ECONOMICS AND INDUSTRY STANDING COMMITTEE

FRANCHISING BILL 2010

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 11 APRIL 2011

SESSION ONE

Members

Dr M.D. Nahan (Chairman)
Mr W.J. Johnston (Deputy Chairman)
Mr I.C. Blayney
Ms A.R. Mitchell
Mr M.P. Murray
Mr P. Abetz (Co-opted member)

Hearing commenced at 11.22 am

SUTHERLAND, MR DEREK
Chair, Franchising Law Committee, Queensland Law Society, examined:

CONAGHAN, MR TONY
Member, Franchising Law Committee, Queensland Law Society, examined:

POTGIETER, MR FRED
Member, Franchising Law Committee, Queensland Law Society, examined:

PENNISI, MS LOUISE
Policy Solicitor, Queensland Law Society, examined:

The CHAIRMAN: Thank you for your appearance before the committee today. We mean that! I would like to introduce myself and other members of the committee. I am Dr Mike Nahan, committee chair. Beside me is Bill Johnston, deputy chair, and Ms Andrea Mitchell. The empty chair is Ian Blayney; he will not be here today. That is Mick Murray; he will be here. Ian Blayney does not have a chair, so I guess he is thrown off the committee! Just joking! He is the member for Geraldton and struggles to get down on Mondays. There is also Peter Abetz, who has been co-opted to the committee for the duration of the inquiry.

This committee hearing is a procedure of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as contempt of Parliament. You have agreed to provide evidence to the committee in Western Australia by electronic means from a location outside the state. Uniform defamation laws were enacted across Australia in 2005. This means that even though you are outside Western Australia, your evidence will still be protected by the defence of absolute privilege against actions in defamation. Before we commence, there are a number of procedural questions I need answers to. Have you completed the "Details of Witness" form?

Ms Pennisi: No, we have not.

Mr Sutherland: We were not supplied with one.

The CHAIRMAN: Okay, scratch that. We will get that information via email. Did you receive and read the "Information for witnesses" briefing sheet regarding giving evidence before parliamentary committees?

The Witnesses: Yes.

The CHAIRMAN: Do you have any questions relating to your appearance before the committee today?

The Witnesses: No.

The CHAIRMAN: The committee has received your submission; thank you for that. Do you wish to propose any amendments to your submission at this time?

Mr Sutherland: No, we were not proposing to make a submission, but I would like to read a statement, if I could, from the QLS president. We are authorised to speak on behalf of the Queensland Law Society today; however, most communications are signed off by the QLS

president. He has empowered us to talk about the submission today, but we cannot go outside the scope of that submission without the approval of the president.

The CHAIRMAN: Okay; I understand that.

Mr Sutherland: While we can talk about a submission, we cannot go further and make other comments.

The CHAIRMAN: Okay, good. Before we ask any questions, do you wish to make a brief opening statement that directly addresses your submission and the terms of reference?

Mr Sutherland: Yes, we are quite happy to start with an opening statement. As chair, we were notified about the introduction of this bill in November, and we wrote to various members of Parliament, indicating our concerns about a number of the provisions. Unlike a lot of other submissions that we have seen, we have tried to approach it on the basis of identifying potential problems that we could foresee for practitioners, franchisors and franchisees in the sector, and that was the basis on which we prepared the first submission which went, as I understand it, on 8 November to many members of the Western Australian Parliament. We then made a supplementary submission to your committee on 2 February 2011, and we reiterated those comments in both submissions to you. That is all we wanted to say as an initial statement.

The CHAIRMAN: Could you briefly describe the Queensland Law Society, so I understand what it is, how it exists and whatnot?

Ms Pennisi: The Queensland Law Society was formed in the early 1900s. We have more than 8 500 members and we represent our members in relation to any developments in the law that affects them and, as a result, the community as well.

