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Economics and Industry Committee
Legislative Assembly
Parliament House
Harvest Terrace
PERTH WA 6000

laeisc@parliament.wa.gov.au

Dear Economics and Industry Committee Members

INQUIRY INTO THE FRANCHISING BILL 2010
Our Ref: CLS:DCS:1000021
Your Ref:

I refer to the inquiry being conducted by the Economics and Industry Committee (the Committee) relating to the *Franchising Bill 2010* (the Bill).

Background

I am a legal practitioner director of Icon Law Pty Ltd an incorporated legal practice in Qld trading as Icon Law.

In particular by way of my expertise in franchising I draw to the Committee's attention that:

1. I am the current chair of the Qld Law Society Franchising Committee.

2. I am a member of the FCA, the Qld Law Society, the Law Council Of Australia, the AICD.

3. I am a member of the Commonwealth's ACCC consultative panel.

4. I am a long standing member of the FCA Qld State Chapter and a member of both the FCA Ethics Committee and Legal Committee.

5. I was previously a partner at Dibbs Barker Lawyers where I was the head of the Franchising Division Nationally.

6. I have practiced in the franchising Sector since the late 80's.

7. I estimate that 90% of my legal work is based around the franchising sector acting for Franchisors, Master franchisees, franchisees, consultants, suppliers and advisors to the sector in a wide range of industries.

8. I have acted for many franchisees and master franchisees over the years in relation to:

a. Reviewing documentation associated with the acquisition, sale or termination of franchises.

b. Dispute resolution including litigation, mediation and other informal dispute handling procedures and referrals of complaints to the ACCC.

c. Breaches and terminations of franchise agreements.

d. Renewal and non renewal.

e. Insolvent franchisors and dealings with Administrators and liquidators and receivers appointed by financiers.

f. Dealing with relationship issues between them and their franchisors.

9. I currently act for and have previously acted for a large number of franchisors and master franchisees over the years in both site and mobile based franchise systems. Many of these franchisors are iconic household names and brands. I regularly represent groups of franchisees in collectively negotiating resolution of issues with their franchisors.

10. I have made submissions personally and on behalf of industry associations such as the FCA and the Qld Law Society to many federal government enquiries into the Code going back to the original drafting of the Code.

11. I believe that I have over the years had extensive exposure to and experienced a wide variety of issues confronting the sector and both franchisors and franchisees.

Submission

I was extensively involved in the preparation of the submission made by the Qld Law Society in November 2010 to various members of the WA Parliament (the November Submission).

I fully endorse the points and issues raised in that submission which I understand that the Committee has received directly from The Qld Law Society for consideration. The Qld Law Society is also separately sending a supplementary submission to you to compliment the November Submission.

My submission follows the Terms of Reference as follows:

1. Whether the Bill, in its current form would be directly inconsistency with the Trade Practices Act and the Franchising Code of Conduct, with particular reference to the inclusion of provisions for:

a. The requirement to "act in good faith";
b. Civil monetary penalties;
c. Injunctions;
d. Redress orders; and
e. ***Damages.***

I refer to the QLS November Submission in relation to particular technical aspects concerning the Bill and those specific items raised above. There are detailed comments and explanations outlined in the November Submission that I fully endorse. There were a number of technical defects in the Bill specifically addressed and suggestions for overcoming them. The Committee should carefully consider the full contents of the November Submission in their deliberations and consideration.

I specifically draw the Committee's attention to:

(a) The retrospective application of the Bill. The Code is a commonwealth law. The Bill has been prepared in a manner inconsistent with the Commonwealth's Legislation Handbook drafting manual issued by the Department of the Prime Minister and Cabinet Canberra (the Manual) that was no doubt used and followed to craft the Franchising Code of Conduct (the Code). The Manual clearly provides that it is only in exceptional circumstances that legislation be crafted with retrospective application. The relevant section 6.18 provides that:

" *Provisions that have a retrospective operation adversely affecting rights or imposing liabilities are to be included only in exceptional circumstances and on explicit policy authority...*".

In particular reference is made to Paragraphs 4.7(g), 4.17 (C), 8.19 and paragraphs 4.24 to 4.27 of that Manual. The Manual is available from the Parliamentary Library of the Parliament of Australia Website www.aph.gov.au/library/INTGUIDE/law/statutelawresources.

Clearly the nature of this form of legislation is not "*exceptional circumstances*" in the way in which the Commonwealth would draft legislation. The Code does not apply retrospectively in the way in which the Bill does. It is the creation of the right or claim to relief that is the offending aspect. Accordingly this is a direct inconsistency.

