ECONOMICS AND INDUSTRY STANDING COMMITTEE

FRANCHISING BILL 2010

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 6 APRIL 2011

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 10.33 am

DRISCOLL, MS ANNE MARIE
Commissioner for Consumer Protection,
Department of Commerce, examined:

MACKAY, MR DUNCAN
Director Policy, Consumer Protection,
Department of Commerce, examined:

SCOTT, MS CATHERINE
Legal Policy Officer,
Department of Commerce, examined:

The CHAIRMAN: Thank you for appearing before the committee today. This committee hearing is a proceeding of Parliament and warrants the same respect that the 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.

Have you completed the "Details of Witness" form?

The Witnesses: Yes, we have.

The CHAIRMAN: Do you understand the notes at the bottom of the form?

The Witnesses: Yes.

The CHAIRMAN: I should not have to ask, particularly you, Anne!

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 about appearing before a parliamentary committee?

The Witnesses: No.

The CHAIRMAN: Please state for Hansard the capacity in which you appear before the committee.

Mr MacKay: I am the director, legislation and policy, consumer protection at the Department of Commerce.

Ms Driscoll: I am the Commissioner for Consumer Protection at the Department of Commerce.

Ms Scott: I am the legal policy officer, Department of Commerce.

The CHAIRMAN: Thank you very much. The committee has received your submission. It is a good contribution, thank you. Do you wish to propose any amendments to your submission?

Ms Driscoll: Not in substance. To some extent we will give some context to the submission today. I think as we learn more and more, more issues come up but we are very comfortable with the document.

The CHAIRMAN: Do you wish to make a brief opening statement that directly addresses your submission and terms of reference?

Ms Driscoll: Yes please, Mr Chair, thank you; perhaps, firstly, to provide a bit more context to who we are. My role is fairly clear but I can provide some background to Duncan's role. As director policy and legislation he is responsible for development of consumer protection legislation in the Department of Commerce. As a consequence, he is clearly involved in the consultation associated with that, the regulatory impact assessments and the process of putting legislation through the Parliament. Catherine is, as her title suggests, a legal policy officer with us and has done the primary work in preparing the submission on this issue.

At the outset, I feel it appropriate to very much emphasise that we do not consider ourselves to be experts in this field. Consumer protection, as the name suggests, has traditionally been involved in disputes between consumers and business as opposed to business-to-business contracts. We have not had very much involvement—indeed no involvement to my knowledge—of contractual disputes between franchisees and franchisors in a legal intervention sense. Clearly the ACCC nationally has had carriage of the national Franchising Code and, indeed, some areas of the Trade Practices Act. The new Australian consumer law also provides some new arenas to some extent both for the ACCC in terms of its capacity et cetera. To date, consumer protection has not been asked to intervene in this area. Having said that, we note that the current bill as drafted recognises a potential role for us, and we see the sense in that, in that, obviously, in terms of a skill set there are a range of resources within the department in terms of investigation skills and capacities, and our legal team is clearly involved in taking legal proceedings on behalf of consumers in regards to business.

It is an issue for us that of course our resources are fully occupied and stretched in relation to consumer protection. Indeed the new Australian Consumer Law, introduced from January, has provided some extension to the range of activities and, in particular, unfair contract terms is an example of a new area of the law that involves some fresh eyes and fresh review.

Our submission was designed to some extent to raise questions and options for the committee as opposed to having any really strong position on any issues. We very much recognise that the role of the committee is to determine what its views are and make recommendations to government. To the extent that government then makes a decision to take this forward we certainly stand ready to deliver on what is and might be asked of us. One of the issues that we encountered—I suspect it is a major issue for the committee—is the difficulty in quantifying the net costs of the proposals in this bill, its impact and the benefits. They may well deliver some real change in a way that is productive for consumers and the market generally. It is very difficult to know just how the market will respond to these particular proposals. Of course, a major question that arose no doubt in your minds and certainly for us was whether a departure from the national regime is, on balance, in the interest of the state's market. We are all very well aware that franchisors are operating largely nationally—certainly the major ones. What sort of skewed effect may play out in the event that a particular regime applies in WA? What impact will that have? Again, we have made some suggestions that there might be some issues. There can also be some positives. We also recognise that, traditionally, there have been examples where pilots, if you like, have been run in specific jurisdictions and have been quite beneficial as something of an incubator sort of test-tube situation that then plays out in the national arena: perhaps the sky did not fall in and it turned out to be a worthwhile effort and trial.