Mr Sutherland: It also comprises a number of committees, of which the franchising committee is one, which are basically interest groups for practitioners in particular areas of specialty, and they basically come together to help review legislation, make comments and submissions to government, and keep the profession in Queensland informed on what is going on.

The CHAIRMAN: Why did you have a franchising committee? Is it because it is an area of great interest to your members, or does it have a lot of business for you?

Mr Sutherland: In 1998 when the Franchising Code of Conduct was proposed to be introduced I was heavily involved with the commonwealth government in relation to the drafts. The commonwealth flew me to Canberra with a bunch of other lawyers from other law firms to review the proposed legislation. We were heavily involved at that stage in submissions to the FPC about the need for commonwealth legislation and the need for a code. As a result of that, I approached the Law Society and suggested that we form a franchising committee to prepare submissions to the commonwealth government in relation to it, and also to provide ongoing advice and assistance to our members, most of whom, at that stage, would not have known very much about the code.

[11.30 am]

Mr Conaghan: If I could also speak to that question, the solicitors on the committee are solicitors who represent franchisors and franchisees. Consequently, we have been involved in franchising since the mid-80s and subsequently, and we have been part of the debate in Australia about the franchising sector, the small business sector, and the elements of conduct of concern in the industry from both the perspective of franchisors and franchisees. So consequently I and Derek and other members of the committee have given evidence and made submissions since the early ‘90s. I gave evidence before the 1996 inquiry, for instance, into fair conduct and fair trading that affected the small business sector plus the franchise community. As your reports and submissions have already indicated to you and you are very well aware, franchising is an important and significant part of the small business sector, albeit only five per cent under Professor Frazer’s findings in her reports in relation to the small business sector. At the same time, we have members of the Law Society who

act for franchisors and franchisees. Our obligation is to advise them on updates in the area, which have an impact upon their clients, and, accordingly, their clients and the communities in which they operate. A large section of the Queensland Law Society is outside Brisbane, similar, I understand, to Western Australia where you have a lot of regional communities, and small business and franchising are essential in those small communities as well. We stretch across Queensland. I just wanted to give that perspective from where we look at the legislation, not from any particular franchisor influence or franchisee influence; it is really from that basis of looking at, equitably across the board, what is in the best interest going back to our members to be able to advise their clients.

Mr W.J. JOHNSTON: Mr Sutherland, in respect of those submissions et cetera that you were doing in 1998, did you support the introduction of the national code or what was the —

Mr Sutherland: Did I?

Mr W.J. JOHNSTON: Or did the society?

Mr Sutherland: Yes, I personally did. At that stage, the Law Society made submissions to government about errors in the code and suggested corrections to it, many of which were taken up. Since that time, pretty much on every single review there has been of the code we have had the opportunity to make submissions to correct defects that have been identified, and they have taken up a large number of those. The Law Society was not opposed to the introduction of the code.

Mr W.J. JOHNSTON: And the most recent set of amendments, I understand, were last year. What was your position in relation to those?

Mr Sutherland: The amendments that went through—1 July amendments—we made submissions to government in relation to those. The Law Society took a view that there were more defects in the code at that stage and we highlighted additional things that we thought needed to be corrected. They went to the relevant minister, they are on the record as being sent, but we did not support all of the changes; we pointed out particular issues of concern. But, again, that is on the record with the commonwealth government.

The CHAIRMAN: You have serious concerns about the meaning given to "WA franchise agreement" in clause 4 of the bill in question. Is this definition not an adoption of the definition of franchising in the Franchising Code of Conduct? Could you briefly explain your concerns and provide suggestions on how the definition could be altered to reduce confusion?

