ECONOMICS AND INDUSTRY STANDING COMMITTEE

FRANCHISING BILL 2010

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
MONDAY, 11 APRIL 2011

SESSION THREE

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 2.03 pm

FINLAYSON, MS JACQUELINE
Acting Managing Director, Small Business Development Corporation, examined:

GISBOURNE, MS JULIET PIA
Director, Policy and Advocacy, Small Business Development Corporation, examined:

HASSELBACHER, MR MARTIN
Assistant Director, Policy, Small Business Development Corporation, examined:

The CHAIRMAN: Thank you for coming today. This committee hearing is a proceeding 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 a contempt of Parliament. Before we commence, there are a number of procedural questions that I need to ask you. Have you completed the "Details of Witness" form?

The Witnesses: Yes.

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

The Witnesses: Yes.

The CHAIRMAN: Did you receive and read an 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—thanks for your contribution—do you wish to propose any amendments to your submission at this stage?

Ms Finlayson: No.

The CHAIRMAN: Before we ask any questions, do you wish to make a brief opening statement that directly addresses your submission and the terms of reference, or perhaps a brief description of the organisation that you represent?

Ms Finlayson: Yes, I would. I do have a couple of opening comments as a prelude to further discussion, and I thank you for the opportunity to provide them. My opening comments really are directed at giving the committee hopefully an understanding of the SBDC's role in relation to dealing with both franchisees and franchisors, some insight into why we would have some concerns about some of the approaches in the Franchising Bill as they relate to small business, and some thoughts on how small business might benefit from alternatives to state-based legislation.

With regard to the SBDC's role, in the past three financial years the SBDC has received on average around 300 inquiries regarding aspects of franchising; of those, between 30 and 40 were inquiries about matters that might relate to a dispute. It is important to note at this point in time that the SBDC when dealing with these inquiries does not provide legal advice. We do not have in-house legal expertise. Our involvement is generally limited to advising business operators on how they in turn can become franchisors, providing pre-entry guidance and information for potential franchisees —

The CHAIRMAN: Is that 30 a significant number in the number of people that you see?

Ms Finlayson: It represents less than two per cent of our inquiries.

We also provide assistance to business operators to clarify the particulars of an issue. So sometimes we get distress calls where a number of irrelevant factors might be brought into the discussion, and we provide assistance for operators to distil and condense the relevant factors prior to them perhaps going and seeking legal advice. We also refer them to other sources of expert advice, particularly for legal review of documentation. Also, where we can, we provide advice on options for when a disputation does occur.

That said, the committee will also be aware that the SBDC performed a secretariat role for the Bothams inquiry. So to some extent our observations and understanding of franchisee–franchisor relationships is informed by that role as well.

The CHAIRMAN: Are the officers who were involved in the Bothams inquiry still with the SBDC?

Ms Finlayson: One of them is—Martin Hasselbacher is here and can answer questions related to that.

Our submission and the further information that we provide today is therefore drawn very much on our experience of these small business operators and how they interact in the business community and with legislation that might impact on them. It is not an attempt at all to provide a legal perspective on this bill.

In relation to the bill itself, while we can see the merits of a good faith standard, we have some concerns about the codification and whether the approach taken in the Franchising Bill will best serve small business in relation to the current issues that we observe. As I have mentioned, we are not in a position to provide a definitive legal perspective on these merits, particularly in relation to good faith obligations. However, we are aware that legal experts are divided both in their understanding of and opinion of what constitutes good faith and whether this bill would provide any further clarity to that. Our concern is that although, if proclaimed, the bill will lead to a testing of the good faith provisions in court and the establishment of a body of case law with regard to the matter, ultimately even if courts find it easy to decide what constitutes good faith, this may not be the case for small business, who must make decisions involving their capital and their investment based on what they understand of the here and now. So their capacity to determine through the provisions of this bill what constitutes good faith is perhaps more primary to the small business operator in the immediate term.

We acknowledge that throughout the wider discussion with regard to particularly mum and dad franchisees, it is they that typically risk their savings and their capital and often their homes in order to participate as franchisees, and they make the decision to do this based on their understanding of what that means now—what behaviour is required of them now. Until such time as this obligation to act in good faith is tested in the courts, there will be additional costs involved for businesses—I would argue both for franchisors and franchisees—to consult with legal experts and to arrive at a position on what constitutes behaving in good faith. So that is one of our key concerns regarding good faith.

It is our experience that it is the franchisors that will have the funds and the incentive to get advice on this matter, whereas franchisees, fuelled by the excitement of getting into business and starting their relationship with the franchisor, and perhaps limited by the demands on cash that inevitably a start-up operation might expect of an investor, will end up winging it without getting a legal opinion. It is our concern that the risk is that what the average franchisee considers to be fair, honest, reasonable and cooperative behaviour may be at odds with both what the average franchisor might believe that to be and ultimately what the courts will decide that to be. I guess the risk here is that the mistakes in this respect have the potential to be very expensive for the mum and dad

lawnmower contractors and coffee carters and ice cream vendors, and they will be obliged to act in good faith immediately even if uncertainty exists around what this means.

