solely on this premise.

3.13 Most franchise agreements contain a detailed procedure for the exercise of a right to renew a franchise agreement. Most contain prescriptive formal steps required to exercise the right as well as outlining the consequence of the failure by the franchisee to follow that process within the time

required. Like other contractual options, the courts have consistently held that if they are not exercised in accordance with their terms they are not enforceable by the grantee of the option, they simply lapse. Most franchise agreements also have time expressed to be of the essence of the agreement.

3.14 Therefore the consequence of the failure by a franchisee to properly and validly exercise that right is contractually very clear. If as a result of that failure the franchisor does not wish to entertain further discussions about a new agreement it should be able to lawfully do so.

3.15 The Commonwealth Code now requires a franchisor to provide a specified renewal notice to a franchisee (who has entered into an agreement on or after 1 July 2010) at least 6 months or 1 month (depending on the length of the agreement) before the expiry of the franchise agreement.

3.16 If that notice was not given or the franchisor did not act in "good faith" to renew then arguably the franchisee should be required to act promptly to apply for a renewal order under the Bill. In practice that application should occur before the end of the agreement (if 6 months notice of non renewal is given) or by a date shortly after the end of the term not a period up to 6 years after that date.

3.17 Unfortunately Regulation 14(4) of the Bill sets a 6 year limitation for any form of remedial order (which includes a renewal order). That 6 year term may be more relevant to other claims however any franchisees application for a renewal order should occur quickly and before the end of the term of the franchise or a period ending shortly after that. This would allow for certainty in the creation of rights to other third parties such as subsequent franchisees. It should be limited in time.

3.18 It is clearly unfair that the franchisor would have a statutory cause of action hanging over its head for up to 6 years if it cannot get past franchisees to sign a release of that potential claim. This will have a serious negative impact on the sale of franchise networks.

3.19 In addition statutory rights for causes of action would come into existence on the commencement of the Act but relate to matters which occurred before the Act and thereby unfairly convey a right to a franchisee who had left the system before the commencement of the Act to seek a renewal or remedial order in circumstances where the franchisor may have already granted a competing right to another third party.

3.20 The consequences of retrospectivity are significant and unfair. It would also allow for prosecution of a franchisor for a breach which occurred prior to the commencement of the Act which was not possible before the Act commenced. In these circumstances the Society believes that any legislation should not act retrospectively in its operation.

3.21 Alternatively, in the absence of the Bill expressly clarifying that the harm suffered in clauses 14 and 15 must be a result of acts and omissions that occur on or after the date of commencement of the Bill, the Society has significant concerns regarding the retrospective application of clauses 14(4) and 14(5). The Society notes that unless there is good reason, legislation should address future conduct, not past conduct. Further, the presumption against retrospectivity "is no more than simple fairness, which ought to be the basis of every legal rule."[1]

[1] *L'Office Cherifien des Phosphates v Yamashita-Shinnihon Steamship Co Ltd* [1994] 1 AC 486 at 525.

4 Cost Implications for professionals, business and the states and territories

Australian Legal Practitioners and Insurance

4.1 The application of clause 12(1)(e) of the Bill will have a financial impact on Australian legal practitioners if they are dragged into a prosecution because of the conduct of their client and the existence of their client retainer. Whilst legal practitioners provide advice to clients on their legal rights and responsibilities, practitioners cannot and do not have the power to compel their clients to act upon that advice. Whilst any deliberate or active participation in a breach of the law by a legal practitioner should result in a prosecution of that individual, the Society is concerned that:

(a) there is a potential financial risk to its members for being unfairly dragged into a prosecution in WA for matters simply by virtue of the existence of their retainer where they will have no access to insurance coverage; and

(b) there is a risk that the legal practitioner would be unnecessarily joined to a prosecution of its client to conflict the legal practitioner from continuing to represent his client or to otherwise obtain access to documentation or correspondence that is otherwise subject to legal professional privilege. This adds a layer of unnecessary expense to the client and the legal practitioner in briefing alternative legal representation;

Business Owners and Operators and the states and territories

4.2 It is the Society's position that a code regulating business operations is more consistently provided for at the Commonwealth level. The ACCC has dedicated funding for investigation and regulatory powers for enforcement. Introducing a state based regulatory code will see disparity between the states which has the effect of lessening franchisor confidence and certainty in opening and operating franchises in Western Australia.

4.3 If South Australia or other states follow with their own legislation this will result in a multiplicity of laws regulating franchising in Australia and cause confusion and additional costs.

4.4 The Society is of the view that regulation of the contractual relationship between parties to a franchise agreement should be undertaken in a way that gives certainty to the parties without overlapping and inconsistent treatment between state and commonwealth jurisdictions.

4.5 The Society believes that the Commonwealth Code and the outcomes of the various reviews and inquiries that have occurred since it was introduced in 1998 appears to have struck a balance between the interests of franchisors and franchisees, to encourage and facilitate growth in this area.

4.6 Whether there is the currently the right equitable balance in the rights and obligations of the parties to a franchise agreement in Australia is a political consideration that has been debated in length and no doubt there may never be a general consensus of opinion on this point. Franchisors, master franchisees and franchisees may each have their own diverging view about it. However the sector has been through many changes to the Commonwealth Code and has been hoping for a period of stability to enable business to understand and deal with the changes. This Bill will not help to achieve that stability.