(b) The retrospective nature of the Bill will create rights or liabilities through the remedial orders that may not have existed before the Bill was enacted under either the Code or the TPA against franchisors. It is manifestly unfair in its one sided retrospective application and opens the door to claims for personal injuries by those who may seek to claim they have suffered loss even though they are not a party to the agreement.

(c) Whilst the Code applies to parties to a "franchise agreement" and rights for breaches of the Code flow from that contractual relationship, the remedial orders under the Bill are available to "*a person who suffers loss*" rather than a party to a franchise agreement. This is directly inconsistent with the Code.

(d) The Code and the TPA are policed and enforced by the ACCC. They have investigative and prosecutory powers conveyed under the TPA. There appears to have been no elaborated consultative process explained in the explanatory memorandum (either before the Bill was introduced or since its introduction) as to how and in what way the process of investigation or prosecution of a matter under the Bill will be handled in a cooperative

manner by the Commonwealth and State to avoid a duplicity (double jeopardy) or overlap in terms of investigations and prosecutions. This issue and problem is highlighted in and dealt with in detail in the November Submission. Ideally it should be dealt with at a COAG level and discussed in detail.

(e) The Commonwealth Franchising Code of Conduct is contained in a Schedule to *Trade Practices (Industry Codes - Franchising) Regulation 1998*. That Commonwealth Regulation is registered under the Federal Register of Legislative Instruments created under the *Legislative Instruments Act 2003* (section 20). That register comprises a database of all legislative instruments and explanatory statements and more relevantly compilations of registered instruments that have been amended that have been registered under that Act. The latest Compilation of the Code (including amendments to 1 July 2010 taking into account amendments up to SLI2010 No 125) is on the Federal Register of Legislative Instruments F2010C00457.

(f) Judicial notice is taken in respect to instruments registered under that Act. That Regulation comprises 3 regulations, a Schedule (which includes the 2 Annexures) and Notes to the Trade Practices (industry Codes – Regulations 1998 that contains a table of instruments and a table of amendments.

(g) When a franchisor prints out a copy to include in their Disclosure Document, they do not printout a copy of just the Schedule (containing the terms of the Code) they typically hand out a complete copy of the Regulation, as that is how it is downloaded from the comlaw website. You do not normally download just the Schedule. Presumably the WA government would be required to include a link to that comlaw website or reproduce the Regulation in its entirety. Unfortunately the explanatory memorandum does not explain how the WA government intends to reproduce the legislation in particular whether it will copy it or create a link to the comlaw website. This process should be made clear and should be.

(h) The Bill seeks to adopt as its own the provisions of Code and under the Bill it refers to it as the "*Franchising Code of Conduct (WA)*" and gives effect to that code as if it were a law of WA (section 7(a)). In other words the terms of the Commonwealth Code (as in force from time to time) become a law of WA. Its terms become legislation but are not contained in that Bill. It gets amended when the Commonwealth amends the Code.

(i) The *Copyright Act* 1968 confers copyright in the Commonwealth in its Acts and subordinate legislation. Section 7 of that Act and the definition of the "Crown" clearly indicates that includes the Crown in right of the Commonwealth, the States, The Northern Territory, ACT and Norfolk Island. However even though the Act binds the States, the State is not liable to be prosecuted for an offence. The reproduction of the Code by reference to create the Franchising Code of Conduct (WA) may be an infringement of the Commonwealth's copyright in the regulation that at least requires the consent of the Commonwealth or consultation with it.

(j) If the reproduction by the State includes the Commonwealth Coat of Arms that is also something that the Commonwealth Government retains control over and protects and restricts.

(k) I understand that federal regulation and administration of copyright of Commonwealth Acts and subordinate legislation was recently revamped on 1 January 2011 and that Comlaw have indicated that a *Creative Commons Licence* (*Attribution - non commercial 3.0 Australia*) applies to the Franchising Code of Conduct and its subsequent use.

(l) Arguably the WA parliament's right to reproduce the Code is regulated now by the terms of that licence. Note there are particular restrictions on distribution of the work (in particular clause 4A which deals with how it can be produced and ensuring that Uniform Resource Identifier to the licence must be linked).

(m) Section 36 (1) of the Act provides that copyright in a work is infringed by a person who (not being the owner of the copyright) and without the licence of the owner of the copyright does in Australia or authorises the doing in Australia or any act comprised in the copyright. Therefore the reproduction by incorporating the terms of the Code by reference may be an infringement, unless it is done for the purposes of a "*judicial proceeding*" (Section 43) or is otherwise done for the "*services of the State*" (Section 183).