Mr Sutherland: The reason this point was raised is that in the Franchising Code of Conduct there is a definition of what is a franchise agreement. There is an exclusion in the franchising code to certain types of franchise agreements that meet what they call the fractional franchise test or they are regulated under another code. So the definition of a franchise in that document captures all forms of agreements, the application of the code is then excluded by virtue of a separate section. The same definition applies in the Western Australian code; however, it is the bill that causes the problem, not the Western Australian franchising code. The reason is that the bill says that the provisions of the bill apply to a Western Australian franchise agreement; it does not say the bill applies to a Western Australian franchise agreement that is not otherwise excluded under the franchising code. We put that in the submission; I thought that was pretty clear, but it just takes minor correction to fix that problem and you will take out the fear, I suppose, you could say—you could call it a fear or a concern—by oil code participants and also fractional franchise participants that they were to be subject to a statutory duty of good faith even though they would not have to comply with the Western Australian code.

The CHAIRMAN: Could you please explain your argument on page 3 of your submission that a constitutional challenge could result, particularly where a prosecution arises from something that has already been dealt with by the ACCC under the CCA?

Mr Sutherland: Which submission are we talking about?

The CHAIRMAN: Your submission.

Mr P. ABETZ: It is page 3 of your most recent submission, the third dot point from the bottom.

Mr Sutherland: Well, the challenge would be if there is a prosecution by the ACCC, a satisfactory prosecution by the ACCC, it is open to a party to argue that they have already been adequately dealt with. To the extent to which they have already been dealt with under a commonwealth law to deal with a breach of a commonwealth code, it seems unfair and also possibly beyond the scope of the power of the state to prosecute somebody a second time for the same offence.

Mr P. ABETZ: Does not clause 12(2) of the Franchising Bill 2010 cover that provision satisfactorily? Because that basically says you cannot be fined or punished—I cannot remember the exact wording—if you have already been dealt with under the federal law.

Mr Sutherland: Yes, but they may not have been prosecuted at the time you commence your application. So Western Australia could start first whilst the ACCC is considering an investigation, has not got to court yet, and you have already started to do your prosecution, which you are entitled to, you get a judgement against the franchisor, the ACCC continues with its prosecution, gets a judgement. That section does not apply because you have already got your payment; the ACCC at that time has not got a pecuniary order against the franchisor.

Mr P. ABETZ: Would the ACCC not normally—from what I have read of their work, they look at whether it is in the public interest. If someone has already been prosecuted under the WA law, why would they want to expend their resources on prosecuting someone all over again? That would not seem to be in the public interest.

Mr Sutherland: Well, they have different rights and remedies available to them, which you do not have, including section 87B undertakings, compulsion to undertake training and compliance programs, which you do not have, which they may wish to do for the benefit of franchisees.

Mr Conaghan: Mr Abetz, that is really a question for the ACCC because it is not a matter for us to opine about what the ACCC may or may not do. The point from our legal perspective is that it is not clear under this legislation as to whether there are timing issues in respect of prosecutions. If a franchisee, for instance, has a complaint and makes that jointly to the Western Australian authority and to the ACCC, there does not seem to be a clearly defined ambit of responsibility and obligations in dealing with that. The answers to your questions about whether it is in the public interest or not, as Derek has mentioned, the ACCC has additional powers beyond these. Some of those, which go to the undertakings about trade practices compliance and education, go to address the issue you raised in your second reading speech, Mr Abetz, in relation to your concern about the critical issue of trust between franchisor and franchisee and go to try and address the elements of conduct of the parties between franchisors and franchisees, so you that you would get those elements that you talk about in terms of good faith or otherwise. So as to this particular point under 12(2), it applies when there is finality on, if there is finality on, an ACCC investigation, but it leaves it quite open in terms of a franchisee consulting their legal advisers whether they go down the path of a Western Australian inquiry and prosecution, perhaps at the same time, because it does not come into play until there is the end of that, and that is the concern.

Mr P. ABETZ: Thanks.

The CHAIRMAN: Could you summarise how the Franchising Code of Conduct currently relates to and operates within Australian Consumer Law? In particular, can you explain how violations of the code can come under the ACL and its unconscionable conduct provision and whether or not many of the things that the Western Australian bill attempts to do are already being undertaken by the Australian Consumer Law?