We are also concerned that the bill may create expectations of remedy for small business that cannot be fulfilled because of the selective nature of that approach. I understand you have already heard from the Commissioner for Consumer Protection, speaking about the difficulties she foresees in filtering the volume of complaints she expects might be a consequence of this bill, and selecting the handful that her office may take forward to the court system. While this selective approach may lead to ultimately a change in behaviour across the industry, unless you are one of the few businesses that is selected for this kind of attention from the consumer protection commissioner, there is little comfort in that in the immediate term, and I would argue that perhaps the expectations might be higher than that. This is actually one of the main reasons why the ACCC is criticised by businesses, because it takes on so few cases, and it is arguable that the Franchising Bill could end up creating a similar situation in Western Australia.

With regard to the ACCC and its role in regulating franchising, this is one of the issues that we have tried to highlight in our submission. It is our view that the real need is less for a change in legislation and more for a change in timely and affordable access to justice. Even if we include in state legislation an obligation for businesses to act in good faith, if franchisees cannot afford the costs of participating in our legal system, it will do them very little immediate good. Our experience reveals that time and again, small businesses cannot afford to pursue their rights through the court system against bigger and better resourced businesses. We would expect this to be the case if a small franchisee has no other avenue for taking actions over a breach of good faith without the assistance of the consumer protection commissioner.

I think when considering the access to justice issue it might be helpful to also consider some of the causes of the breakdown of franchising relationships that we have observed during our dealing with franchisees, and whether the Franchising Bill will create any new avenues to access justice that do not already exist. Among the complaints discussed with our advisers between 1 July 2009 and 8 April 2011 were the following—it is a bit of a list: the lack of promised training; restrictions and interruptions to supply; misleading information about the potential of the sales volume and revenue; lack of accountability for marketing levies; lack of advertising; disagreement over costs being deducted; shrinkage of territory; infringements in relation to disclosure documents and cooling-off periods; leasing and subleasing arrangements; price setting and erosion of margins; and unfulfilled guarantees of minimum revenue. It could be argued that the Franchising Bill could potentially provide grounds for these franchisees to bring action against the franchisors. However, likewise, it could be argued that these issues appear prime facie to relate to misrepresentation, misleading and deceptive conduct, and/or unconscionable conduct, which are already prohibited under the commonwealth Competition and Consumer Act 2010. The real issue for franchisees experiencing conduct-related issues with their franchisors appears to be the cost of pursuing matters through the court system rather than a lack of legislative protections. The SBDC acknowledges the intent of the Franchising Bill to change behaviour.

[2.15 pm]

However, we are of the view that improving access to justice whenever an offence occurs is the higher priority for small business. As an alternative to state-based legislation, the need is for existing provisions of the Franchising Code of Conduct to be supported with resources for the ACCC to prosecute test cases, enforce the outcomes of mediation and impose penalties under the code for breaches of the provisions. Before moving on to some comments on the potential cost implications of the bill and perhaps some thoughts on how a future Small Business Commissioner might go some way towards achieving some of the intent of the bill, I reiterate that the SBDC considers that a potential shortcoming in the Franchising Bill is that its approach is at the centre: it relies on formal, costly proceedings in order to rectify poor franchising conduct. It is our experience

that in most cases this is neither practical nor cost effective for franchisees, particularly mum and dad investors. I am aware that the committee is interested in our views on the potential cost implications of the Franchising Bill in its current form. The most significant financial impact of this bill will fall within the realm of the Commissioner for Consumer Protection in the cost of preparing cases for formal proceedings. I am obviously not in a position to offer an opinion in that respect; however, there may be a future role for the SBDC to receive and investigate complaints about unfair market practices involving franchisors with the establishment of a Small Business Commissioner. This role to some extent would provide a filtering option for the Commissioner for Consumer Protection, with the Small Business Commissioner making recommendations as to the merit of considering selected matters for formal proceedings or identifying emerging trends of behaviour within franchise systems that may form the basis of a test case. Of more significance would be the Small Business Commissioner's role in providing dispute resolution options, ranging from facilitated meetings and preliminary advice through to low-cost timely access to professional mediation services. This service is aimed at resolving the dispute and getting parties back to doing business before the relationship is irreparably damaged. Arguably, the preservation of the business relationship and ongoing operation of the franchisee's business is the most effective means with which to conserve the investment and the livelihood of the business operator, which in our experience is almost invariably at risk when the only recourse for the franchisee is a time-consuming and costly pursuit of the matter through the courts. In terms of a cost implication of the Franchising Bill for a future Small Business Commissioner, it was always expected that a proportion of the complaints received by the commissioner would involve franchising disputes. In the event that the Franchising Bill resulted in a formalised articulation of franchising disputes through the office of the Small Business Commissioner prior to them going before the consumer protection commissioner, I would anticipate additional cost for the SBDC in areas of subsidised mediation services and specialist in-house expertise. As there is no accurate single source of data about the number of franchise disputes in Western Australia and given the likelihood that if the bill is passed, the state would be used to test the provisions of this legislation to an unknown extent, it is difficult to estimate the potential impact on the Small Business Commissioner's resources. However, I would consider the need for an additional $500 000 in the immediate instance would be the likely cost, with an expectation that this would be reviewed as more information on the demand for recourse through the office of the Small Business Commissioner is known. That concludes a sort of summary opening comment. My colleagues and I are happy to take questions and provide further details.

