

**Government Response
to the
Western Australian Legislative Assembly's
Economics and Industry Standing Committee**

Report No.7 – Inquiry into the Franchising Bill 2010

In reference to the above report by the Economics and Industry Standing Committee ("the Committee") tabled in Parliament on 23 June 2011, the Western Australian Government ("the Government") provides the following response to the Committee's recommendations.

The Government welcomes the findings and the recommendations in the Committee's report. The Inquiry was comprehensive and considered a large array of issues.

The Government appreciates the importance of the franchising sector to the State's economy and acknowledges that fairness in franchise arrangements continues to be an issue causing personal hardship in some individual cases and reputational harm overall.

The Committee report provides a compelling case as to why the Franchising Bill 2010 should not be introduced at this time. Some of the findings relevant to this recommendation include:

- Franchising is most appropriately and usefully regulated at the Commonwealth level and therefore there must be compelling reasons to depart from that regulatory system by introducing state-based legislation;
- Evidence heard and conclusions drawn from previous inquiries, and recent data provided by the Australian Competition and Consumer Commission ("ACCC") and the Small Business Development Corporation, indicates that incidences of misconduct – while serious – are not widespread in Western Australia;
- Recent amendments to the Commonwealth *Competition and Consumer Act 2010* (including the Australian Consumer Law) that have come into effect in 2010 and 2011 should significantly improve the effectiveness and enforcement capabilities of the ACCC;
- The full suite of amendments to the Franchising Code of Conduct and the *Competition and Consumer Act 2010* address many of the problems cited in earlier State and Commonwealth inquiries, with a view to lifting the standard of conduct in the franchising sector; and
- Given the significance of these amendments, which are due to be reviewed in 2013 (i.e. in less than 18 months time), the Committee was not convinced that the Franchising Bill 2010 is an appropriate measure at this time.

The Government agrees with the Committee's conclusion that the Franchising Bill 2010 is unlikely to deliver on its overall objective of improving conduct in franchising in Western Australia. This is mainly due to remedies being dependent on court-based litigation, which tends to be expensive and out of the reach of most franchisees.

Furthermore, it is the Government's view that the Franchising Bill 2010 is likely to increase compliance costs, uncertainty and risks for franchising participants in this State and lead to franchise agreements becoming more expensive to enter into and renew, among other unintended consequences.

The Government fully supports the primary recommendation of the Committee that the Franchising Bill 2010 be opposed. A formal response to each of the Committee's recommendation is at Attachment A.

The Government recognises that affordable and efficient access to justice continues to be a problem for many small businesses in dispute with other businesses, as formal court procedures are generally too expensive, time consuming, complex and/or intimidating. This is why we have recently passed legislation to establish Western Australia's first Small Business Commissioner, whose role it will be to reduce the vulnerability of the small business sector to unfair market practices. Specifically, the Small Business Commissioner will be able to investigate small business complaints about unfair market practices and provide assistance to resolve disputes through a low-cost, non-litigious mediation service.

The Committee itself acknowledged that "franchising sector participants would derive significant benefit from improved access to justice via non-litigious means", and identified the Small Business Commissioner as a potential avenue to provide such assistance (pg.89).

While the Government supports the principles of fairness in franchising and is committed to ensuring small businesses involved in the sector are adequately protected against the unfair market practices of other businesses, there is insufficient evidence at this time of ongoing or widespread patterns of rogue behaviour to justify the introduction of separate, State-based regulation of franchising conduct. And where problems do exist, solutions should be sought nationally rather than via fragmented and disjointed state-by-state reforms.

To this end, the Government is pursuing a dialogue with the Federal Minister for Small Business and State and Territory counterparts on this matter. Current indications are that a meeting of Small Business Ministers will be convened later this year and the issue of franchising regulation will be an agenda item.

ATTACHMENT A

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In reference to the above report by the Economics and Industry Standing Committee ("the Committee") tabled in Parliament on 23 June 2011, the Western Australian Government ("the Government") provides the following response to the Committee's recommendations.

Recommendation 1:

The Committee recommends that the Franchising Bill 2010 be opposed.

The Government fully supports the primary recommendation of the Committee that the Franchising Bill 2010 be opposed.

The Committee report provides a compelling case as to why the Franchising Bill 2010 should not be introduced at this time. Some of the findings relevant to this recommendation include:

- Franchising is most appropriately and usefully regulated at the Commonwealth level and therefore there must be compelling reasons to depart from that regulatory system by introducing state-based legislation;
- Evidence heard and conclusions drawn from previous inquiries, and recent data provided by the Australian Competition and Consumer Commission ("ACCC") and the Small Business Development Corporation, indicates that incidences of misconduct – while serious – are not widespread in Western Australia;
- Recent amendments to the Commonwealth *Competition and Consumer Act 2010* (including the Australian Consumer Law) that have come into effect in 2010 and 2011 should significantly improve the effectiveness and enforcement capabilities of the ACCC;
- The full suite of amendments to the Franchising Code of Conduct and the *Competition and Consumer Act 2010* address many of the problems cited in earlier State and Commonwealth inquiries, with a view to lifting the standard of conduct in the franchising sector; and

Given the significance of these amendments, which are due to be reviewed in 2013 (i.e. in less than 18 months time), the Committee was not convinced that the Franchising Bill 2010 is an appropriate measure at this time.