Mr Potgieter: Firstly, it is maybe worthwhile just making the comment to the effect that at this point in time there has not been any precedent being developed by the courts or otherwise of the interaction with the Australian Consumer Law, given its recent introduction. But by and large the

view that should be taken is that there is very little in the Australian Consumer Law, and in particular the Competition and Consumer Act, that does not apply to franchising. There are some exclusions: one in particular is standard-form contracts, but franchising is not the only form of business that is being excluded under those provisions because all business-to-business contracts are excluded.

If one looks at unconscionability, the unconscionability provisions of the Trade Practices Act are now being substituted with sections 21 and 22 of the Competition and Consumer Act. The amendments that have been introduced are fairly significant and they apply to franchising exactly in the same way as they apply to any other relationship. One of the primary benefits flowing from that is the moving towards a consistent national framework and removing of current inconsistencies and duplication between commonwealth and state and territory laws. If one looks at the old section 51AA and the more expansive section 51AB that are now sections 20 and 21 of the Australian Consumer Law, that non-exclusive list of factors provided to assist courts in determining whether conduct is unconscionable enables a court now to look at the conduct of the parties in negotiating the terms of an agreement, look at the actual terms of the agreement and to also look at the conduct of the parties after the commencement of the agreement. So the whole landscape against which the non-exhaustive list of factors a court can take into consideration in determining whether conduct is unconscionable or not has significantly been broadened. So there should be no concern, we would think, that the Australian Consumer Law does not apply to franchise agreements.

[11.45 am]

The CHAIRMAN: The WA bill basically accepts the commonwealth code of conduct and applies a clear definition of "good faith", and some remedies. Does not the ACL do that in a way; that is, it takes the code of conduct as applied to franchisees, applies the ACL conditions of unconscionable conduct, and applies, among other things, a good faith clause in there?

Mr Potgieter: Good faith is already one of the factors that a court should take into consideration in applying sections 21 and 22 of the Australian Consumer Law in considering unconscionable conduct. So in itself it does not, and cannot, constitute unconscionable conduct in combination with other factors; and that is what our case law to date has indicated in unconscionable conduct matters.

See erratum

Mr Conaghan: The ACL does not have a code as such. In the unconscionable conduct provisions, it has a number of indicia to which a court will give regard in forming a view as to whether unconscionable conduct has occurred. It is not exclusive, though. It is still remains open to a court to look at all of the conduct that has occurred. Similarly, good faith is an element to be taken into account, but it is not defined, because the inquiries previously have all formed the view that rather than codify this issue of good faith, it has been better to leave it to the courts to continue to evolve that concept and apply it, as indeed it was been applied in several cases already in terms of the franchising sector. That is the override as far as I can see.

Mr W.J. JOHNSTON: I read in the media much criticism of the courts in their interpretation of the unconscionable conduct provisions; that is, that the courts have been too narrow in their interpretation. What is the society's view of the way the courts have interpreted those provisions? I understand that the legislation is being amended to try to give further direction to the courts. But what is society's commentary on the state of the common law and the interpretation of the law in respect of unconscionable conduct?

Mr Conaghan: I think, Mr Johnston, it is quite difficult for the society or, indeed, lots of commentators, to make reasoned and considered views, because there is a fundamental lack of statistical information. The difficulty for your committee and otherwise is that there have been issues that come before you by way of complaint about behaviour, which you would see deserve consideration and, indeed, remedies in instances. The difficulty is that while commentators also go to cases, we know from practice and some other statistical information that it is only a very narrow

element of those cases where there are issues that have come before the courts. We know from Professor Fraser's last research report, which is in the submission before the inquiry, that only four per cent of franchisees are in dispute with the franchisor, and that even fewer of those cases actually ever get before the courts. Of course we also know that people do not go to court for the sake of it and they want to find any resolution possible along the way. Mediation has been a wonderful development, and from my experience we are very much leading the world in terms of our development of the mediation process and its success in franchising in particular. It is, therefore, difficult to draw conclusions that will apply more widely from looking at particular cases in isolation. So I am not able to further comment, because we do not have the wide statistical information. Also, we know that when something gets before a court and actually gets to a judicial decision, it is because a lot of very good people have not been able to reach a conclusion about it, and there will be debates about that, and we have appellate courts that are doing it. So I do not think I can add to it.