4.7 The Society also believes that the practical experience of franchisors and legal practitioners in some foreign jurisdictions such as the USA where a dual legislative system of federal and state laws exist, is that a multiplicity of laws across federal and state jurisdiction, causes confusion, inconsistency and significant additional and unnecessary costs to doing business. It has also led to some commercial resistance to expansion of the franchise network into those states.

5 Impact and operation of the Bill

5.1 The Society's view is that the Bill will have a significant impact on practitioners, business owners and operators and consumers is significant.

5.2 The Society understands that the impetus for the Commonwealth Franchising Code in 1998 was to ensure consistency and uniformity throughout the states and territories in the conduct, operation and regulation of franchises. This also has a constitutional foundation through section 92 of the Australian Constitution in ensuring the free interaction of trade and commerce between the States and Territories.

5.3 The Society has concerns that the introduction of the *Franchising Bill 2010* may effectively stymie the interaction of trade and commerce (through franchising) by introducing a stricter franchising regime and more onerous obligations on parties. This has the potential to increase costs to both parties in a franchising agreement by increased insurance premiums and higher legal fees (for further and specialised legal advice).

5.4 Other practical impacts as a result of the introduction and operation of the Bill include:

(a) practical and legal complications arising from a simplistic approach to adopting the Commonwealth Code as a state based law. As a result its drafting its application is not limited to only franchise agreements that the Commonwealth Code is expressed to apply, but also to other Franchise Agreements (for example those that may be regulated by another a Commonwealth mandatory Industry Code, such as the Oilcode);

(b) considerable concern by sector stakeholders of imposing a state based statutory definition of "good faith" even though there is a generally accepted principal that there is an "implied duty of good faith" imposed into franchise agreements. The Society's view is that it should be left to the courts to determine the nature and extent of that duty and over time to determine the appropriate definition of what constitutes "good faith" for all agreements not just franchise agreements, this concept is an ever evolving concept in commercial dealings.

(c) the introduction of a regime of state based civil penalties for contravention of the Bill will result in confusion and conflict where other Commonwealth regulators are in the process of investigations or prosecutions for the same breach. The ACCC has clear powers of enforcement and to seek appropriate orders under the TPA for breaches.

(d) the uncertainty due to the proposed retrospectivity to agreements that have already expired or been terminated or to actions or proceeding already in existence.

(e) the power to make redress orders and renewal orders for franchise agreements which may have expired and not been renewed before the commencement of the Act, is likely to have a significant negative financial and commercial impact on the rights and obligations of other innocent third

parties who may have in good faith entered into franchise agreements for that area or territory after the expiry of the existing agreement.

(f) that there is no doubt that the retrospective aspect alone has the potential to cause considerable uncertainty and fear amongst franchisors and franchisees who have bought franchisees over the last 6 years leading up to the passing of the Bill that their rights may be subject to a competing interest of a prior franchisee. Retrospectivity will also affect the rights of and create concern for third parties such as financiers who have advanced money and taken security over businesses.

(g) the Bill conveys a statutory cause of action in favour of any person (not just a party to a WA franchise agreement), granting relief to persons who have suffered harm, with the definition of harm being non-exhaustive and therefore uncertain, which includes, but is not limited to any person who suffers a loss, personal injury (including a mental or physical condition), damage to property or economic loss. (clause 15 of the Bill)

In summary, disturbing the delicate balance between franchisor and franchisee rights by attempting to introduce excessive and unfair obligations on franchisors at a state level may well also result in franchisors withdrawing from, or refusing to offer franchises in territories considered high risk to them and their systems. The 1992 Iowa Franchise Act (United States of America) is a prime example as since its introduction, it faced Constitutional challenges and an ever shrinking franchise sector in that state. Since 1992 there have been repeated calls for change based on franchisor resistance to offer franchises in Iowa which is to the detriment to all concerned franchising parties. As a result of continued pressure, the Iowa House recently amended good faith provisions rather similar to the WA bill in fear of Bandag tires, a large employer in the state relocating.

Therefore it is the Society's view that a Code regulating franchise and business operations is more adequately provided for in the Commonwealth sphere. Introducing a state based regulatory code will see disparity between the states which has the effect of lessening franchisor and franchisee confidence and certainty in opening and operating franchises. The Society is of the view that regulation should be at the Commonwealth level with any proposed amendments to the Code striking a balance between the interests of franchisors and franchisees, to encourage and facilitate growth in this area.

Thank you for the opportunity to provide comments and submissions to the proposed legislation.

For your information I have also written to your colleagues, the Hon. Eric Ripper, the Hon. Brendon Grylls, the Hon. Charles Porter, the Hon. John Quigley, the Hon. Robert Johnson, the Hon. Bill Marmion and the Hon. Nick Sherry, in similar terms.

We would also be pleased to meet with you or your officers at a mutually convenient time to discuss these issues further, if you so require. Please do not hesitate to contact either the Chair of our Franchising Committee, Derek Sutherland on 07 3208 8111 or 0410 326 999 or Derek.sutherland@lconlaw.com.au, or our Policy Solicitor, Louise Pennisi on 3842 5872 or l.pennisi@qls.com.au.

Yours faithfully

Peter Eardley
President