I guess the issue, potentially, is the extent to which there may be some skewing in relation to arrangements in WA. I will play that out in a bit more detail in one example. Obviously, a flow-on from that is whether the different laws in WA will act as a disincentive for players to operate in WA. Would not the concept of good faith be what one would expect under all good, productive business exchanges? But we have certainly found with unfair contract terms that even the concept of unfairness involves a cost. All businesses have had to review their contracts to make sure the balance is reasonable given the market context in which they operate. It involves some review of arrangements. Obviously in this field, there is not a lot of case law. Some findings will then come forward and there will be perhaps some need for people to interpret the impact of that—decisions

we make and in the context of a particular circumstance—and there will be a need to manage the playing out of these decisions and their impact on the way business operates. Obviously to some extent franchisors will be better resourced to assess those issues; indeed, better resourced often to take the lead in taking people to task in this area of the law, so the potential cost is the franchisees having to defend positions. Again, that is the sort of market we operate in and people should of course have their say in court if there is an imbalance. Obviously, a benefit might be that over time there is a better balance and collaboration and clarity for all parties. But there may be some uncertainty in the interim. There is certainly a possibility that for a period, there will be a more litigious environment in which we operate. As I mentioned, there is more chance perhaps that franchisees will be on the receiving end of that as opposed to those taking the action. One of the issues that is certainly a question for me is the extent to which this brings a change in position on the part of the state in terms of its responsibility to act in the area of a business-to-business dispute. Traditionally, it has been an area that has been left, to some extent, to the people involved directly. Of course, this bill is actually suggesting that the state will take on an obligation on behalf of business and at some considerable cost.

One of the issues for me was the potential, again because this will be at state level, that representation is essentially to be funnelled through WA. Obviously franchisees operate as a network and there is some capacity potentially for people through, say, conferences or whatever to talk about the problems they have and basically get all the disputation to a large extent in terms of the balance between the two parties funnelling back through WA because we will be the only place where this can occur. From a consumer protection point of view this potentially will create considerable issues for us in terms of our capacity.

[10.45 am]

The CHAIRMAN: Is there any precedent for that?

Ms Driscoll: I think in some ways this is quite unique. As I think we all acknowledge, most of the large franchising activity is nationally based. Clearly there are networks of franchisees. Clearly there is going to be capacity through this, and pressure upon the state agency given responsibility for this, to take these matters forward where a case is evident. We see the data that has been presented. I might also note that we expect the matters that might be taken forward will be robustly defended. Obviously we will be developing case law, and that will often involve appeal through the higher courts. It is significant, I suspect, in terms of the impact. Really, WA will basically become a forum, and skewed to some extent, in terms of playing out what are national issues.

The CHAIRMAN: Just on that, you mentioned that this can be concentrated by the franchisee; the same could apply to the franchisors?

Ms Driscoll: That is very true, yes.

To summarise some of the issues that we have identified: it is very, very difficult to know the full costs and benefits. Clearly others are better placed to understand the problems in the marketplace and will have made representations about that. It did appear to us that it is a very difficult task to really assess the full impact of this. Some of the comments and observations we made —

Mr W.J. JOHNSTON: Sorry, I just want to seek clarification because I think you are making an important point. Basically what you are saying is, given that this will be, let us use the words "leading edge", it is a new approach to this issue—disputes may exist everywhere in the country—you would seek to resolve them here to see how far the law applies?

Ms Driscoll: Yes.

Mr W.J. JOHNSTON: That would inevitably mean, as with any new law, that until you get some decisions of a higher court—Parliament writes its intention in the act, but it is only the court that can really decide what it is about.

Ms Driscoll: That is right.

Mr W.J. JOHNSTON: That is the argument. That is a reasonable position to put.

The CHAIRMAN: It is called "jurisdiction shopping" is it not?

Ms Driscoll: Yes. The lowest or highest common denominator, whichever way you want to look at it. Further to Mr Nahan's question, now that I think it through, indeed this is what happened with unfair contracts in Victoria. They looked at telecommunications contracts and energy contracts, and a whole range of national suppliers. Indeed, it meant that all of the main players had to review their contracts. It has made it a little easier for us, as we move to this next phase where it is rolled out across Australia, that the focus is now on a different level of activity.

Mr W.J. JOHNSTON: Can I just explore that one step further. You have made it clear you are not making a recommendation whether the underlying principles are a good or bad idea, you are saying that in making that decision this is something the committee needs to clearly consider?

Ms Driscoll: Yes. Indeed the question is: does the government wish to be in this space? That of course is an issue for the government. In terms of other comments we made, I might highlight a few. One thought we had was if we were to go in this direction, our feeling was that it may be worthwhile, while using the four terms proposed—fairly, honestly, reasonably and cooperatively—it would be useful not to exclusively define those, to allow the court scope to interpret; again, to avoid unanticipated limitations that that might present. It would certainly provide clarity in terms of retrospectivity, which probably does not need elaboration. We raised the question about whether there are other more incremental options that might be appropriate, such as introducing perhaps the small business commissioner in a mediation role at a lower cost perhaps to the current option available federally. Also, whether there is value in considering the addition of the SAT as a contract dispute resolution forum, although, again, costs would have to be considered in terms of that. Obviously other options are to look at a stronger lobby to the commonwealth. There are like-minded states. Is there a momentum there, particularly given the drive of the commonwealth to try to get consistency and to show there is real momentum now established? Obviously, there is also the question whether the most recent amendments to the Franchising Code and the ACL, and the powers of the ACCC, mean there is some value in waiting to observe the net change and impact.