The CHAIRMAN: I would just like to clarify the question that Mr Johnston just asked. Is it your view that the unconscionable conduct in the common law has been narrowly interpreted in its application to franchising and small business, and that the ACL, with those various issues to consider, has attempted to widen the coverage of unconscionable conduct?

Mr Conaghan: As the Queensland Law Society, we have not been really part of this. I do not think we are able to answer that, because we just do not have sufficient information. There have been other inquiries and reports that have access to much greater information that would be able to opine about that.

Mr Potgieter: If I can add to that, it is probably fair to say that the old views that the courts have enforced generally—not specific to franchising, but generally—have followed a narrow interpretation of unconscionable conduct. That is exactly why those changes were implemented or brought about in the Australian Consumer Law. I would say that the courts should be allowed time to develop the law based on these changes introduced, and that the introduction of a good faith obligation, whether defined as acting reasonably, fairly or whatever, is not going to take it any further, because it is legally and practically impossible to formulate an exhaustive definition of what good faith is. It eventually depends upon the circumstances of each case.

Mr W.J. JOHNSTON: In respect of that question of good faith, has the society given any consideration to specific franchise agreements and whether they currently provide for good faith?

Mr Conaghan: No, we have not specifically looked at particular franchise agreements, because it is not our role to opine about that. However, the commonly held view is that there is an implied obligation of food faith in franchise agreements and on franchise laws. Whether there is an implied obligation of good faith on a franchisee is a moot point. But we note that under this proposed bill, the obligation of good faith—where the prevailing legal view from most commentators would be that the obligation of good faith is to be implied on a franchisor under any franchise agreement—will also apply to a franchisee.

Mr W.J. JOHNSTON: You have suggested that we do not currently have enough statistics to make a decision—I am not trying to put words in your mouth, but that is the way I interpreted your comment that only four per cent of agreements are in dispute. I want to reflect on that in respect of industrial law. There is a very long history in Australian industrial law of, for example, some form of unfair dismissal law. That is the term that is used in Western Australia. I do not know what terms are used in other states. In New South Wales, the term is "unfair in all the circumstances". Yet there are not four per cent of employment contracts that are terminated and end up becoming subject to these arrangements. I am wondering whether it could be justified for Parliament to act even when there is only a very small number of people if Parliament views the unfairness to be so great, which is what happened in respect of the industrial law. Do you have a comment on that?

Mr Sutherland: I do not think the society can comment on that particular aspect. My particular comment is that I think, as Tony said, the statistics that have come out, and that he quoted from—from Fraser—are that only a very small number of franchisees are in dispute. However, a couple of comments from people who made submissions, and also the media, seem to indicate that there is some sort of rampant rorting by franchisors. I have been involved in this game now for over 20 years and I have not seen that level of rorting. Yes, there is every now and then an occasional franchisor who goes broke or does the wrong thing. But there is certainly not, in my opinion, widespread abuse. I have had franchisors in Western Australia, master franchisees in Western Australia, and franchisees in Western Australia. Western Australia has traditionally had a level of disputation in relation to master franchising that is probably more than in any other states. But that is based on the 1990s when I saw master franchising going on in Western Australia. The society does not have a particular view on it. That is my particular view.