(n) "*Judicial proceeding*" is defined in the Act to mean a proceeding before a court tribunal or person having power to hear, receive and examine evidence on oath. The obvious reason for this is to allow a court to consider a work in the course of that proceeding without the need for the owner of the copyright to consent to it.

(o) The Commonwealth, State and Territory Governments are entitled to use copyright material for the "*services of the Commonwealth State or Territory*" without first seeking permission from the copyright owner (Section 183 of the *Copyright Act*). Normally that is done under a formal or informal arrangement between the government and the relevant declared copyright collecting society (or in the commonwealths case the Attorney Generals department. In addition, Governments have a statutory duty to notify the owner of that copyright. However not every act of using copyright material will be covered by the exception.

(p) This section allowing use by the States seems to relate more to producing and selling or using copies of the work (which retains its original character) rather than copying words into their own legislation. It is not clear and even the *Australian Copyright Council* published text on Government & Copyright does not deal expressly with this issue. I understand that NSW have expressly allowed for anyone to reproduce or use their legislation.

(q) This means that the Code which is a Schedule to a Commonwealth Regulation is subject to copyright and its reproduction is controlled by the Commonwealth. The Commonwealth allows the reproduction of its legislation

and subordinate instruments under a Creative Commons Licence which commenced to apply on 1 January 2011.

(r) The WA Government has adopted and published a Government Intellectual Property Policy and Best Practice Guidelines to deal with IP created by it and its relevant governmental arms to commercialise it and obtain benefits for WA. It seeks to retain copyright in its legislative instruments as well.

(s) Whilst for public policy reasons there is a strong argument that all legislation should be available freely for use by other States and Territories to adopt in whole or in part other legislation they may wish to use for the benefit of their state or territory, normally that would be done in a collaborative manner in consultation with the Commonwealth and State or territory involved.

(t) This appears not to have occurred and if anything, the stated Commonwealth position is that the current Commonwealth government is opposed to the introduction of State based regulation that overlaps the Commonwealth Code. It is unclear whether the Commonwealth has been approached for consent to use the terms of the Code and presumably that consent would be forthcoming.

(u) Whilst we would expect that the Commonwealth would not object to the use of its copyright in the terms of the Code being embodied by reference into the Bill there may not yet have been any formal consultation by the relevant WA government or its departments with the Attorney General's department in relation to seeking that consent or dealing with issues such as an informal agreement contemplated through COAG.

(v) Normally the Code is not printed on its own. The document is downloadable from the comlaw website www.comlaw.gov.au. If you access it, it gives you the whole regulation not just the Code. That means that if someone wants to reproduce the Franchising Code of Conduct (WA), they must essentially download the whole regulation which includes the regulation provisions and notes and the Schedule and the Commonwealth Coat of Arms.

(w) However the Franchising Code of Conduct (WA) does not include the Regulation or the Notes, only the Schedule. It has not been made clear if or how the Franchising Code of Conduct (WA) will be published (if at all) or whether it will remain simply a copy of the Commonwealth regulation when it is sought to be enforced.

(x) The WA Parliament State Law Publisher allows the downloading in word or PDF versions copies of relevant legislation. I would strongly suggest that if the WA Parliament and other states that want to follow this method of adopting the Commonwealth Code as their own that they contact and liaise with the Commonwealth to ensure it is dealt with in a similar approach to uniform laws.

(y) It is also important that any "*electronic rights management information*" in the Code (if any) is preserved as State governments do not have under section

183 the power to amend or alter that. Refer to the definition in section 10(1) of the Act.

(z) The manner in which the Code is to be unilaterally adopted into a State based law (by reference) is novel and to a significant extent untested as the adoption of uniform national laws by States has been in the past been based on cooperation and discussion and formalisation through agreements at COAG level. This is not apparent in respect to this private Member's Bill and I submit that it is preferable to do so through COAG if it is the intention of the WA Government to proceed down this path. It has been foreshadowed by a number of State Parliamentarians that South Australia may follow a similar path which would mean that it would be appropriate to raise and discuss it at that level.

(aa) Normally any proposed state based adoption of uniform national laws would be discussed at COAG level and if necessary agreements reached between the States and the Commonwealth in relation to its adoption (and subsequent amendment). In that manner issues such as amendment of the Code and its subsequent effect on the Franchising Code of Conduct (WA) would be more certain.