The CHAIRMAN: When did they come into place?

Ms Driscoll: The changes to the Franchising Code were from 1 July.

The CHAIRMAN: 2010?

Ms Driscoll: Yes; I am sorry. The ACL, with additional powers to the ACCC, from 1 January this year.

That really probably concludes the opening remarks that we want to make. I will finally emphasise that in the event that this proceeds, certainly we will look to, if called upon, deliver as fully and appropriately as we can. But we do caution that this will be a very complex area and very costly, involving, obviously, external senior counsel for many of the matters that will be taken forward to ensure that the matters are balanced with the level of representation that we will encounter along the way.

The CHAIRMAN: One of the arguments for this bill is that there is a small but sizeable, to some extent, number of "rogue" franchisors. That word was used by various proponents of the bill. As your submission states, there have been quite a few studies into this thing over the years—about five related ones. What is the independent evidence, in terms of case law, showing a significant problem with rogue franchisors?

Mr MacKay: Is your question specific in terms of case law? You mentioned that; or is it including case law?

The CHAIRMAN: Including any source that you have.

Mr MacKay: I think, Mr Chair, the evidence is mixed and not necessarily immediately conclusive. There have been a number of inquiries and a number of investigations. One of the problems we have had as a department is drawing some conclusions around this within the resources we have available. I am afraid we do not have a definitive answer for you on that.

Ms Driscoll: I would certainly emphasise—again going to our opening remarks—we do not hold ourselves out as having any expertise or knowledge in this area. While Cath may wish to make some comments, I really feel that our overriding message is that we do not see ourselves as well positioned to make a conclusive response to your question, Mr Chair.

The CHAIRMAN: Did you want to make a comment?

Ms Scott: I thought about that question as well. In particular, I know that the submission refers to the Griffith University survey. I know that the limitations of that survey, albeit an independent university survey, is that it is a survey of franchisors and not of franchisees. In relation to what that survey reveals, it does no more than reveal a snapshot as to what franchisors might see cause disputes in the franchising sector. However, I did some more looking in the last couple of weeks, and I thought the committee may be interested that Griffith University also did some research in 2009 and conducted a survey of franchisees —

The CHAIRMAN: That was cited in your submission, too.

Ms Scott: That survey is also interesting because it did not canvass franchisor views at all. It also gives a picture, I suppose, of the degree to which franchisees trust their franchisors; a picture of what causes disputes between franchisees and franchisors. The committee might find that helpful. A real difficulty in this area is that there is no snapshot specifically focused on Western Australia. It is quite difficult to get an idea as to exactly the number of franchisees that might be affected by bad behaviour on the part of franchisors or, conversely, the number of franchisors who might be affected by bad behaviour on the part of franchisees.

The CHAIRMAN: Was the Griffith survey a national survey?

Ms Scott: Yes. It still had quite a sizeable response. It provides a picture.

The CHAIRMAN: I have a technical question: is it easy to identify when a small business is a franchisee versus just a small business? Is that an issue?

Mr MacKay: You would have to look at the contractual arrangements that were entered into. That would be the defining differentiation of whether it is a franchise —

The CHAIRMAN: Does the commonwealth legislation define that adequately?

Ms Scott: No, I do not think so. The thing that defines a small business franchisee is the fact that they have entered into a franchising agreement with a franchisor.

The CHAIRMAN: Let us start with the good faith issue. You have dealt with it; I do not want to go through that again. I think you have done a very good job. Thanks for some of the case law references. Some of the other submissions, it was individual opinion rather than case law.

Ms Driscoll: We need to thank Cath for that.

The CHAIRMAN: If you have any others, it would be very useful—as to guidance about what the courts are looking at in good faith and applying good faith to the common law; how they interpret it.

Ms Scott: In particular one of the dilemmas I have had in this area is that there is not a large amount of case law in Western Australia. Most of the cases are in New South Wales. Most of the cases are the Supreme Court of New South Wales or the appeal court of New South Wales. They are quite senior cases. However, I think one of the QC opinions that the committee has, referred to a

WA case last year. It was handed down in November last year. That is a case from the WA appeal court of the Supreme Court. That is a really good case because it looked at the meaning of "good faith". It was not an issue in that case because there was an express obligation in the contract—it was an MOU—for good faith. The court actually looked at the existing case law on good faith, including some of the New South Wales cases, and provided some quite useful analysis about what "good faith" means. That judgement found that you should look at the ordinary meaning of good faith. By "ordinary meaning" they look at the dictionary.

[11.00 am]

The CHAIRMAN: Which one?

Ms Scott: I think in that instance they looked at the *Macquarie Dictionary*. They referred to honestly performing the purpose of the contract. Interestingly, they raised some questions about whether reasonableness as an objective standard should be a criteria for good faith, partly because the dilemma they had in that case was that one party was wanting the other party to give them an indemnity for a very large amount of money if a party was sued because of harm caused to people who might buy houses on land. The party from whom that indemnity was sought was arguing that seeking that indemnity was in bad faith. One dilemma the court had was, if there is a disagreement between two commercial parties, that does not necessarily make the requirement for an indemnity, in this case, unreasonable. How do you objectively assess that when looking at what each party is doing in terms of its own best interests and protecting their interests?