The Government supports the principles of fairness in franchising and is committed to ensuring small businesses involved in the sector are adequately protected against the unfair market practices of other businesses.

The Government shares the Committee's conclusion that the Franchising Bill 2010 as it is currently drafted is unlikely to deliver on its overall objective of improving conduct in franchising in Western Australia. Significant amendments to the Franchising Bill 2010 are therefore required to minimise compliance costs, uncertainties and risks for franchising participants in this State, among other unintended consequences.

Recommendation 2:

The Committee recommends that, if the Franchising Bill 2010 is to proceed, clause 4(1) should be amended to explicitly remove any ambiguity as to whether, and to what extent, the Bill is intended to have extra-territorial application.

The Government supports this recommendation to remove any ambiguity regarding the extra-territorial application of the Franchising Bill 2010.

Currently, the Franchising Bill 2010 so far as possible would apply to acts, transactions and matters done, entered into or occurring outside of Western Australia that relate to "the conduct of a business in, or partly in, Western Australia" (as defined by "WA franchise agreement" under the legislation).

In the Government's opinion, this provision has the potential to cause confusion about which agreements are covered by the legislation and which aren't, and could lead to practical problems about which jurisdiction should hear a particular dispute. This could also increase costs to the State in investigating and hearing matters that could have principally taken place elsewhere.

This provision may also cause franchisors based in other states to be reluctant to enter into franchise agreements with franchisees in Western Australia as they would have to comply with the additional obligations set out under the proposed WA Franchising Code of Conduct. This is likely to add costs and compliance requirements on those franchisors that operate in Western Australia and other jurisdictions, which in turn is likely to result in these additional costs being passed onto franchisees in this State.

Amending this provision to remove any unintended extra-territorial application as a result of how courts may determine "the conduct of a business in, or partly in, Western Australia" will make clear the reach of the Franchising Bill 2010, and is supported by the Government.

Recommendation 3:

The Committee recommends that, if the Franchising Bill 2010 is to proceed, clause 4 should be amended to stipulate that the Bill does not apply to agreements that are excluded under sections 5(3)(a) and (b) of the Franchising Code of Conduct.

The Government supports this recommendation to remove any ambiguity regarding the application of the Franchising Bill 2010 to agreements excluded under the Franchising Code of Conduct.

Recommendation 4:

The Committee recommends that, if the Franchising Bill 2010 is to proceed, any statutory obligation to act in good faith should be left undefined.

The Government supports this recommendation to leave undefined any statutory obligation to act in good faith.

Under the proposed legislation, parties to a WA franchise agreement must act in good faith (i.e. fairly, honestly, reasonably and cooperatively) in their dealings with all stages of the agreement (including when entering into or renewing the agreement, or resolving or attempting to resolve a dispute related to the agreement) and when acting under the agreement.

The Franchising Bill 2010, however, fails to provide clear guidance about how a franchisor or franchisee should behave to ensure that they are acting in good faith in regard to their dealings with all stages of the WA franchise agreement. The Western Australian Government agrees with the Committee's finding that there are problems with defining and interpreting what it is to "act in good faith" (with each term having its own definitional issues), which would likely create uncertainty for franchising participants regarding what is and what is not acceptable behaviour.

Following on from this, the vagaries of the duty's definition and terms may increase disputes between franchising participants about conduct that may not be in good faith. At the heart of the issue is the question of where the line between a hard bargain and an act that offends the good faith standard should be drawn.

Furthermore, inclusion of the word "and" in the definition of "act in good faith" implies that all four elements of fairly, honestly, reasonably and cooperatively need to be present before a person satisfies the duty. On the other hand, there is an argument that a breach of the duty cannot be proved unless all four elements to the definition were missing from the alleged behaviour. Potentially, the use of these terms in explicitly defining good faith could, depending on a court's interpretation, actually narrow the application and utility of this standard.

For the reasons highlighted above, the Government would support the good faith obligation being left undefined in the legislation.

Recommendation 5:

The Minister for Small Business ensure that the effectiveness of the amendments to the *Competition and Consumer Act 2010* and the Franchising Code of Conduct is reviewed in 2013 by the federal

government, with particular emphasis given to considering the need to introduce:

- **civil monetary penalties for breaches of the Franchising Code of Conduct; and**
- **a general statutory obligation to act in good faith into the Code.**

The Government supports the intent of this recommendation.

