



20 January 2011

Dr Mike Nahan MLA
Chairman
Economics and Industry Committee
Legislative Assembly
Parliament House
PERTH WA 6000

By email: laeisc@parliament.wa.gov.au

Dear Dr Nahan,

Inquiry into the Franchising Bill 2010

I refer to the *Franchising Bill 2010*, introduced into the Legislative Assembly on 13 October 2010 by Mr Peter Abetz MLA and which has been referred to the Economics and Industry Committee of the Legislative Assembly for consideration.

The Shopping Centre Council of Australia urges the Committee not to support this Bill. Passage of the Bill would be the first step on the road to fragmentation of the national regulation of this important industry. The Bill, if passed, would also inevitably lead to companies choosing other States over Western Australia when it comes to decisions about franchising their operations.

We believe it would be a retrograde step to partially regulate franchises in Western Australia, given the present national uniform regulation of franchising through the *Franchising Code of Conduct*, made with the authority of the *Competition and Consumer Act*. Committee members would be aware that national retailers and national retail property owners in Australia suffer from the costly inefficiencies of having eight separate systems of regulation of retail leasing around Australia. State and Territory Governments, through the Small Business Ministerial Council, are now grappling with measures to harmonise retail tenancy legislation. This is part of the 'seamless economy' initiative being pursued by the Council of Australian Governments, which includes Western Australia, with the objective of achieving greater productivity and reduce costly regulatory burdens on business caused by disparate state and territory legislation. At a time when all Australian governments are seeking to achieve greater regulatory efficiency, it would be illogical and counterproductive for Western Australia (or any other State) to introduce legislation that conflicts with, and even attempts to override, Federal regulation.

Until now franchising in Australia has avoided these mistakes by having uniform national regulation. The *Inquiry into the Operation of Franchise Businesses in Western Australia*, which reported to the WA Minister for Small Business in April 2008, recognised this when it concluded: "Given the importance of the franchising business model to the national economy, and the fact that franchise systems operate across state borders, the Inquiry does not recommend that changes be made to franchising regulation on an individual state basis." (p.45)

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If the Bill proposed by Mr Abetz was passed by the Western Australian Parliament it will be the first stage in the unravelling of national regulation of franchising. If other States and Territories were also to take this step - and you will be aware that there are similar developments in South Australia - it is not fanciful to imagine that we will one day have, in addition to the *Franchising Code of Conduct*, eight other pieces of franchising regulation around Australia. This would mean that the franchising industry would face the same costs and inefficiencies that currently bedevil the retail tenancy industry.

Nor is there any justification for this Bill. The *Franchising Code of Conduct* has been extensively reviewed in recent years. The disclosure provisions of the code were reviewed by the then Federal Government in 2006 and changes were introduced in 2008. Also in 2008 a wide-ranging review of the code was undertaken by a Federal Joint Parliamentary Committee and extensive changes came into effect in July 2010. The then Federal Minister for Small Business noted then that these changes to the code were "the most sweeping reform of the *Franchising Code of Conduct* since its inception." The fact that the present Federal Government has given a commitment that there will be no further changes to the code for three years is simply a recognition that, after several years of inquiry and examination, the sector needs a period of legislative stability to ensure that businesses can be planned with some certainty and confidence. A three year period is also necessary to evaluate the effectiveness or otherwise of the changes that have recently been made.

We are also concerned with aspects of Mr Abetz's Bill which would substantially overturn the fundamentals of contract law in Western Australia. The introduction of a general duty of 'good faith', defined in a much broader fashion than courts have previously done, will put the conduct of many business affairs in the hands of the judiciary. This will enable courts to force parties to contract with each other on terms decided by the courts, including on terms which contradict those agreed by the parties in their initial franchise agreement. The notion of a general duty of 'good faith' in commercial dealings, including in franchising, was considered in 2008 by the Senate Economics Committee in its examination of the need, scope and content of a definition of unconscionable conduct in the (then) *Trade Practices Act*. This was expressly rejected by the Committee.

There are other aspects of Mr Abetz's Bill which would cause problems in Western Australia. The Bill appears to create a new position of Commissioner (or to enlarge the responsibilities of the Commissioner for Consumer Affairs) and this would involve a substantial increase in staffing and resources. This would be a direct cost to taxpayers. This is despite the fact that this new office or new role would be duplicating the responsibilities of the Australian Competition and Consumer Commission, which has an office in Perth.

The Bill is also retrospective in operation and would apply to existing franchising agreements and not simply to agreements entered into on or after the date of operation of the Bill. It would be grossly unfair to parties who have entered into a contract for the terms of that contract, and the basis on which the contract was negotiated, to be changed retrospectively by the Parliament. Parliaments have generally rejected retrospective laws.

If the Bill became law it is naïve to believe that franchisors would not take into account the increased risk of doing business in Western Australia when making decisions about franchising. This would result in fewer franchises being granted in Western Australia and/or franchisors seeking an increased return from the franchise to compensate for the increased risks they now face. This would therefore be to the detriment of retailing in Western Australia and, ultimately, detrimental for Western Australian consumers.

For all of these reasons we urge you to recommend that Parliament should not pass the *Franchising Bill 2010*.

In making this recommendation we do not suggest that the Western Australian Government, or the Western Australian Parliament, should not have an interest in the operation of the franchising industry in Western Australia. It is entirely proper that the State should, for example, review the operation of the industry as it did in the 2008 *Inquiry into the Operation of Franchise Businesses in Western Australia*. Similarly it is entirely proper for Parliamentary Committees, such as the Economics and Industry Committee, to conduct similar inquiries. There are plenty of opportunities (through forums such as the Council of Australian Governments, the Small Business Ministerial Council and relevant Federal Parliamentary inquiries) for the results of such reviews and inquiries to be fed into future considerations of the operation and application of the *Franchising Code of Conduct*. This is entirely consistent with the operation of a uniform national system of regulation. Indeed it is probably fair to say that it was agitation in some States, including in Western Australia, which led to the most recent changes to the *Franchising Code of Conduct*.

We would be very happy to expand on any aspect of this submission. I can be contacted on

The Shopping Centre Council of Australia represents the major owners and managers of shopping centres in Australia. Our members are: AMP Capital Investors, Brookfield Multiplex, Centro Properties Group, Charter Hall Retail REIT, Colonial First State Property, Dexus Property Group, Eureka Funds Management, GPT Group, ISPT, Jen Retail Properties, Jones Lang LaSalle, Lend Lease Retail, McConaghy Group, McConaghy Properties, Mirvac, Perron Group, Precision Group, QIC, Savills, Stockland and the Westfield Group.

Yours sincerely,



Milton Cockburn
Executive Director