The CHAIRMAN: The word "reasonable" is used in a lot of contracts as a kind of open door for judges to interpret a decision in the context of the evidence they find more widely. Let us take the issue of "fairly". Business fairness is open to interpretation. Let us say you have a franchisee–franchisor relationship and, under the contract, the franchisor has the right to say whether the franchisee has to invest money in upgrades or whatever, and the franchisee does not have money to do it but it is up to the franchisor to do it. Would it be fair if the franchisor said, "I don't care if you don't have the money, you have to find it; you have to do it." How would courts interpret that; would "fairness" mean to reinterpret the details of a contract?

Ms Scott: Possibly. I am not a court so I can only purport what it might be. As the commonwealth has recognised, that is a potential issue in relation to franchising agreements, so one of the reforms introduced for 1 July last year was that it requires franchisors to inform prospective franchisees before they enter into an agreement that if the costs are going to increase, they have to be informed of that beforehand. Also, I think if the costs were increased excessively to the point where the franchisor was seeking to do nothing more than make a huge profit out of the franchisee, a court may well find that that would be unfair and not in good faith.

Mr P. ABETZ: Has the department done any research on the effect of the good-faith type provisions in the United States and Canada on franchising in those particular jurisdictions? I understand Canada and the United States—I am not sure whether it is 14 states in the United States—have had the good-faith type provisions in their legislation for more than 10 years.

Ms Scott: It is limited. It is difficult because the United States uses different sorts of terms. They use terms like "due cause".

Mr P. ABETZ: That is with a termination?

Ms Scott: Yes.

Mr P. ABETZ: To not renew, the franchisor has to show good cause why not to renew. That is in some of their legislation.

Ms Scott: Yes. I have not looked into it in any great detail, partly because the legal system in the United States is very different from the legal system here. One thing I have found interesting is that

there is quite a lot of good faith clauses on the statute books. There are quite a lot of examples of a statutory obligation for good faith.

The CHAIRMAN: Do those clauses enumerate or try to define good faith?

Ms Scott: No, they do not.

Mr W.J. JOHNSTON: Would one of those you are referring to be industrial law? In Australia good faith bargaining is one of the criteria used in the federal industrial relations regime.

Ms Scott: In looking at these issues I have looked at the other legislation in some detail so I can give you some examples. I am aware of the Fair Work Act provisions.

The CHAIRMAN: Can you provide that as a supplementary submission? Tim will get it from you later.

Ms Scott: Yes, sure. I think this has certainly been pointed out by Mr Abetz and others who are proposing this legislation that the oil code includes good faith obligations. The significance of the oil code in part is that, like the Franchising Code of Conduct, it is a mandatory industry code under the Competition and Consumer Act and also the Native Title Act.

The CHAIRMAN: What does the oil code relate to?

Ms Scott: It relates to the relationship between oil producers and oil retailers, I think.

Mr P. ABETZ: Petrol stations.

The CHAIRMAN: Bad use of the word "oil".

Ms Scott: Yes. Also the Native Title Act contains an obligation for good faith as does the Insurance Act and in fact expresses it as "utmost good faith".

But none of those actually defines good faith. I think the underlying legal policy reason for that is that this is an area that is being developed by the courts. It is appropriate that the Parliament leave the courts free to develop it. I think that is one of the reasons it has not been defined.

The CHAIRMAN: In the process in our system of common law, that is a well-held principle, and many aspects of the law is to allow the courts to explore over time across a range of issues to come to some agreement on what an issue means.

Ms Scott: Yes, particularly where the conduct of your parties is governed by commercial agreement.

Mr P. ABETZ: I think it was about 15 years ago—someone might correct my timeframe—when the unconscionable conduct provision was put in the legislation, and the people who proposed that at the time argued whether what that actually means should be defined. From my understanding as the case law has developed, the case law has made an incredibly narrow definition and it is very, very difficult to get a court to say something was unconscionable conduct, so the intent of the legislators was not fulfilled because the common law has narrowed it right down. I guess my concern is "good faith" is in the process of being developed by common law. Justice Rein's definition, which picks up the four words in the bill, summarises his position quite well. As legislators we are saying, "We don't want this narrowed down over time; we want a broader definition." I am not a legal person, but is there any reason, as legislators, we should not do that?

Ms Scott: That we should not narrow it?

Mr P. ABETZ: After all, our judges are not elected; if people do not like the laws we make, they can throw us out. Does Parliament have a right in the legal system to do that, or is that frowned upon?

Ms Driscoll: Perhaps it is again a question of unintended consequences. Is it inappropriate to start in a generalist way and then refine over time? If, for example, unconscionable conduct does not play out as intended, obviously the governments of Australia can start to say "this includes" and

"this means" and what have you, as necessary. Of course, our proposal was to recognise the four terms, but say it might indeed be other things as well. It was not looking to contain or take away those guides.