The CHAIRMAN: Thank you very much. You deal with small business of all sorts, of which I understand franchisees are a small but significant number. Do you feel there is a specific problem with franchisees coming forward and complaining versus other small businesses? Do you get that feeling that there is a more specific and targeted problem with the franchisees as opposed to the small business sector as a whole?

Ms Finlayson: My own observations of what we record in terms of statistics are that there is no particularly evident problem in the area of franchising. We deal with around 3 000 business-to-business dispute matters per year in terms of inquiry, not actual intervention in those disputes. As I mentioned, around 30 to 40 would be franchise-related inquiries that could potentially be a dispute-related matter.

The CHAIRMAN: What do you think is the major cause of disputes? Is it a problem of rogue franchisors or franchisors using heavy-handed tactics, misunderstandings between parties, or is it on the other side with maybe franchisees getting in over their head in entering a business deal?

Ms Finlayson: Certainly, the 30 or 40 complaints that we receive a year would comprise a combination of those.

Mr Hasselbacher: Perhaps I can give you some statistics. We tracked some of the disputes that have come our way since 1 July 2009 to 31 March 2011. Roughly, the disputes were broken down to around 32 per cent relating to contractual issues; about 24 per cent in regard to misleading conduct and false and misleading representations; five per cent in regard to the disclosure documentation or the lack thereof; 16 per cent in regard to unconscionable conduct; 11 per cent in regard to termination of the franchise agreement; a further 11 per cent in regard to exclusive dealing; and about three per cent in terms of the transfer of the franchise agreement. It should be noted that this is quite consistent with ACCC figures that have been recently released as well.

The CHAIRMAN: Did you provide that in your submission?

Mr Hasselbacher: Not to that level of detail.

The CHAIRMAN: When we end today, I will ask you for a supplementary submission including that.

Mr Hasselbacher: Absolutely.

Mr W.J. JOHNSTON: I think you said 16 per cent related to unconscionable conduct. What sort of issues were raised in that?

Mr Hasselbacher: I guess there are things in regard to some potential bullying and intimidatory behaviour. These are all alleged; it is only one side of the story. We do not have an investigatory role, so we cannot investigate any further.

Ms Finlayson: We could provide further information.

The CHAIRMAN: What do you do when you get a complaint?

Ms Finlayson: As I said, we are in a difficult situation because our role, primarily, is advisory. Our advisers would run through a combination of approaches. Most typically, as I said, helping a client identify what the core issues of the dispute are. Sometimes we get representations to us that allege unfair behaviour on the part of the franchisor, when in fact it is a lack of understanding, perhaps fear, or a lack of due diligence that the franchisee is responsible for, and the rose-coloured glasses of the franchisee have been removed once they get into the cut and thrust of actual commercial reality of doing business. It will vary. The adviser may go through the franchise agreement and identify for the client what the rights and obligations are as they are articulated in the agreement. Where there are allegations of breaches of the Franchising Code of Conduct that could be perhaps described as unconscionable, the client would be referred to the ACCC and their office of mediation at this point in time.

Mr M.P. MURRAY: In your submission, you estimate that the six franchise-related matters that the ACCC was involved in cost $2 million plus internal resources. Could you expand on that, because it relates to costings further down the road?

Mr Hasselbacher: Certainly, that involves the amount of the costs of going to litigation, which is quite expensive. My understanding is that the ACCC has a range of internal legal advice, but they do then contract out to legal experts to provide a definitive point of view. That charge is not cheap. There are quite a lot of costs involved. It is also the nature of how long an investigation could take. They could take many months, if not years, to fully investigate before a matter could proceed to court. The costs do drag on and accumulate.

Mr P. ABETZ: We have focused thus far on how big the problem is in franchising. The Bothams report stated that the current legislative framework adequately protects the majority of franchising participants from serious misconduct. The letter that Mr Bothams sent to the minister along with his report clearly indicated he was of the view that some urgent action was needed because only the majority were adequately protected, and there was a minority who were getting the short end of the stick in the franchising arrangement. The Ripoll inquiry indicated an unacceptable level; they did not put a figure on it. Would you agree that there is a serious problem in the franchising industry?

Mr Hasselbacher: Not across the industry; I do not believe that is the case. I think there are elements that are undesirable, but certainly the evidence that was presented to the inquiry alluded to misconduct by just a small handful of franchisors. I certainly do not consider it as epidemic.

The CHAIRMAN: Let us explore that a bit, because there have been a lot of inquiries and usually inquiries are brought on when there is a little bit of concern that there is a fire somewhere. The question is: how big is the fire and is it spreading? You were one of the officers, so you sat through all that process.

Mr Hasselbacher: Yes.

The CHAIRMAN: Obviously, a large number of people came to the inquiry and I assume they were mainly franchisees saying that they were hard done by for various reasons. I understand there was a significant number of them. Was there a fire there? Were there systemic problems warranting special legislative remedy at a state level to address the conduct of franchisors in Western Australia?