Mr P. ABETZ: With regard to the level of disputation, the federal inquiry—the Ripoll inquiry—found that there was an unacceptable level, and it put a figure on it. I notice that the Law Institute of Victoria, which represents some 15 000 professional members, made a submission to the federal franchising inquiry in 2008, in which they stated, "Through longstanding experience, our members and their clients find the substance of franchise regulation in Australia lacking a number of important protective components to ensure good faith is required in franchise commercial relationships." In that submission, they state their support for a good faith obligation to be included in the code, and that it should be defined in terms of honesty, reasonableness and behaviour which goes to better the interests of the franchise business—which perhaps could be interpreted as the word "cooperative". It would appear the Queensland Law Council is at odds here with the Victorian Law Institute. Could you explain to us why you have such a strong opposing view?

Mr Sutherland: I was not aware of that submission, firstly. Secondly, I am not sure who was actually on that committee of the Law Institute of Victoria. From what I understand, they are entitled to their opinion in relation to it, but I am not sure to what extent their level of expertise on that committee structure generates the level of evidence to support that view.

The CHAIRMAN: Is one of your people going to respond?

Mr Conaghan: Mr Abetz, the concern relates to codifying the concept and placing those four words around it as proposed in the WA bill, which as reasonable as they might sound to you and sound to me, as soon as we codify something and give it very formal, specific words, by the nature of that, we have found that courts will be locked into those particular words and how they might apply to every particular circumstance, whereas a number of inquiries and others have found that it is better to leave it as a resource back to the common law and the courts to evolve. We know that through the development of jurisprudence in this particular area, that, yes, in the 1980s and 1990s, that concept of unconscionable conduct was interpreted narrowly. You then go through the jurisprudence, which started really with the National Australia Bank and the Amadio case, where there was found to be unconscionable conduct in that circumstance, and you started to get an evolution of this concept of application of the courts of unconscionable conduct. That will continue to evolve, because of the very circumstances that many of your constituents have found themselves in, and needs some redress and remedies.

[12.00 noon]

I would endorse what Mr Potgieter has said. Rather than be prescriptive and then narrow the ability of the courts to evolve that concept of unconscionable conduct as it may apply in the myriad circumstances that we find in franchising that occur, it gives the courts the ability to move with the times and to adjust that concept. That is what has been happening. We have just seen that evolve and become much wider. In Amadio there was this concept that there had to be a party under some sort of disability before the courts would imply unconscionable conduct. The courts have been consistently moving away from that and broadening the concept, as Mr Potgieter said and, as I said,

the ACL is now having a number of indicia. But in forming that view on that legislation, the thought was: let us give indicia to the courts, but not make it exclusive, because as soon as you make it exclusive, you are just cutting out other aspects. I know that sometimes, when you say there are these four words and that affects what we want to do in terms of good faith, you just know there will be circumstances that occur where there will be definitions and going to dictionaries and otherwise that may constrain where a judge may like to go by doing it. Our concern comes from that element of it, and that rather than allow it to evolve, you pass this legislation and then you are stuck with that definition, and then the next minute there is some case which occurs which might be outside and the courts are not able to deal with that. By not codifying it, you allow that common law to evolve. It may not happen as quickly as some of the constituents may want, but we know it has evolved, extremely from the nineties and in the last decade, and will continue to do so because of the circumstances that are arising that are of concern to your committee.

Mr P. ABETZ: Would that mean that if the definition in the bill was changed from "means" to "includes" would that satisfy your concerns? In other words, "good faith includes" those four words that are in the bill, rather than "good faith means".

Mr Sutherland: I think the society in its submission also suggested that there might be areas where a fairness test is not necessarily appropriate. So, to get all four elements together and say it includes these plus other ones, puts a higher bar. There may be circumstances in which it is totally reasonable to exercise a contractual obligation or a right in a particular way without having regard to a fairness test. You could almost say that any termination on any exercise of contractual right by a party that is detrimental to the other party is unfair to that other party. To that extent, the question is whether or not your definition of good faith is a reasonable definition of good faith. I must say that I understand that the Western Australian definition was drafted by Professor Zumbo, and that the Western Australian position followed on from the South Australian position. You might be aware that the South Australian Small Business Commissioner Bill was released by Mr Koutsantonis for public comment, and the Law Society, the Law Council, and the Law Society of South Australia also made submissions. If you look in that bill, you will see the problem with defining good faith. They had one of the functions of the small business commissioner to act to encourage people to act fairly and in good faith. So they have used the word "fairly" outside of the good faith definition, even though they were trying to encourage people to adopt it as a definition. Do you understand what I mean by that?