(bb) There is currenty a Standing Committee of the WA Parliament empowered under a Standing Order to consider all such uniform legislation although at this stage only the SA Bill introduced in 2009 (which has now lapsed) and the WA private member's bill had signalled an intention to adopt the Code.

(cc) I submit that the regulation of franchising at a National level is now well accepted and gives certainty to contracting parties and their legal advisors on the relevant laws applying not only to the grant of the franchise but importantly on its grant, renewal, termination and breach. There are also extensive rights under the Trade Practices Act available to franchisees and the ACCC to enforce rights and obligations.

(dd) Whilst the Code is certainly not perfect, it has and will continue to evolve over time. Arguably many franchisees are already adequately protected by the Code. Many others would prefer greater regulation and codified rights to sue franchisors. Unfortunately there are already rights to sue under existing laws and the introduction of this law does not mean that a franchisee can afford to commence an action. Whether the right balance exists currently under the Code and TPA is a matter for the legislators and the stakeholders to argue. It needs detailed consideration of the rights of the parties and most importantly consultation with Stakeholders not a rushed form of legislation.

2. ***Whether the Bill, in its current form would enhance the purpose of the Franchising Code of Conduct, which us to regulate the conduct of participants toward each other.***

(a) The Code's purpose is worded slightly differently to the terms of reference although it may have been intended to paraphrase the commercial essence

as that specified in clause 2 of the Code. The Bill goes further in its purpose than the Code and states that it is:

"*An Act to regulate the conduct of people who are about to enter or who are parties to franchise agreements and for related matters*".

That goes much further than Clause 2 of the Code which states:

"*The purpose of this code is to regulate the conduct of participants in franchising towards other participants in franchising*".

The Code contains no express relief or penalty provisions which are all otherwise contained in the Trade Practices Act. The Code regulates conduct in a way that includes disclosure, contract terms, breaches and disputes and prohibits certain types of conduct by franchisors.

The Bill goes much further than the Code so its purpose and effect is far wider. It embodies rights and a statutory basis for claims (relief orders) and accessorial liability for those knowingly concerned in a breach (in much the same way as Section 75B of the TPA).

Of course the Code only applies to agreements that are franchise agreements within the meaning of the Code and which are not otherwise exempt under clause 5 of the Code. The November Submission outlined some areas of concern on the application of the Code and therefore the purpose of the Bill and who was intended to be covered by it.

I submit that there needs to be amendments made to the Bill to ensure that it does not inadvertently apply to franchise agreements regulated by Oil Code or fractional franchise agreements that are otherwise exempted under clause 5(3)(a) and (b) of the Code. The drafting error identified cannot be allowed to be overlooked or significant consequences to those persons would arise.

(b) The purpose of the Bill appears to be a deliberate move to introduce state based relationship legislation similar to those that already exist in Ontario Canada. In that jurisdiction there is a piece of legislation called the *Arthur Wishart Act (Franchise Disclosure), 2000, S.O. 2000* (the Wishart Act) In that jurisdiction there is a definition of fair dealing which has a good faith element attached to it.

(c) Relevantly there was a recent Ontario Court of Appeal case of *Salah-v-Timothy's Coffees of the World Inc* 2010 ONCA 673 which highlighted the affect that this form of law would have in franchising litigation. In Ontario there is a codified "duty of fair dealing" (or good faith) and a right to bring a claim for damage suffered. In this case the franchisee had a conditional right of renewal. The franchisor did not allow a renewal and was sued for damage for breach of contract and breach of the duty of good faith and fair dealing. The franchisee also sued and obtained damages for mental distress.

In particular in that jurisdiction there is legislation that is similar to what is sought to be enacted:

Breach of duty of good faith

Section 3 of the Wishart Act provides:

Fair dealing

3.(1) *Every franchise agreement imposes on each party a duty of fair dealing in its performance and enforcement.*

Right of action

(2) *A party to a franchise agreement has a right of action for damages against another party to the franchise agreement who breaches the duty of fair dealing in the performance or enforcement of the franchise agreement.*

Interpretation

(3) *For the purpose of this section, the duty of fair dealing includes the duty to act in good faith and in accordance with reasonable commercial standards.*

In that case the plaintiff sought and obtained damages for breach of contract and damages for the breach of good faith and for mental distress. The appeal by the franchisor was dismissed.