Mr P. ABETZ: In your understanding of "good faith" and the four adjectives we use, I take it that they would not be contrary to your understanding of "good faith", but you are saying we should leave it as being wider than just those four words?

Ms Driscoll: That is what we are saying.

Ms Scott: Yes. That is exactly what we are saying. Part of that is based on the use of the word "means" where there is a lot of legal precedent that "means" when used in legislation is very confining. The intention of the Parliament, if it uses the word "means", is that it means these four things and nothing else. That is why we have suggested in the submission that the word "includes" would address that

The CHAIRMAN: In your evidence you also state that from the case law, limited as it is, some interpretations include some of those four terms. Sometimes they are not included.

Ms Scott: That is correct. In relation to that issue, one of the question marks I had in my mind about the definition was the use of the word "means" and what implications that might have, and the use of the word "and". Is the definition saying it means fairly, cooperatively, reasonably and honestly? Does it mean all four so that in acting in good faith you have to demonstrate all of those things or is it such of those as are relevant to the commercial arrangement and to the conduct between the two parties? That was another question I had.

The CHAIRMAN: Can we go to the issue of cost? Thanks for the information; it is very important. Let us say this bill is passed. How would the adjudication process take place at the Western Australian level and relate to whatever takes place at the commonwealth level? Say a franchisee has a dispute with the franchisor; in your interpretation of this bill and surrounding legislation, how would it be resolved and who would be responsible for those disputes?
<004> N/5

Ms Driscoll: It certainly seems to me that one of the issues will be, to some extent, the uncertainty about where people might direct their concern. But of course to some extent that already exists with the joint role of the ACCC and consumer protection in supporting consumers. We have really effectively managed that for the last 30 years, and hopefully will continue to do so. For us, it will be a new area of activity. A particularly important and difficult role is going to be sifting through the matters that are presented and selecting those that are most appropriate to take forward. The high likelihood is that many issues will be presented that are going to be at significant cost. It will be not a particularly enjoyable task having to basically choose some over others. I suspect it will involve quite a lot of research in terms of which of the matters you actually take forward. It will potentially create many difficulties.

The CHAIRMAN: Let us say I am a franchisee and I have a problem. This bill is in place. I have to go through mediation under the commonwealth legislation; which is mandatory, as I understand it. That has a certain charge. I can choose that, or I can go to you. You are the commissioner for consumer affairs—this is a B to B, not a B to C. Is that not an issue?

Ms Driscoll: Obviously, through this new bill, it would more clearly also say to the Commissioner for Consumer Protection there is a regulatory role here. Indeed you could potentially give it another name, or whatever. The Australian Consumer Law also recognises the commissioner as the regulator across matters in the ACL. Through the Fair Trading Act 2010 we have identified that from time to time we see it as in the public interest, if civil matters arise, for the commissioner to take a business-to-business transaction that is a consumer transaction; for it to take forward. We have actually provided a little bit of space for ourselves when it is in the public interest to intervene on behalf of business.

Mr MacKay: Where business is a consumer.

Ms Driscoll: Where business is a consumer as opposed to a contractual business-to-business —

The CHAIRMAN: This would be a new space for you because actually you vacated that space a couple of decades ago when the commonwealth pursued most corporate law.

Ms Driscoll: It certainly is new space. Indeed we would have to set up a whole lot of processes in terms of reviewing matters that are brought to us; probably filtering them in terms of: is this better dealt with through the Franchising Code? It is evident that, as I said before, a major role would exist in terms of actually assessing each of these in terms of determining which matters need to take priority as public interest matters.

The CHAIRMAN: Let us say you get cases brought to you, you find one that has a relevant issue —

Ms Driscoll: Yes; there is an important point of law to be made here. There seems to be substance to the concerns et cetera.

The CHAIRMAN: You then take that to court on behalf of the franchisees. The assumption is that your department will fund that legal matter?

Ms Driscoll: Yes. Indeed, what this represents is a transfer of cost, if you like, basically from franchisees to the state. As I said before, what is a bit of a concern to me is the potential for all grievances shared by franchisees to actually come forward within the state arena as opposed to the national arena. I might add, too, that one of the concerns for us is, in reading the data on the number of complaints presented to the ACCC and the number of matters that are actually taken forward, consumer protection locally has a reputation that generally we will try to conciliate and educate, and deal with every single matter that is presented to us as a formal complaint. Obviously from time to time, and to some extent, against a public interest test, we have a template of questions we ask ourselves; we will then take the matter as a legal proceeding. It will be very difficult to manage this. We certainly need to work in partnership with the Small Business Development Corporation to look at the conciliatory role that might operate, as well as the mediation options that might exist, to try to basically sort through the issues. I see it as being very resource intensive.

The CHAIRMAN: You mentioned there is an estimate of $1.565 million. That is plucked out of the air, I gather?

Ms Driscoll: Yes. The more and more I think about it, the more I am concerned that it may be understating the reality.