Mr P. ABETZ: Sure.

Mr Sutherland: You almost have dual obligations of fairness in a definition, which was probably never intended to be that. It was considered to be something separate. I think some care has to be taken into consideration about whether or not this is an acceptable form of a definition of good faith or leave it to the courts to decide in all of the circumstances, as Tony said, as an evolving duty.

The CHAIRMAN: Just to change subject —

Mr Potgieter: If I can just quickly add to that: I think the position that Derek just stated that has been incorporated into the amendment to the code that was introduced in July last year; that is, by saying nothing the code limits any obligation imposed by the common law on parties to a franchise agreement to act in good faith. The second comment I want to make is that the International Franchise Association in its research document—I can give you a reference—concluded from the research they have done in a number of countries that when legislators go further to include an explicit duty of good faith and then go on to define good faith with words such as "fairly", "honestly", "reasonably" or "cooperatively", that actually leads to more uncertainty and additional litigation—that is, where countries have adopted that final definition of good faith.

The CHAIRMAN: Is that reference to that international body in your submission?

Mr Potgieter: No, that is not.

The CHAIRMAN: Would you be willing to provide that as a supplementary submission?

Mr Potgieter: I am more than happy to provide the reference that the International Franchise Association prepared on that. It is unfortunately not part of the NRA's submission.

The CHAIRMAN: Thank you. The society believes that clause 13(2), which prevents the courts from requiring franchisees to give an undertaking as to damages, is unfair. For what purpose do you think this clause was included? Could you please explain briefly your view on this issue?

Mr Conaghan: The seeking of injunctive relief has over the years been a claim and a right of action which has been the cause to grant an injunction on an interim or preliminary basis without having the opportunity to have full trial is a remedy which the courts are reluctant to award—unless they are satisfied on the criteria which have been applied over many decades of jurisprudence now. In order maintain a balance between a party such as a franchisee coming to a court and saying that there is behaviour occurring which is of such nature that the court should make orders directing parties to act in a particular way, and then we will have a trial about that some months or more down the track, is something in which the courts have to balance convenience versus whether damages are an adequate remedy. Then, if it does grant that remedy restraining someone from acting in a way which they believe they are entitled to under an agreement, yet after a year or two years or three years, there is found after the trial not to be any basis for that claim, then the party is left without any remedy in terms of the significant costs and otherwise it has incurred. The balance the courts have applied over decades, if not longer, in terms of our English jurisprudence is to balance that by saying if a party is going to come to the court and says that this is so serious as to require the court or to seek a court grant an injunction directing parties to behave in a particular way, as opposed to remedies, then the balance for that is that they should give an undertaking that if they are not going to be successful they will pay the damages that the party suffers. To change this jurisprudence, in a way, would be a very significant change in Australian jurisprudence that would be a hallmark that does not leave a balance in terms of the scenario. Bear in mind that parties who approach a court on the basis that they believe they will be entitled to injunctive relief are not reluctant at all, in my submission, to grant that undertaking to pay damages to the other side should they lose, because they do not believe they will. To take that away, though, is a very significant change to the law and one which does not create a balance.

The CHAIRMAN: We are running out of time, and I would like to go through two questions, particularly given your history on these issues. In your view, are there any deficiencies in the current commonwealth legislative framework governing the franchise industry and, if so, what areas?