(d) The case is important as the consequences of this Bill if enacted would clearly allow for this type of litigation. When you read the case, and applied the current Australian Law (the TPA) to these facts, there would certainly be grounds to raise an unconscionable conduct claim under the TPA and also the ability for the ACCC to investigate and prosecute. This right may not necessarily exist in Ontario. Great care needs to be taken in adopting similar legislation to other foreign jurisdictions without extensive consultation of all stakeholders.

(e) There is no doubt that this Bill if enacted will result in more claims proceeding to Court although many franchisees still lack the financial ability to bring those claims in our court system and would argue they cannot do so quickly, cheaply and effectively. Arguably those 3 elements may ultimately be what franchisees ultimately want. To enhance the purposes of the Code it would be more beneficial for the States to spend the time working with the Commonwealth to simplify and streamline a useful dispute resolution forum and empower the ACCC with more funds to prosecute clear breaches of the law.

(f) If the purpose and intention of the Bill is to reduce litigation and encourage faster more affordable avenues for dispute resolution then there is no doubt

the States and the Commonwealth need to cooperatively consider how that can be achieved.

(g) Unfortunately it appears that the purpose of the Bill is clearly designed to give a franchisee a second chance to sue if the ACCC does not prosecute or win its case against a franchisor and circumvent the provisions of the Trade Practices Act. This unfairly exposes franchisors to a clear form of double jeopardy under 2 separate pieces of legislation and arguably significant costs for multiple claims in different jurisdictions relating to the same issue.

(h) It has been suggested in the press by others that a process similar to that used in Victoria could be beneficial. There is always a problem that parties want to enforce their legal rights in a forum that will allow them to get appropriate relief. Currently that is through mediation in part 4 of the Code and the Code expressly allows for the parties to follow that mediation process. The Bill does not convey a cost effective, or meaningful alternate dispute resolution process.

(i) The Bill seeks to create new rights for relief that go further than mediation. Presumably the State will not interfere with the role or appointment of the Office of Franchising Mediation Advisor in any referral process as the parties are bound by that.

(j) There is no doubt that litigation is expensive in Australia and takes an inordinate amount of time to reach court. Put simply the parties (most Franchisors and most franchisees) simply cannot afford to run a claim all the way to court and lose. Most claims settle before they go to court and that in relation to mediation parties are forced to compromise and accept less than optimal outcomes because they "*can live with it*" and move on. Often this is far more cost effective than proceedings and is a no costs award way of resolving the dispute. This sort of process is not unique to franchising and is the same consideration given to resolving many other forms of contractual disputes.

(k) It is important that any dispute process allow for certain types of disputes to be resolved quickly. Some issues would lend themselves to resolution through mediation whereas others could be resolved in a form of tribunal. There are many other forms of disputes that would not and would need the ability to go to court to get adequate relief. The decision on whether there should be a form of faster, cheaper and more accessible resolution processes needs far more involvement and collaboration between the states than I can deal with in this submission.

(l) It is therefore my submission that the Bill does not enhance the purposes of the Code. It creates a codified definition of good faith that will end up being tested and seeks to displace in WA an implied duty of good faith that is evolving in the courts. It will result in more not less litigation which invariably will cost those involved far more.

(m) Interestingly many franchisees argue that their franchisor does not act in good faith and that is why they would argue that they want a definition

codified. Many franchisors also argue that some of their franchisees display a lack of candour and good faith in their dealings, and there is little that the franchisor can do because franchisees do not have any form of significant obligation under the Code other than those limited to and contained in Part 4 Dispute resolution including dealing with the requirement to attend at mediation and having to pay have their share of the costs.

(n) In addition the language in the Code such as contained in clause 11 (2) of the Code dealing with independent advice certificates is expressed in terms of a prohibition imposed on a franchisor from doing something such as entering into the agreement rather than any form of enforceable obligation on the franchisee to provide them with the certificates

(o) The Code therefore is already heavily weighted in terms of the benefit of rights conferred on and the benefit obligations (imposed on the franchisor) that benefit and favour the franchisee.

(p) In the High Court Case of *Ketchell – v – Master of Education Services*, a franchisee sought relief from liability for failure by the franchisor to prove it had received a certificate under Section 11(1) of the code. The evidence clearly showed that the franchisee had received the disclosure document and the case revolved around the franchisee seeking to rely on a technical argument that the franchise agreement was void simply because the franchisor could not produce the certificate certifying they had received the disclosure document and the code and had a reasonable opportunity to read and understand it, even when the Disclosure document had been received and they had read it and sought advice on it.