Mr Hasselbacher: Certainly, while there was, I guess you could say, some smoke, I believe that the remedies that were available under the Trade Practices Act probably covered the vast majority of the issues that were brought to the inquiry's attention. These issues were mostly to do with misleading and deceptive conduct, misrepresentation and unconscionable conduct. There was only a very small handful that potentially were criminal, which was just in the most extreme circumstances. The vast majority I could put down to probably a lack of understanding on the part of the franchisee that they either did not do their due diligence appropriately when they first entered into the agreement or that they did not fully understand their rights and obligations under a franchise agreement and under the federal legislation, so they got themselves into a situation, when really if they were fully informed to begin with, they might not have ended up in such a situation.

The CHAIRMAN: As I understand it, the federal code of conduct—I might be wrong here—requires some kind of disclosure and it surveys potential franchisees on whether they sought legal advice; in other words, trying to make sure that they get expert advice before they enter into a deal that could put in jeopardy all of their assets. I would think that is a big first. Is that happening? Is that helping? Do you do that sort of thing?

Ms Finlayson: Certainly, our advisers who deal with potential franchisees do draw that to their attention. We also run some specialist workshop material as well as our part in trying to inform potential franchisees of the rights and obligations that they need to be aware of.

Mr Hasselbacher: If I can add to that, certainly under the code there is an obligation on the franchisor to provide a written statement—I believe it is even on the first page of the disclosure document—that the prospective franchisee has to understand what they are entering into and that they should go and seek expert legal advice prior to signing; otherwise they can sign off that they understand that obligation, but they have chosen not to pursue that.

[2.30 pm]

The CHAIRMAN: Do many people say "I understand the obligation" and not do it?

Mr Hasselbacher: I am not sure about that. We did not see too many franchise agreements or disclosure documents as part of our inquiry.

Ms Gisbourne: Anecdotally, though, from our advisers I think the answer to that is yes.

The CHAIRMAN: Many say "I understand the obligations", but then decide not to go ahead with it?

Ms Gisbourne: "It is going to cost me $5 000; I am not prepared to spend the money."

The CHAIRMAN: Two things I would like to just discuss with you, especially with your role. One is—I get to that second—how do you make access to courts cheaper and more accessible for small

business? That is clearly a big issue. I think that one thing this bill is trying to do is simplify the process and streamline it. Another one is to know that the franchisees—you deal with small business people—know what they are getting into. One of the issues is that "good faith" as part of this bill is defined with four terms. One of the aims, as I understand it, as part of the proponent of the bill is you describe it in everyday language so both parties know what they are getting into in advance. Would that work for franchisees? Will their understanding of "fair" and "cooperative" be what the courts, or whatever the adjudicator is, interpret them to be? Because there is tensions between cooperation and contracts.

Ms Gisbourne: You are asking an opinion, and in my opinion I doubt that that is the case. The reality is that a lot of people enter a franchise in the same way as they take a commercial lease, thinking that the fair thing is that, "As long as I do the right thing by this, it will be renewed at the end of the term." From their point of view, I would think that was fair and reasonable. From the franchisor's point of view, there might be a series of reasons why they decide to take a different approach and it is quite fair and reasonable from their point of view not to renew. That is a single example, but it is one of the critical examples. There are plenty of incidences where the franchisor is taking a view that is not reasonable, but just something as simple as that—you see again and again people have quite different understandings of it.

Mr W.J. JOHNSTON: Can I just explore that further? The question of what happens at the end of the agreement is quite important. There is a view that some franchisors are not acting fairly in failing to renew an agreement and you said the franchisor might have reasons. If they have reasons, why not have a capacity to test those reasons through a process, just as you do in the industrial tribunals?

Ms Gisbourne: I think fundamentally the principle is it is a franchise agreement: "I am giving you this agreement for five years. I am not giving it to you for life." That is where this real disclosure comes into it, this lack of understanding. I think if people at the very beginning when they enter into a franchise actually worked out their figures—"Within the next five years I have to make my profits and get out"—things would be very different. The example I use in talking to my staff about this is someone who, like ourselves, might have a rental property. "I am renting it out to an excellent tenant. The tenant is doing all the right things. My 18-year-old niece is going to university next year and she wants to use it and I choose to lease it to her." I mean, in this sense there is nothing to lose for the tenant beyond the small costs. There is a great deal more for a small franchisee to lose. I think it is that sort of imbalance that causes so many of the difficulties that we are seeing.

Mr W.J. JOHNSTON: That is exactly what I am saying.

Ms Gisbourne: But what is fair? Where do you draw the line?

Mr W.J. JOHNSTON: Indeed, where do you draw it?

Ms Gisbourne: What is "fair and reasonable"?

Mr W.J. JOHNSTON: That is what I am trying to explore; what do you think is "fair and reasonable"? Do you have a problem with the idea that there is a process to test "fair and reasonable"?

Ms Gisbourne: What it does is leave so much uncertainty for all the parties, including the franchisor and the franchisee.

Mr W.J. JOHNSTON: But how is it more uncertain than what is happening now?

Ms Gisbourne: I guess if I am the franchisor, it is quite certain for me because generally I can make up my mind and I am not defending that by any means, but you start to question how many people would actually want to start setting up franchise businesses on those sort of bases.