Mr Sutherland: I would like to answer that, if I can. Yes, there are deficiencies, mainly because there are a lot of commonwealth laws that affect the sector. For example, if you look at insolvency of franchisors, the Corporations Act provides powers and authorities on administrators to deal with companies for the protection of creditors. That obviously has to link in with the commonwealth Franchising Code of Conduct. As you know—you have probably seen examples in the press of the collapse of a number of franchise systems—administrators and liquidators seem to suggest that they have wider powers under the Corporations Act than they have obligations under the code. That is one example of an inconsistency. The trade marks legislation is another example of inconsistency in terms of protection. There is not any protection, really, afforded to a licensee of a trade mark, but that applies not just to the franchising sector but to any licensee of a trade mark. It was not part of our brief for our submission for the QLS, so I really cannot go much further than to say that, yes, there are. I would like to say that the commonwealth provided us with an opportunity to make additional submissions of technical defects in the code that needed to be corrected. They were lodged before the closure of the comments that were allowed in relation to the changes that happened last year. They have taken them on board, but I understand a couple of those minor

changes that we raised were fixed. They were typo and interpretation errors, but there is still a large number of other ones that need to be corrected.

The CHAIRMAN: To follow on from that, amendments have been made to the Franchising Code of Conduct during the last few years up to 2010. Can you provide a summary of those amendments? Notwithstanding these amendments, are there any other ways that the code can or should be enhanced?

Mr Sutherland: In relation to the summary of these amendments, I think we have on the Law Society website a summary of the changes and if the committee wishes to download that from the website that will give a complete summary.

The CHAIRMAN: Thank you very much.

Mr Sutherland: I would like to say that most of the changes that came about from the latest review related to disclosure issues and not necessarily relationship issues. In terms of the disclosure issues, I think we have come quite a fair way in disclosing end-of-term arrangements and what is to happen at end of term, and implementing a proposal where reasonable notice of non-renewal is effectively required to be given. That is a significant improvement on what has been in the past. Interestingly, I note your bill does not really interact the six-month notice provision that is now a mandatory obligation for agreements entered into on or after 1 July last year. When they are up for renewal, you have to give not less than six months' notice to renew, and I do not think your bill seems to fit squarely with that, particularly in relation to orders for renewal of the agreement after the period of the term of the franchise. There are some inconsistencies there, which we have raised in our submission.

In other respects, the changes to the code were not probably as wide and as far as a lot of people would have liked. However, they took place after extensive consultation. The society was involved in that consultation, and we made our recommendations, which are on the record with the commonwealth.

The CHAIRMAN: Thanks very much.

Mr Sutherland: In terms of what other things can be done to enhance, that is really a matter for the commonwealth, which we have taken up with the commonwealth in relation to improvements to the code. I think the society and its members embrace the code and the commonwealth regulation of franchising, and we prefer to see it stay that way, rather than fragmenting into additional state-based relation reforms. Having said that, we are aware that there are in certain states particular pieces of legislation which do affect franchising and franchise agreements, and that obviously over a period of time additional state-based laws will happen. But it is consistency for members of our profession and dealing with national clients who do franchising in Western Australia, which is one of the reasons we were sparked to make a submission on the practical implications for our members.

The CHAIRMAN: I will close it up there with a closing statement. Thank you for your evidence before the committee today. There are a number of questions that we have not been able to ask you today. Would you be willing to answer a series of further written questions that the committee can provide when it sends you a copy of today's transcript?

Mr Sutherland: Yes, we would.

The CHAIRMAN: Thank you very much. A transcript of this hearing will be forwarded to you for correction of minor errors. Please make these corrections and return the transcript within 10 working days of the date of the covering letter. If the transcript is not returned within this period, it will be deemed to be correct. New material cannot be introduced by these corrections and the sense of your evidence cannot be altered. Should you wish to provide additional information or elaborate on a particular point, please include a supplementary submission for the committee's consideration when you return your corrected transcript of evidence. Thanks very much. I hope this arrangement worked well for you. It worked well for us.

Hearing concluded at 12.18 pm