The Minister for Small Business has been pursuing a dialogue with his Federal and State counterparts on this matter. Current indications are that a meeting of Small Business Ministers will be convened later this year and the issue of franchising regulation will be an agenda item. This is expected to include discussion about the timing and extent of the Federal Government's proposed review of franchising regulations.

Recommendation 6:

If the Bill is to be enacted, the Minister for Commerce make sure that administrative arrangements are made between the ACCC and the Commissioner for Consumer Protection to ensure that the risk of a multiplicity of actions under clause 12 is negated.

The Government supports the intent of this recommendation.

The Franchising Bill 2010 precludes action under this legislation if there is a penalty imposed under the *Fair Trading Act 1987* (WA) or the *Competition and Consumer Act 2010*. However, the Franchising Bill 2010 does not limit a party to one remedy under the legislation. This could cause confusion amongst people seeking to rely on it, and could cause people to "double dip" and get two remedies for the same contravention.

A similar administrative arrangement as that proposed by this recommendation already exists in relation to the role of the Commissioner for Consumer Protection in investigating alleged breaches of unconscionable conduct in Western Australia through the incorporation into the *Fair Trading Act 1987* (WA) of the Australian Consumer Law.

Administrative arrangements between the Commissioner for Consumer Protection and the ACCC would prevent a multiplicity of actions from occurring in relation to the pursuit of civil monetary penalties for breaches of the Franchising Bill 2010 and is supported by the Western Australian Government.

Recommendation 7:

The Committee recommends that, if the Franchising Bill 2010 is to proceed, clause 13(2) should be amended to apply only to the Commissioner for Consumer Protection.

The Government supports this recommendation in principle to clarify that only the Commissioner for Consumer Protection would not need to give an undertaking as to damages when seeking an injunction.

As it is currently drafted, clause 13(2) may be unfair in circumstances where a franchisee has made a claim which is subsequently shown to be frivolous or vexatious. In these circumstances, the franchisor cannot be reimbursed for its costs or any loss incurred in defending the claim.

In the Government's opinion, it seems more appropriate for the issue of damages to be determined by the court in each individual circumstance. It is noted that this is the approach taken in relation to interlocutory injunctions under the *Competition and Consumer Act 2010*.

Recommendation 8:

The Committee recommends that, if the Franchising Bill 2010 is to proceed, clause 14(1)(b) "a renewal order" should be removed.

The Government supports this recommendation to remove the authority of courts to make renewal orders. Such a provision would allow a court to require a franchisor to renew a franchise agreement beyond the term that was agreed by the parties when the contract was first entered into, irrespective of whether or not there was a contractual right of renewal or extension.

The Government supports the views of a large number of contributors to the Inquiry that the renewal order goes far beyond existing powers under Australian commercial law and would potentially undermine the parties rights of freedom to contract (i.e. the basic legal principle that individuals should be free to bargain among themselves the terms of their own contracts, without government interference; the practical result of which is that once a contract expires, a party such as a franchisor or landlord cannot be compelled to enter into a new contract).

It is the view of the Government that to confer on a court the capacity to effectively ignore the terms of the franchise agreement and continue its terms beyond that provided could be considered an extreme outcome given the commercial decisions that were made when the agreement was entered into. Such a court-enforced renewal order could also place ongoing pressure on the franchisor/franchisee relationship which, following court action, is already likely to be soured or irreparably damaged.

In the Government's opinion, the redress order provisions do not appear to take into account the complex nature of franchise agreements which may involve additional third parties (such as new franchisees as well as lessors and lessees) or changed business foci (such as the commercial decision to withdraw from a particular geographical market).

This complexity is compounded by the fact that clause 14 of the Franchising Bill 2010 allows aggrieved parties to make applications for redress orders up to six years after the date on which the conduct occurs. The long-tail nature of this limitation of liability provision would significantly increase the risks and uncertainties associated with the establishment and expansion of a franchise system in Western Australia.

Removal of this contentious provision is therefore strongly endorsed by the Government. It is also noted that consequential to this amendment, the definitions of “renewal order” in section 14 and “renew” in section 3(2) will also need to be removed.

Recommendation 9:

The Committee recommends that, if the Franchising Bill 2010 is to proceed, clause 15(1) should be deleted and clause 15(2) should be amended to read:

A person who suffers loss or damage by an act or omission of another person that contravenes this Act has a cause of action against that person for damages for the loss or damage.

The Government supports this recommendation to limit damages to “loss or damage”.

Such an amendment would make this consistent with the remedial damages provisions in the *Competition and Consumer Act 2010* and is likely to minimise frivolous and vexatious claims for “harm”, which is very wide ranging under this provision.