Mr P. ABETZ: Can I explore that a little bit further? Justice Rein in the two cases that he has dealt with in the last few years in New South Wales has come to the conclusion that there is a clear

common law obligation to act in good faith in the context of a franchisor–franchisee relationship. I think all the submissions we have received acknowledge that there is a common law obligation. I do not think anyone disagrees with that, if I am not mistaken. So that is a given. Given the fact that that is a common law obligation, I am just unclear as to why the proposed definition, which according to many of the submissions, including yours, is unclear and creates uncertainty, yet there is a common law one that everyone says is undefined and still developing. Why should that be clearer for a franchisee to understand than these four terms that we have? I did a little experiment and I just asked some people who were in business, "If you are required to act according to the four words we use or you are required to act in good faith, what would you understand more clearly?" Every single one of them said, "I am not really sure exactly what 'good faith' is", but everyone understood what that meant. Can you help me understand why you have —

Ms Gisbourne: I guess your question is: why is one any different from the other? What we are suggesting is that we are not sure that it is any different. We are not sure that you are adding to the debate by including those words. Clearly, the people I would talk to and the businesses I would talk to—you are absolutely right—they all have their opinion on what those things means. Whether the opinion is the same is the issue.

If we go back to this question of testing what is fair at the end of contract terms, one of the examples I think we had here with the Botham inquiry, or at least at that time, was that franchisors, 12 months before the end of a contract were requiring some fairly substantial fit-out changes from a franchisee and then did not renew the contract. I do not think there is anybody I have spoken to who has not seen that as not acting in good faith. There are some absolutely clear examples. I think under the new proposals or under what exists, there is not that much difficulty in sorting that out. It is the nuances; it is when we get much closer to, "Well, it is my franchise. I am the franchisor; I can do as I please if I have given you five years." Where is fair and not?

Mr W.J. JOHNSTON: Sure. But is that not really the whole thing?

Ms Gisbourne: It is.

Mr W.J. JOHNSTON: I mean, you take employment law. An employer in Western Australia has a common law right to terminate an employee at any time for any reason on notice. However, the long practice here in Western Australia is that that can be set aside by the courts if it is—I hope I get these right—unjust, unreasonable or unfair. In New South Wales they have a provision that says "unfair in all the circumstances" or "unreasonable"—I forget what it is in New South Wales, but it is—"in all the circumstances". So there is a test. So if you are going to act this way, you have an absolute right to do it, but you can have it tested. Is that not what is being said here?

Ms Gisbourne: The difference with that example, certainly from the point of view of our advisers talking to businesses about how they should deal with their employers is that we can usually give them some very clear guidelines on how they should or should not behave in that case.

Mr W.J. JOHNSTON: Is that not because there is case law that has been developed over 50 years —

Ms Gisbourne: I am not sure, because those guidelines are much more mechanical. They are: if you are going to do something, you must give a warning, you must do this, you must do —

Mr W.J. JOHNSTON: Yes, but those are all as the result of court cases —

Ms Gisbourne: If you can translate it into the more complex circumstances of a franchise business, that might solve our problems, but I am not sure that the test has created the guidelines that we follow or whether someone has just found some mechanism —

Mr W.J. JOHNSTON: Just to explore that industrial thing, all those things—three warnings—are all the results of tribunals making decisions, not because of the written law but the way the tribunal has interpreted it. Is that not what is being said by this bill?

Ms Gisbourne: I guess what we have been saying all along is that that is a long process and that is a process where a series of people are going to argue to and fro. The moment this comes into being enacted, businesses are going to have to start behaving according to something that nobody has determined and that is a fairly invidious situation for the small franchisee who does not have the wherewithal to go and take legal advice. They did not take legal advice originally; they are not going to take legal advice now. Some of them are possibly going to be more staunch in their views about what is "fair and reasonable" and what their rights are and it could come unstuck as a result. It is the uncertainty on the ground that is the biggest issue from our point of view.

The CHAIRMAN: One aspect of what Bill said is that, as I understand it, in industrial law they codified to some extent the common law—the common law and industrial is a bit different—and that is what this is just trying to do. In industrial law, the words that Bill used were rather vague and open to interpretation by the tribunals. That is what you spent your life doing.

Mr W.J. JOHNSTON: Absolutely, kept me very busy.

The CHAIRMAN: Twenty years more. That applies to the common law. As I understand it, if you ask a lawyer what the common law interpretation is, they give you certain criteria that is considered. So I do not see too much of a difference between the common law and this. One of the issues is you have a common law right to act in good faith. How do you get it acted on?

Ms Gisbourne: Exactly.

The CHAIRMAN: I am a big supporter of the common law. I think it is what made the British system of justice what it is, but how do you get it acted on, particularly if you are a small person who in the first place did not want to get legal advice, let alone after something has happened to them? Then when something goes wrong, they might not listen to legal advice. So the question is: is there an inadequacy in the common law definition, or is there a lack of access to action, whatever the definition may be?

Ms Gisbourne: I think it is the latter. I do not really think we need to change the legislation to help the vast majority of franchisees that are having problems. I think we need to give them the opportunity to exercise their rights.

The CHAIRMAN: What would you suggest? A big bucket of money?