The CHAIRMAN: Will you operate like the DPP? I am no lawyer; I just read the newspaper about this. One, they have a limited budget; a huge demand, they have to ration. They have to say whether they think they can get an adequate prosecution out of this. It might be an issue of law, it might be an issue of fairness, but can we get a prosecution out of this? What is the probability? Would you have to use the same decision-making process?

Ms Driscoll: We certainly have used the test applied by the DPP as a basis to the development of ours. Equally—I am sure it is in the DPP one as well—some of the triggers for taking action are things like, even if you think you might lose, testing the law to demonstrate there is a gap, say if unconscionable conduct was an issue. We need to show that this was a deserving case and we were not able to get a decision in our favour. There is a range of issues that might impact on whether we take it, but certainly there is a rationing. You have to look at, "We've only got this many resources, we need to ensure we do have representation to mirror what is going to be put before us from the opposing side." Might I say, another question in my mind, which I have not thought through is what if franchisors choose to take matters in this area? Will we also be called upon to defend, if you like? We may find ourselves being involved in actions that we are not initiating, but we are also engaged by virtue of a support role to those that are defending actions.

The CHAIRMAN: Let us say I am a very wealthy franchisor of a big firm. If I took action here, went to you and wanted to sue one of my franchisees—I have a dispute with them—would you have to fund it?

Ms Driscoll: Again, we are going to need to look at the way the law is played out. In terms of the way this bill is particularly structured, this would see us taking actions separately. Sometimes we are able to stand in the shoes of other parties in a representative action, but it is not particularly set out here.

The CHAIRMAN: The answer is unclear. My interpretation of this bill is that it is neutral between the franchisees and franchisors. Any party, "or (e)" can come to you, that is my understanding. Therefore, if there is a dispute, you have to do some filtering; you can refuse, but if there is an issue of fundamental law you might have to be funding the court case for the "or" franchisor.

Ms Driscoll: I think the parties can take action themselves.

The CHAIRMAN: They can.

Ms Scott: But only in relation to some of the remedies. One of the things the bill does is say that any party can take action for pecuniary penalties. However, I think because pecuniary penalties go into consolidated revenue, that would be a provision that would need to be amended. In relation to pecuniary penalties, only a government regulator can take action both at commonwealth level and state level because the money goes into consolidated revenue.

Ms Driscoll: Still, I am sure we would all welcome the additional revenue!

The CHAIRMAN: Another issue is that if this bill were passed and you were given these powers, I could ask a very aggressive question: how much would you ask for from the Treasurer? You are facing a reality here: This is not a budgetary ERA, but how much would you ask for all up, for over a four-year period?

Ms Driscoll: The reality is that we have not fully assessed this.

The CHAIRMAN: Could you give some thought to that?

Ms Driscoll: I would need to know the way the bill finally comes together.

The CHAIRMAN: Let us say the bill is as it is, unaltered.

Ms Driscoll: A small business commissioner role is being developed separately. That to me is an important part of the equation.

The CHAIRMAN: That commissioner cannot take legal actions; it is a mediating role.

Ms Driscoll: No, but it is very useful in that filtering educative, interpretive process of what might be a way of managing the floodgates and identifying the most appropriate matters to take forward.

The CHAIRMAN: Just another issue: if you did not get it, and you were given these things, you would have a huge task that you undertake already, and we all know you are stretched. We have had other issues we have explored with you on caravan parks and what not. One of the issues is that it has to be additional money for these additional tasks.

Mr MacKay: That bit is very clear. Without that we would have to reduce or withdraw services that are currently provided.

Mr W.J. JOHNSTON: Is it your view that the bill would require you to act in cases that were brought to you, or is it a matter that you could choose to act?

Ms Driscoll: It would have to be that we would be choosing to act.

Mr W.J. JOHNSTON: I just want to make it clear that just because there is a dispute between the parties to an agreement, even though the bill provides a remedy, it does not mean the remedy would be acted yet.

Ms Scott: I think one of the issues for the department may be managing the expectations of stakeholders. One of the things that the department would have to balance is yes, the cost, but also to the department of taking action, and also the expectation that it will take action.

Mr P. ABETZ: My understanding would be, as I understand franchising law and what has been put forward, that obviously if there is some kind of dispute between franchisor and franchisee, under the small business commissioner model the first place people go to would be the small business commissioner to try to sort that out. I was given to understand—and I seek your advice—that regulations could be put in place that the commissioner would not consider anything brought to the commissioner unless the issue had first been addressed with the small business commissioner in the sense that the mediation role was tried. If it is not sorted out at the small business commissioner level, under the Franchising Code of Conduct, by law they must go to the mediation opportunity that is there under the Franchising Code of Conduct. If that fails, then they would only come to you. There would automatically be significant filtering. Can that sort of thing be done by regulation or does it need to be put in the legislation?

Mr MacKay: We would probably have to look at the detail of the small business bill establishing the small business commissioner and the interplay with the franchising bill. I could not answer that off the top of my head.

