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The Chairman
Economics and Industry Standing Committee
Legislative Assembly
Parliament House
PERTH WA 6000

By Facsimile: 9222 7804

28 January 2011

Dear Chairman

Submissions regarding Franchising Bill 2010

I submit, in response to the Parliamentary Committee's invitation to submit to it a submission as part of its review of the *Franchising Bill 2010*, that:

1. The *Franchising Bill 2010* proposes a new level of regulation over franchising in Western Australia with "extra territorial" application.
2. With respect, if the Bill is passed into legislation it will add an unnecessary and most likely unworkable layer of regulation to franchising in Western Australia.
3. Franchising is 1 of the most regulated areas of commerce in Australia. This is established by recognising that the Commonwealth Government has legislated under the *Trade Practices Act 1974*, now incorporated into the *Australian Consumer Law (ACL)*, 4 mandatory codes of conduct 1 of which, and the only 1 that covers an entire industry segment, is the Franchising Code of Conduct (**Code**).
4. The Code is supported by many other provisions of the ACL that apply to participants franchising including prohibitions against unconscionable conduct and misleading and deceptive conduct.
5. Both of those concepts are supported in turn by volumes of legal jurisprudence including decided cases and learned writing.
6. The Code has been continually amended and was the subject of a recent Commonwealth Government enquiry and comprehensive report; "Opportunity not Opportunism: Improving Conduct in Australian Franchising" (**Report**).

7. I consider the relevance of proposed new law first against a simple question. Why? Or, in other words: what evil is the law aimed at preventing or what good will it introduce? Whilst this may not be accepted as the only test it perhaps gives the reader a conceptual basis for this submission.
8. I have been involved franchising as an advisor, including drafting and reviewing many franchise agreements and avoiding and resolving disputes, for over 10 years in various states including Western Australia on behalf of Franchisees and Franchisors.
9. With respect to Mr Abetz, I cannot determine from the Bill or EM 162 any plausible reason for the Bill, particularly given that the Western Australian Government supports the ACL as law of Western Australia which applies to franchise participants.
10. In the Bill:
 - (a) the definition of "Franchising Code of Conduct" seeks to make the Code a law of Western Australia. Why? The Code is a law of the Commonwealth of Australia with application in Western Australia. EM 162 at clause 7 says that this is required to "close any potential gaps in the constitutional coverage of the Commonwealth Code." The apparent "gaps" are not described as anything but "potential". There is no requirement for this definition and the apparent reason for it is not sustainable;
 - (b) the definition of "renew" appears to mean that each "WA Franchise Agreement" (which is an agreement that "relates to the conduct of a business in, or partly in, Western Australia") must be capable of renewal. This proposition attacks the parties rights of freedom to choose to contract and their contractual terms specifically about when their obligations to the other party will conclude. It does not consider the rights of various third parties that are affected by the conduct of a business in, or partly in, Western Australia. For example: landlords, tenants, financiers, suppliers. If enacted it will move Western Australia outside the law as it applies in Australia under the Code and the ACL. The Report at paragraph 6.85 concludes a discussion relevant to this proposed provision. It states (in part):

"The committee is of the view that franchisors should be entitled to decline to renew franchise agreements on expiration if that is their choice. The committee therefore does not support an automatic right to renewal or the requirement for good cause to be shown for not renewing a franchise agreement. It is not the role of the law to force unwilling parties to enter into any commercial arrangement, including new franchise agreements. . ."

The Bill also ignores the fact that the price paid by Franchisees for franchises is obviously calculated according to the term of the agreement. What price a "never ending agreement";

- (c) clause 6 refers to the Act applying: "as far as possible" to various conduct anywhere in Australia and outside of Australia. The reference to: "as far as possible" could mean "not at all". If it could be "not at all" why have the "law". Has any consideration been given to the sovereignty of places outside of Australia. Has any consideration been given to a legal challenge to the application of this law to Australia outside of WA or even the susceptibility to it being unconstitutional under section 109 of the Australian Constitution in light of the Code. For ease of reference the section states:

"109 Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid";

- (d) the definition of "good faith" does no more than introduce legislative uncertainty. What do the terms "fairly, honestly, reasonably and cooperatively" mean at law or in fact. Proposing to define the term of "good faith", which might not be amenable to a concise legal definition, with 4 words of equally imprecise meaning does not serve any purpose. Therefore, why do it? Section 23A of the Code essentially codifies the common law requirements of good faith into all franchise dealings. Attempting to define "good faith" by 4 notions or norms of behaviour, 1 of which, honesty, is a requirement in any dealing, could fetter in Western Australia the application of norms established by the common law as part of the development of what is meant by and what is required by "good faith". If the legislature decides to enact the Bill, with respect, the resulting Act would benefit by allowing the definition of "good faith" to be decided by the common law. For example, it could define "good faith" to be given the meaning of the common law, from time to time, of the States and Territories (from section 23A of the Code). EM 162 refers to *JF Keir Pty Ltd v Priority Management Systems Pty Ltd (Administrators Appointed)* [2007] NSWSC 789. When describing "good faith", that case refers to matters other than those behaviours proposed as the definition of "good faith" in the Bill. This illustrates the restriction that attempting to define "good faith" could have on its meaning and, therefore, thwart, what appears to be the protective intention of that aspect of the Bill (even though its apparent intention does not improve the concept of mandatory renewal which is unsupportable). The cases referred to in *JF Keir, Burger King v Hungry Jack's Pty Ltd* [2001] NSWCA 187 and *Far Horizons Pty Ltd v McDonalds Australia Ltd* [2000] VSC 310 held that franchise agreements were subject to a term of good faith and fair dealing. Read with section 23A of the Code what does the Bill add to the law applicable to franchising in this regard?
- (e) the concept of a "renewal order" in essence allows the Court to grant an injunction compelling a Franchisor to renew the franchise agreement; even over the Franchisor's objection. I have above discussed the concept of "renewal". However, if the legislature decides to enact the Bill it should allow the same rights proposed by the Bill to both the Franchisor and the Franchisee particularly because the Bill proposes that they both act in

good faith (as does the common law and by implication section 23A of the Code). Compelling people into legal contracts is contrary to the accepted notions of freedom to contract which is a foundational principle of our market economy. The proposal should not be supported. Also, compelling 1 person to contract with another who cannot be compelled to contract is likely to make the contract unworkable.

11. With respect, the Bill will not correct or meet any evil or substantially enhance any person's rights. It is redundant considering the Code and the ACL. Its enactment will not benefit Western Australia or Western Australian society and is likely to achieve little more than to provide an unnecessary layer of regulation which will further complicate the regulatory landscape of franchising.

Yours sincerely

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John F Park