Ms Gisbourne: This is the problem. Obviously we have talked about tribunals and our submission talks about tribunals and certainly we have seen the difference of having commercial tenancy–type problems going before SAT and it makes things so much more accessible, and an equivalent role for franchising would be from our point of view, I think, the ideal circumstance. This is a state tribunal and this is still commonwealth law and in our submission we talk about the fact that if you ended up bringing something into state legislation, we would not rather see it move towards a SAT approach than necessarily worry about the good faith. See attached erratum

Mr W.J. JOHNSTON: It was not quite 20 years as a union official; it was a decade. One of the big problems with the industrial commission is you get an order, but the commission cannot enforce its own order, and neither can SAT. So even if you take the dispute to SAT and you get a decision, you still have to go to the civil courts to get it enforced. So you are still going to end up having all the same costs if you go back to the civil courts to get your order enforced.

Ms Gisbourne: I am not a legal expert and the adviser that we have that deals with this is not here, but my understanding is that it is not working in that way with the commercial tenancy issues and that once you have a decision, it is acted on and the costs are very minimal.

The CHAIRMAN: You are suggesting perhaps at either a state or federal level franchisees in particular have access to some sort of low-cost mediation decision making, not just us get around and talk —

Mr W.J. JOHNSTON: Arbitration.

The CHAIRMAN: Arbitration, yes.

Ms Gisbourne: We are talking about two things. Principally, we are talking about access to justice and there are a variety of forms of accessing justice and we should be tackling it at the lowest level, ideally, and building up. We have talked very briefly about the fact that there is a bill in Parliament at the moment proposing the establishment of a Small Business Commissioner. The intention of that commissioner, if it goes through as it stands, is that the commissioner will basically provide preliminary assistance to businesses in dispute, which would be answering questions, providing information and guidance, but also dealing with the respondent party and seeing if at the simplest level without even going to mediation, you can work something out. There is an equivalent model of this in Victoria that has been operating since 2003, and 34 per cent of complaints that come to them are sorted out at that level. Those complaints that do not get sorted out at that level then move to a full mediation process, and they are resolving 80 per cent on average of complaints.

The CHAIRMAN: But is that process —

Ms Gisbourne: They have a private sector mediator; the two parties go for a mediation session. It is subsidised by government. The way that works is certainly not advocating on behalf of one party or the other, but sitting down and coming to a practical resolution of a problem so that the two parties can go back to working together. Because if you end up having something arbitrated or going through the courts and the result is we have sorted it out but the relationship is completely fractured, you have not done anybody any good either. So that is one of the great advantages of the mediation.

The CHAIRMAN: Especially with the tiny nature of the franchise.

Ms Gisbourne: Absolutely.

The CHAIRMAN: By the time you get to the court the house is taken away from them, along with everything else.

[2.45 pm]

Ms Gisbourne: Absolutely. Now, there are two sorts of issues that will be considered by the Small Business Commissioner. The general unfair market practices issues will capture franchising as it is, so with or without anything else going through, the Small Business Development Corporation, if this bill is passed, will be able to assist franchisees, or franchisors in their case, who are in dispute and provide that mediation service.

The CHAIRMAN: Just to clarify that, there is no need to change, if we even could—I cannot remember the status of the bill; it already covers franchisees and franchisors.

Ms Gisbourne: It does.

The CHAIRMAN: Does it include franchisors?

Ms Gisbourne: It includes any small business, and there are small franchisors as well as large.

The CHAIRMAN: What is small?

Ms Gisbourne: We try to look at it not so much in the size of employees. The ABS uses under 20 employees. We tend to use more qualitative definitions—basically, +what you understand a small business to be—something that is owned by one or two or three people who put most of the capital in the business and do most of the management of it.

The CHAIRMAN: Warren Buffett has only about 10 people.

Ms Gisbourne: We would probably find a reason not to include him! The other side of the equation with the Small Business Commissioner is that there are going to be some specific amendments to the commercial tenancy legislation that will allow all retail tenancy issues to come to the commissioner. There is an extra sort of jewel in the model in terms of retail tenancy because we do have that subject-specific legislation and it does articulate into SAT. What is going to happen is that

no retail tenancy issue will be able to go to SAT without the Small Business Commissioner providing a certificate saying that there is a reason why the dispute could not be resolved, or he does not think the dispute could be resolved, or there might be some very immediate reason for a decision to be instantly made. That certificate can include words from the commissioner saying that one or other of these parties did not cooperate very well in mediation, and SAT can look at that and award costs accordingly, if it so chooses. What that has done in Victoria is that it has meant that 99 per cent of people who are asked to come to mediation with the Small Business Commissioner say yes, for fear that if they do not cooperate, they may end up paying costs in their VCAT, which is the equivalent to SAT.

The CHAIRMAN: And the small business development commissioner here has been modelled very much on the Victorian one.

Ms Gisbourne: Very much so. We would expect that there would be no difficulty, I should imagine, in getting retail tenancy issues to the mediation table. It will be a more difficult process with the unfair market practice issues, but, again, as I said, the Small Business Commissioner in Victoria is still fairly influential and his staff fairly persuasive in getting people to see it worth their while to come and participate.

The CHAIRMAN: What about for the SBDC from an administrative perspective? This is a significant change to your functions.

Ms Gisbourne: Very much so.

The CHAIRMAN: I can remember when it was first set up that it basically ran programs for people to get into business, and it ran a regulation-review unit for a long time. So, are you adequately resourced, both finance and skill based, to service the small business development commissioner?

Ms Gisbourne: There will have to be some additional staff and changes to our skill base to do that, and obviously the costs of that are being determined with the government.