(q) The Code creates many obligations on franchisors, however the same cannot be said to apply to franchisees. It creates predominantly rights for which franchisors can and have been held accountable if they are not observed.

(r) If the explanatory memorandum is correct, then the terms of the Bill are now intended to create obligations on franchisees to act in good faith and to compensate franchisors for loss they may suffer as a result of a franchisee breaching the Franchising Code of Conduct (WA) or the Bill then this goes further than Code currently does.

(s) It suggests that Franchisors will also get a benefit against a franchise who breaches the Franchising Code of Conduct (WA) when in reality it is almost impossible for a franchisor to benefit from that breach as the Code does not create obligations on the franchisee which if they were breached would be actionable.

(t) It is only a breach of the Bill that gives rise to new rights against franchisees that they may not yet fully understand or be aware of.

(u) There are several clauses of the Bill which do create new rights enforceable against a franchisee including: Clause 11 Duty of parties to act in good faith.

Clause 12 right to prosecute individuals for breaching the Bill (although in reality it is extremely unlikely that a franchisee would be prosecuted), Clauses 13 - Injunctions, Clause -14 redress orders, Clause 5 – Damages for Harm. Clearly many franchisees see this Bill as a significant new weapon to be used against franchisors. Many franchisees would be surprised and distressed to learn it could also be used as a weapon against them

(v) If you look through the drafting to what is intended it is clear that it is not franchisors asking for additional rights to pursue franchisees, the primary and predominant purpose of the Bill is to empower franchisees with greater rights and claims that they can use against franchisors and the Bill seeks to do so in a retrospective and imbalanced manner.

(w) This Bill seeks to use a novel approach to give the State Jurisdiction to hear disputes that otherwise would be solely within the jurisdiction of the Commonwealth and the ACCC and create new basis of claims which will encourage litigation. The Code deliberately was intended as a measure to reduce litigation and encourage ADR. This will not be enhanced by the enactment of the Bill

3. ***Whether the Bill, in its current form would result in a cost impact on the State or participants in franchising.***

Yes clearly there will be costs for participants in the franchising Sector as well as addition costs occasioned by the State in the administrative enforcement, monitoring and prosecution of breaches of the Bill and the Franchising Code of Conduct (WA).

Some of the more relevant costs to participants would include:

(a) Immediate costs for updating disclosure documents for WA to take into account the Bill and to update specifically items concerning end of term arrangements;

(b) Transitional costs of obtaining releases from franchisees in the sale of franchise systems;

(c) Cost of dispute resolution will rise where there is the prospect of additional remedial orders (including personal injury claims);

(d) Duplication of costs for maintaining more than one disclosure document;

(e) Training and HR costs for franchisors having to educate their staff on the Bill and compliance issues;

(f) Costs for having to draft and adopt a new Complaints handling procedure specifically for WA;

(g) Costs for splitting licence agreements for master franchisees for WA alone and other agreements for each state so that operations outside of WA are

not dragged into the jurisdiction of WA simply because the Agreement covers the whole of Australia or territories including WA;

(h) Costs for defending potential claims that were not possible to be commenced before the Bill was enacted;

(i) Insurance companies having to fund claims relating to (f) and increased premiums resulting;

(j) Costs for defending 2 simultaneous or concurrent investigations by the ACCC and the WA regulator arising from the same incidence;

(k) Costs of having to pay 2 lots of penalties where the ACCC obtains it and the WA prosecutor seeks additional penalties above those obtained by the ACCC;

(l) Arguably there have already been significant costs incurred by relevant sector associations and members (including those who have prepared submissions on a pro- bono basis) and costs of having to lobby for the defeat or modification of the Bill on relatively short notice. This cost is significant and was caused as a direct result of its introduction as a private members bill as opposed to legislation put out by the Government of the day with consultation. Many organisations cannot quantify the costs to them of the distraction the Bill has caused or will cause them.

Conclusion

As a member of the FCA I strongly endorse the FCA's position in relation to the Bill and its likely affect on the Sector.

I also commend the terms of the November Submission to the Committee and the subsequent QLS submission which will be lodged shortly.

The effect that this legislation will have on the sector is significant and detrimental at a time when as a result of various natural disasters the economy is fragile and small businesses are suffering. It is far preferable that the States work with the Commonwealth for a workable solution and I would strongly recommend that all relevant stakeholders be allowed to participate in that process. .

If the Committee has any questions please feel free to contact me.

Yours faithfully
ICON Law

Derek Sutherland
Legal Practitioner Director