

27 April 2011

Ms Kristy Bryden
The Economics and Industry Standing Committee
Western Australia Legislative Assembly
Parliament House
PERTH WA 6000

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

Dear Ms Bryden

We refer to your letter to Mr William Keane dated 7 April 2011. The Competition and Consumer Committee of the Business Law Section of the Law Council of Australia (**Law Council of Australia**) has prepared responses to the questions on notice in your letter and its response is set out below. For ease of reference, we have reproduced each of your questions in bold and provided the responses immediately under each question.

Questions on Notice

- 1. The Committee has heard the argument that the Franchising Code of Conduct was introduced to create uniformity within the franchising industry throughout Australia and that as the introduction of this Bill will break that uniformity, it should be considered to be inconsistent with the Code. Can the Law Council comment on that argument?**

The Bill is inconsistent with the purpose and function of the Code as a mandatory code under the *Trade Practices Act 1974* (Cth) (**TPA**) (now the *Competition and Consumer Act 2010* (Cth) (**CCA**). The Code and CCA are intended to provide a single, nationally consistent regime.

The introduction of a distinct State legislative standard applying to franchise businesses (in addition to the existing framework of the Code and CCA) derogates from the national consistency that is an inherent attribute and benefit of a national mandatory code under the CCA.

- 2. On page 4 of your submission you state that the Bill will make it possible for franchisors to be simultaneously subject to private proceedings, and proceedings commenced by the ACCC and the Commissioner for Consumer Protection.**

Can you provide an example of an action for which this scenario may occur and can you offer any suggestions on how the Bill can be redrafted to prevent such an occurrence?

There are many scenarios that could give rise to simultaneous private proceedings, proceedings commenced by the ACCC and the Commissioner for Consumer Protection. For example:

A franchisor promotes franchise businesses throughout Australia that it knows are unlikely to succeed, with the intention of deriving revenue from franchise churn and the supply of goods by the franchisor at inflated prices.

If the Bill is passed:

- franchisees could commence private proceedings alleging unconscionable conduct, misleading or deceptive conduct and failure to act in good faith;
- the ACCC could commence proceedings seeking (among other orders) pecuniary penalties for unconscionable conduct; and
- the Commissioner for Consumer Protection could commence proceedings seeking (among other orders) pecuniary penalties for failure to act in good faith.

The Law Council of Australia believes that it is not appropriate for the Council to suggest drafting changes in relation to the Bill and would prefer to limit its comments to the fundamental problems with the Bill. These problems were identified and discussed in the submission provided on 25 January 2011.

3 Are there deficiencies in the current Commonwealth legislative framework governing the franchising industry? If so, in what area?

The Law Council is not in a position to comment on the current framework in the context of this inquiry. However, the Council has previously provided submissions in relation to the legislative framework governing the franchising industry. Those submissions include the following:

13 October 2008 – Inquiry into the Franchising Code of Conduct

7 March 2000 – Review of the Franchising Code of Conduct

29 April 1998 Draft Franchising Code of Conduct

We would be happy to provide copies of those submissions if required.

4. The Committee has heard concerns that Section 6 of the Bill is not explicit enough and may be misconstrued. For example, that the interstate franchisee of a WA based franchisor would be subject to the Bill. Could you comment on that?

The Law Council of Australia believes that it should limit its comments to the fundamental problems with the Bill and that it would not be appropriate for the Council to provide an interpretive analysis of section 6 of the Bill.

5. Some opponents of the Bill maintain that section 14, on redress orders, create an automatic or de facto right of renewal to a franchisee. How does the Council interpret this section? Is the ability for the courts to grant a renewal order problematic in terms of the freedom to contract?

The Law Council of Australia believes that it should limit its comments to the fundamental problems with the Bill and that it would not be appropriate for the Council to provide an interpretive analysis of section 14 of the Bill.

6. **The Committee has heard concerns that section 14(4) could be interpreted as making the Bill retrospective. Is there anything in the Bill that would make it retrospective? Is it problematic that the Bill does not specify that it is not retrospective?**

The Law Council's response to question 5 is also applicable to question 6.

7. **If the Good Faith clause was removed from the Bill does the Council see any problems with a provision in the Bill to have pecuniary penalties for breaches of the franchising Code of Conduct?**

Yes. There is currently an appropriate division of responsibility between the Code and the CCA. The Code is well adapted to prescribing processes and procedures to ensure that franchisees are appropriately informed of relevant information. The relevant provisions of the CCA are well adapted to prohibiting and responding to conduct that is harmful to consumers and the fair conduct of trade and commerce in Australia (including franchise businesses). The CCA already provides for pecuniary penalties in relation to particular contraventions.

Pecuniary penalties for all Code breaches would not be a proportionate response to what appears to be an overstated problem of non-compliance with the Code. As the ACCC's submission to the Parliamentary Joint Committee on Corporations and Financial Services Inquiry into Franchising Code of Conduct of September 2008 stated:

"When a franchise fails to live up to the franchisees' expectations, the perception sometimes is that this failure was caused by unfair or unreasonable conduct by the franchisor. However, an examination of franchising-related complaints received by the ACCC indicates that few franchise systems receive complaints from more than one or two franchisees. This suggests that there is no widespread misconduct regarding the code or the Act by most franchisors ..."

As that submission demonstrated in some detail, the majority of complaints in relation to franchise businesses appear to have arisen from conduct that may contravene the consumer protection and unconscionable conduct provisions of the CCA¹. Pecuniary penalties are already available for conduct that merits the application of such a remedy.

Against that background, the case for introducing penalties for the more procedural or disclosure based provisions of the Code has not been made out.

Yours sincerely



Bill Grant
Secretary-General

¹ See figure 2 on page 10 of the ACCC Submission dated September 2008