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LAWYERS* & MEDIATORS

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Principal Research Officer,
Standing Committee on Economics and Industry
Western Australia Legislative Assembly

By Email laeisc@parliament.wa.gov.au

Set out below are some brief comments on the proposals.

By way of Background:

- I was the ACCC Commissioner responsible at the time for the introduction of the Franchising Code;;
- I have been involved in advising on franchising matters;
- I am on the Office of the Franchising Mediator Advisory Panel and in that capacity have taken part in a large number of franchise mediations;
- I have been actively involved in seeking ways for parties to be able to inexpensively and quickly resolve disputes;
- I was a panel member reporting to Minister Emerson in February 2010 on "Strengthening statutory Unconscionable Conduct and the Franchising Code of Conduct;
- I am a member of the Law Council of Australia's Competition and Consumer Commission Committee and have been involved in the preparation of their response which fully I support. In particular, I support the concept of having only one regulatory regime effective throughout Australia.

I respectfully make following submissions:

1. The unconscionability provisions set out in section 22 of the Australian Consumer Law combined with the introduction of civil penalties, the proposed introduction of new interpretive provisions, the more interventionist approaches of the courts and greater activity by the ACCC and ASIC in utilising these provisions, will not only bring greater focus on these provisions and their utility but also shift the attitudes of both

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- franchisors and their advisors as to the obligations of franchisors to their franchisees providing greater scope for relief for franchisees;
2. Over time these changes will be reflected in the drafting of franchise agreements to enhance the rights of franchisees;
 3. In mediations, franchisors (and their advisors) will be less certain of their position and will increasingly need to take into account the real possibility that they might lose in court or face investigation and possibly action from the regulator;
 4. The unconscionability provisions apply to all business sectors not just franchising. Care needs to be taken in introducing legislative provisions that apply only to certain sectors in the economy and not offer the same benefits to other sectors. For example a small business may compete with a franchise chain but because it is not a franchisee, would not be able to take advantage of the "special" franchise legislation even though it may suffer similar disabilities; and,
 5. There is need to consider enhancing the ability for franchisors and franchisees to have available, over and above dispute resolution rights in the Code, mechanisms for early dispute resolution. You will be aware of the work of the Small Business Commissioner in Victoria. Other approaches might include the franchisor funding, under the franchise agreement, an *independent* dispute resolution panel. IAG did, and I believe still does, operate such a panel for disputes between it and its repairers.

I hope the above may be of assistance to the Committee.

Sincerely,



David Lieberman