Ms Driscoll: I would suggest that for clarity there might be some advantage in flagging through the primary bill and there might be some prelude process to be dealt with through regulation or whatever. Or, indeed, it links the Franchising Code anyway. Clearly that would have to be an issue dealt with through drafting to test the best place to make it clear that that was the intent.

The CHAIRMAN: Further on that, the commonwealth code requires mandatory mediation?

Ms Scott: Only if one party wants it. Yes, it requires both parties to attend mediation if one party says that they want to pursue mediation under the code.

The CHAIRMAN: But if they go directly to legal action?

Ms Scott: If they go directly to legal action they do not have to go through mediation first.

Mr W.J. JOHNSTON: Most courts now would refer it back for mediation as part of their clearing process, would they not?

[11.30 am]

Ms Scott: No, the court would not refer it back, because the court just needs to be satisfied that it has got jurisdiction.

Ms Driscoll: Perhaps the reference is how then a court will often, prior to going into —

Mr W.J. JOHNSTON: It will have a directions hearing.

Ms Driscoll: Yes.

Ms Scott: Yes. Sorry; thank you. Yes, there is very much a shift now towards alternative dispute resolution mechanisms within the court system itself, but those systems are still separate from the mediation systems that are in the Franchising Code of Conduct.

Ms Driscoll: Might I say that once you have got to that point, a lot of resources have already been spent in preparing the matter et cetera.

Mr W.J. JOHNSTON: Yes, of course—probably about $50 000.

Ms Driscoll: Yes.

Ms Scott: Yes. There are also a couple of things in relation to your question. There are provisions in legislation whereby a court will not look at something until it has been to mediation first. There are those sorts of provisions both in relation to tribunals' jurisdiction and in relation to courts' jurisdiction. I think, however, it is unlikely that it would work, whereby if a person goes to

mediation through the Small Business Commissioner and that is unsuccessful, the parties would then be required, in addition, to go through mediation under the Franchising Code of Conduct, or even through the court process, because if the parties have not been able to sit down and reach agreement on the way forward, then no court or tribunal, or even regulator is going to make them try and do it again.

Mr W.J. JOHNSTON: No, they will wait till the last day and then settle.

Ms Scott: Yes.

Mr W.J. JOHNSTON: Could I just go to a new topic, and that is the question of redress orders. On pages 21 and 22 of your submission you have discussed what you say are potential problems with redress orders. I think this is in relation to ordering a resumption of the relationship subsequent to it having been severed. I have two things here. Do you want to make some comment on that? The second thing is: do you think that a court would have the power to order compensation or other remedy other than re-establishing the relationship? Could you just make some comments on that?

Ms Driscoll: Only simply to recognise that that is reasonable.

Ms Scott: I think that that is most likely.

Mr W.J. JOHNSTON: And that would be consistent with the bill; we would not need an amendment to clarify any of that, would we, in your opinion?

Ms Scott: I think, in relation to redress orders, that a court would be much more likely to want to compensate and look at that. Interestingly, I have been looking at the Fair Trading Act 2010, and the Australian Consumer Law that is now incorporated into that, and it has a provision that where there are a number of remedies that are available, ranging from compensation to conduct being subject to criminal charges and pecuniary penalties, if the court feels that compensation is the most appropriate way, it has to give priority to that first, and there are actually provisions in the ACL saying that. So I thought that that was actually quite an interesting way of balancing that and enabling the court to balance that.

Mr W.J. JOHNSTON: If I can just keep going on this a little further, I am a former union official, and under the Industrial Relations Act 1979 you had to get an order for reinstatement, even though that was not what you were really after, because if you did not get the reinstatement order, you could not get compensation. So you are satisfied that this bill would provide a remedy for compensation without having to have any other remedy in place, so we do not have to deal with that issue, because you do not necessarily want to have an order for the reinstatement of the relationship if it has completely broken down, but you still want fairness. Do you see what I am driving at?

Ms Scott: The bill does provide for compensation, including going to personal injury and areas where I think that there is other legislation covering those issues. I think that the remedial orders and compensation orders that are in the Australian Consumer Law, and even in the Fair Trading Act, would provide an alternative set of provisions that might enable the parties to be compensated. It gives the court more guidance as to what it will take into account, because the provisions in the bill as currently drafted are not as comprehensive, I suppose, as some of the remedial compensation orders that are in the Australian Consumer Law and the Australian Competition and Consumer Act.

The CHAIRMAN: Can we talk about penalties? There are some penalties in the bill. Do you have any comments on those? Who would adjudicate them? Are they common? Are they excessive?

Ms Scott: The bill currently provides for penalties in two instances. One is for the breach of the obligation of good faith, and the other is for a breach of the Franchising Code of Conduct.

The CHAIRMAN: The commonwealth Franchising Code of Conduct does not have penalties in it.

Ms Scott: No. The Franchising Code of Conduct is not a part of the Australian Consumer Law; it sits in a different part of the Competition and Consumer Act. You are required to comply with the

code under the Competition and Consumer Act; and, if you do not comply with the code, you contravene the Competition and Consumer Act, and there are a range of penalties and remedies that the Competition and Consumer Act provides if a party breaches the code. Some of those—a franchisee could take action, or a franchisor could take action, in the courts themselves. The ACCC is empowered to take a representative action on behalf of a group of franchisees.