The CHAIRMAN: Okay.

Mr P. ABETZ: With the Small Business Commissioner being established, hopefully many franchisor or franchisee-type difficulties will go there and issues will be resolved. But do you not see value, under the provisions of the bill, in the commissioner being able to actually launch prosecutions? Obviously, that happens when the franchisee or franchisor comes to the commissioner and says, "This and this has been going on." The commissioner looks into the situation. Presumably, it has been perhaps dealt with or attempted to be resolved at the small business commission and has not been. But where there are continuing breaches of the Franchising Code of Conduct, do you see value in it actually being able to have teeth to impose a fine? In the case of a small franchisee, whether it is someone working for a franchisor who does cleaning and where the franchise itself is only worth perhaps 20 grand or something like that, generally they just have to walk away; the franchisor can do whatever they like because the franchisees do not have the resources to do anything. We should send a clear message to franchisors that you cannot get away with this because there is a commissioner who will actually take you to court and fine you, and that is a big black mark against you ever trying to sell more franchises again in the future. Do you not see a value in the commissioner having the capacity to launch prosecutions and, I guess, set the benchmark for the industry; and even for franchisees who do the wrong thing by a small franchisor who cannot afford to take action, for the commissioner to take action against the franchisee as an example to the industry that this is unacceptable conduct and will not be tolerated?

Ms Gisbourne: I think there were two parts to that question. One is whether we should have somebody doing that role at all, and the other is whether it should be the Small Business Commissioner.

Mr P. ABETZ: When I said "commissioner", I meant the commissioner under the bill.

Ms Gisbourne: Under the bill?

Mr P. ABETZ: I guess that could be handed to the Small Business Commissioner.

Ms Gisbourne: With that side of it, I would say absolutely not. The role of the Small Business Commissioner is very much low cost, non-regulatory, not decision making—somebody who sits down and works with parties. What we have heard very much from Victoria is that the success of the commissioner has been because the commissioner has not acted as an advocate for small business. Although he has taken on the issues of small business, big businesses can come in and feel that they are going to get a fair say. I think if you gave the Small Business Commissioner a prosecutorial role, it would undermine that model. Whether there is a need for somebody to take on those prosecutions, I guess the question mark in my mind—it is always nice to have those things, but are the problems that we are seeing in the market sufficient to justify that sort of exercise? I have some questions about that. I would prefer to see the small issues being taken by the cleaners and so forth to a tribunal to get heard and to get dealt with. You asked earlier what was the experience of our advisers when a franchising dispute comes in. In talking to those advisers, there is a flurry of contacts between the adviser and the businessperson as they go through their options, have a look at the franchise agreement. You can actually track it in a record system. Generally, to use the words of one of our advisers, the person they are dealing with caves in because they do not have the wherewithal to take it any further, and that is the problem that we see time and time again. There is nowhere for them to take that. I do not think you need somebody to take that case on for them; I think you need somewhere for them to take their case on themselves, in the same way that, with a problem with a commercial tenancy, an individual can go in without a lawyer and get a —

The CHAIRMAN: Let us just explore the problems that franchisees have. Sometimes you have a franchisee that has a small operation, but there are many of them. They might have a similar problem and be able to act collectively against a franchisor. Do you see that many class actions against a franchisor? Do they tend to cooperate if the franchisees work together to resolve common problems?

Ms Gisbourne: No.

Ms Finlayson: We do not have any evidence of it. It may exist, but certainly, in our records of interactions, under those circumstances there is no evidence of it.

The CHAIRMAN: So there is not a process of collective action countervailing the influence of the franchisor.

Ms Finlayson: I have seen no evidence of it.

Ms Gisbourne: And where we have seen that sort of thing occurring in other areas of industry—again, we talk about commercial tenancy lots of times—tenants are usually very frightened to come together because they might be penalised in one way or another.

The CHAIRMAN: Mr Abetz asked you about the commissioner. What do you think about the commissioner for consumer affairs taking on that role as the head point to take action against someone?

Ms Gisbourne: If the decision is made for that role to exist, the commissioner for consumer affairs would seem to be the most appropriate person within government at this time. Certainly, they have some very similar roles from a business to consumer point of view. I guess the only hesitancy I see is that you could end up with the commissioner's office dealing with one business that has a complaint against them with a consumer, and it is a complaint against a franchisor, but presumably they would work that out within their own systems.

The CHAIRMAN: We have a code of conduct that has been devised over many years, and the latest rendition of it is in 2010. Then we have the ACL that is new. The real question is: do you need more legal basis, if you are going to take action on helping a small franchisee, to take action

on it—that is, a more defined, more refined and explicit good-faith clause? Do you need a specific, more targeted, empowered advocate on behalf of these franchisees? Is that what we need?

Ms Gisbourne: I think it is the latter more so than the former. You need the teeth behind the legislation that we currently have. Certainly, as we mentioned, the ACCC is heavily criticised by small business, and probably wrongly so, because it does not consider it to be its role. We can send time and time again a franchisee with problems to the ACCC and they will be told, "Go and see a lawyer; take it through the courts." It is access to justice that is the problem, not the justice itself.