The CHAIRMAN: And then pursue remedies.

Ms Scott: Yes, and pursue remedies. In relation to a breach of the Franchising Code of Conduct, the ACCC could not apply for pecuniary penalties, so that is not a remedy that is available for a breach of the code, except that in the unconscionable conduct provision that applies to business-to-business relationships under section 22, the provision actually sets out a whole list of things that a court might look at in assessing unconscionable conduct. Because the courts are interpreting the provision very narrowly and not wanting to say, "Yes, this conduct is unconscionable", section 22 is actually a good example of where the Parliament has said, "No, no, courts. You're interpreting this far too narrowly. These are all the things you can look at, and you should be looking at, in assessing whether or not conduct is unconscionable." And two of the things that are included in the list are a breach of the Franchising Code of Conduct and also whether or not the parties are acting in good faith. So, indirectly, if the ACCC formed the view—or in fact the state regulator now, because under the ACL the state regulators can also seek pecuniary penalties for breaches of the ACL—if a regulator formed the view that a party was breaching the Franchising Code of Conduct and a party was not acting in good faith, certainly the regulator could run arguments that, as such, the party was contravening the unconscionable conduct provisions, and the contraventions were sufficiently serious that a court should order the party to pay pecuniary penalties.

The CHAIRMAN: That is very interesting. So, just to clarify it, the ACL has in its definition of unconscionable conduct various criteria.

Ms Scott: It does not define it. It sets out a list of things that the courts can take into account.

The CHAIRMAN: A list that the courts could consider or should consider, and that includes acting in good faith.

Ms Scott: Yes.

The CHAIRMAN: So it has a good-faith clause.

Ms Scott: Yes. It does not define it.

The CHAIRMAN: It does not define that.

Ms Scott: The majority of franchisees do not have the money. The pecuniary penalty provision is brand new; it commenced on 1 January.

The CHAIRMAN: On 1 January this year?

Ms Scott: Yes.

The CHAIRMAN: Okay. So as of 1 January this year we have, on a national basis, a good-faith provision that could apply if franchisees could access it.

Ms Scott: Yes.

The CHAIRMAN: The cost of it is a different issue. The law sits there with good faith undefined.

Ms Scott: Yes.

The CHAIRMAN: What are some of the other criteria in the unconscionable conduct that the act states a judge should consider? Does it include reasonableness?

Ms Scott: There are a whole lot. There are paragraphs (a) to (l). I just need to take my glasses off because this is so small I cannot read it.

Mr MacKay: Perhaps if we offer up to the committee clerks the relevant numbered provisions, they can investigate that.

Ms Scott: Yes. But, in addition to that, another important development in this area is that there is a bill before the federal Parliament now that seeks to include guiding principles.

The CHAIRMAN: In relation to unconscionable conduct?

Ms Scott: In relation to unconscionable conduct, because there have been all these questions around whether or not you can look at conduct across the whole of the contractual relationship. In the cases there have been questions around whether or not it is limited to the bargaining between the parties before they entered into the contract or whether you can look at the course of conduct before the contract was entered into, as the contract was performed across time, and then the way in which the contract was terminated. I think the federal Parliament recognised, in part out of all these inquiries into franchising, that the courts are wanting more help with this and they are wanting the reassurance that this legislation is intended to operate so that the courts can look at the full course of conduct and not just conduct during this period of time.

The CHAIRMAN: This is very important. Could you, maybe just as you have described, give us an additional submission as to how this works; as you described, how the code of conduct relates to the ACL; how a violation of the code of conduct can come under the ACL and its unconscionable conduct provisions; and the issues that a court should consider, as specified in the ACL, in interpreting unconscionable conduct?

[11.45 am]

Ms Scott: The other thing that I would like to draw to your attention is that there is another provision in the ACL that is also useful in terms of the franchising relationship that relates to misleading representations. That is in relation to business-to-business relationships as well. The reason why I see that as important is because that has the full gamut of remedies available to it, so it has the remedial compensation remedies, it has criminal penalties and it has the pecuniary penalties. That is another provision that the commonwealth or the states could regulate.

The CHAIRMAN: Unfortunately, we have to be like Cinderellas; it is almost midnight and we have to go to Parliament. Commissioner, could we perhaps talk about coming back at a different time, or, let us say, make a submission and maybe we can just do it verbally.

Ms Driscoll: Yes.

The CHAIRMAN: Excellent evidence, by the way; very good. Thank you for your evidence today. There are a number of questions that we have not been able to ask you today or queries that we need feedback on. Would you be willing to answer these via written questions that the committee can provide you when it sends a copy of your transcript? A transcript of the 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 covering letter. If the transcript is not returned within that period, it is deemed to be correct. New material cannot be introduced via 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 as discussed. Thank you very much.

Hearing concluded at 11.46 am