Mr Hasselbacher: Can I just add to that? In regard to the latest changes to the Franchising Code, the last review of the code addressed, in my eyes—in my opinion—a lot of those end-of-agreement issues in terms of better disclosure up-front and what the arrangements are when you come to the end of an agreement. It certainly provided a notification period before they can renew or decide not to renew. So, I think in that regard it has addressed a lot of those end-of-agreement issues that were around at the time of the Botham inquiry.

The CHAIRMAN: The code has a mandatory mediation, as I understand it. Maybe you could describe how the code operates, not what it says so much. But if I were a new franchisee, I would get legal advice. The code requires me to have information of a certain type, does it not? If I am not getting legal advice, I would tell them that I know I should, but I do not want to, and so on and so forth. Does it provide a mechanism to more fully inform the franchisee, assuming the franchisor would have lawyers writing up the agreement in the first place, so that they have access, you would hope? As I understand it, it is pushing 50 per cent of the franchisees that the ACCC surveys that say, "I know I should, but I don't get legal advice before I enter into a contract." If I am buying a vacuum cleaner and the little franchisor details cars, okay; fair enough. But if I am putting my house in hock for this business, that is a big weakness. You do not know what your rights are in the first place.

Mr Hasselbacher: I am not sure whether I can agree with that, because I think under the code it is quite specific in terms of complaints-handling procedures. That is mandatory under the code, so the franchisor needs to set that out, and that is backed up by the mediation process, which is mandatory. So you do not have to go through the federal Office of the Franchising Mediation Adviser; you can choose your own mediator. That could be set out in the disclosure —

The CHAIRMAN: Have you ever advised clients or tracked clients through that process—a mediation through the code of conduct?

Mr Hasselbacher: Certainly, the advice that I have received is that we tend to refer them to the ACCC and, to my understanding, they would then refer them on to the OFMA if they believe that there is, I guess, a legitimate claim there. But, as has been mentioned, we do not get involved in the dispute once it actually goes into mediation or further.

Ms Gisbourne: The complaint we receive from time to time from business is that it is a mandatory mediation process. So if I asked a franchisor to participate in mediation, they must go and participate, and we might mediate an outcome, but if, at the end of that, they do not actually follow through on that, the only way you are going to pursue that is back through the legal system.

The CHAIRMAN: So there is an important issue with these mediations.

Ms Gisbourne: We certainly have small businesses complaining in those sorts of respects, but the idea of mediation is that, ideally, you do not want to have to enforce it. If both parties do not come to the table because they see some advantage in it for each of them, then the mediation is somewhat pointless, and that is when mandatory mediation is, I guess, the question.

The CHAIRMAN: Do you see the Small Business Commissioner duplicating this or improving this mediation process?

Ms Gisbourne: Just in speaking to the ACCC themselves, they have said that in Victoria the vast majority of franchising mediation goes through the Victorian Small Business Commissioner. It is much cheaper. It is more like $200 per party compared with $1 500, and it is much more hands on. We see ourselves doing very much. We are going to have case officers supporting and managing the entire process with small business, and that, I think, is what a lot of small businesses need. When you deal with the sorts of people who go into some of these franchise systems, they are doing it because they do not feel that they have the wherewithal necessarily to start from scratch, and they are very much in need of that hand-holding through most stages of it, and certainly when they are starting to be in dispute with the larger party.

[3.00 pm]

Mr P. ABETZ: Some of the discussion has focused very much around end-of-term issues. The bulk of the things that people have come to me with are not end-of-term things but things that occur during the life of the franchise agreement. For example, one of the franchises recently went into receivership. The franchisees were of the view, knowing how much they were paying for a marketing levy, that it was not being spent on marketing. They sought an audit, which they are entitled to under the code, and they got a one-line letter from the franchisor's accountant saying that it was all in order and that was it. Where do those franchisees go with that? They took it up with the ACCC. The ACCC refused to deal with the situation. Because marketing was not happening, their businesses were going downhill. They did not have the resources to deal with it.

Ms Gisbourne: This is the crux of the question.

Mr P. ABETZ: Surely there is value in the Commissioner for Consumer Protection having the capacity under this proposed bill to enforce the law. Those franchisees could have gone there and said, "We don't believe he is doing the right thing. Does this qualify as an audit?" The commissioner could then write to the franchisor and say, "If you do not set this right, we will prosecute you; we will give you 30 days or 60 days or whatever" and put them on notice. Somebody with teeth can actually enforce the code. At the moment nothing happens and that is what frustrates so many people.

Ms Gisbourne: I quite agree. Our solution to this is that a tribunal process would be the best way to handle that. I do not imagine, from everything I have heard from the Commissioner for Consumer Protection—I have listened to part of this process—that she or whoever that person ended up being would see themselves going through hundreds and hundreds of those sorts of issues a year if they were coming up. My impression was that it would become very much like the ACCC and there would be a number of things they would take forward but they would be a very small number. In summary, that is our concern with this. It is very selective and is likely to only touch the very small end of this problem rather than helping the bulk of problems that people are facing day in and day out and that they cave in on.

The CHAIRMAN: Thank you for your evidence before the committee. There are a number of questions that we have not been able to ask you today. Would you be willing to answer these further questions?

Ms Gisbourne: Yes.

The CHAIRMAN: 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. Thank you very much.

Hearing concluded at 3.02 pm