

Your Ref: Franchising Bill 2010 (WA) – Supplementary Submissions

Our Ref: Franchise Law Committee

5 May 2011

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

Email: laeisc@parliament.wa.gov.au

Dear Economics and Industry Committee Members

FRANCHISING BILL 2010 (WA) – SUPPLEMENTARY SUBMISSIONS

Thank you for the opportunity to participate in the public hearing regarding the *Franchising Bill 2010 (WA)* and for your letter of 14 April 2011.

In reference to paragraph 5 of your letter dated 14 April 2011, please note that the Queensland Law Society does not have the authority to make a commitment on behalf of the Law Council of Australia to provide further submissions. The Society, however, is pleased to make further supplementary submissions in its own right. We trust that the reference to the Law Council is simply an oversight.

We will now address the further questions sought.

1. ***In the Law Society's opinion, how would a court define the term 'directly inconsistent' as it pertains to s51AEA of the Competition and Consumer Act 2010.'***

Section 51AEA of the *Competition and Consumer Act 2010* relevantly states:

51AEA Concurrent operation of State and Territory laws

It is the Parliament's intention that a law of a State or Territory should be able to operate concurrently with this Part unless the law is directly inconsistent with this Part.

The Society is not aware of any judgments providing commentary on the term "*directly inconsistent*" in relation to section 51AEA of the *Competition and Consumer Act 2010*.

2. 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 Society comment on this argument?

The Law Society generally supports that argument and considers that:

- The *Franchising Code of Conduct* and the *Oil Code* (the *Mandatory Industry Codes*) were introduced to regulate on a national basis those franchise agreements that were captured within their provisions. A significant degree of uniformity resulted as the parties could not contract out of the terms of the Mandatory Industry Codes.
- The terms of the Code were established and have been reviewed several times since its introduction, after extensive consultation with key stakeholders of the sector. It is the Society's view that in relation to franchise agreements regulated by those Mandatory Industry Codes, that there is a degree of established uniformity throughout Australia. This uniformity is mandatory and is evidenced in terms of the procedures imposed on parties to a franchise agreement including but not limited to dispute resolution mechanisms, initial additional and ongoing disclosure, prescribed and prohibited contract terms, warning statements, statutory cooling off periods, provisions that regulate or allow breach and termination of agreements, provisions that relate to renewal notices, deeming provisions relating to motor vehicle dealership agreements and deemed consent to transfer to name a few.
- Additional State based regulation in the way proposed will impose in WA franchise agreements additional contractual provisions, statutory obligations and rights that are not contained in other franchise agreements of other states.
- There are many commercial reasons why a national Franchising Code of Conduct would be the most practical way to encourage uniformity in dealings with franchisees across a variety of states and territories in Australia. Many of these commercial reasons have been advanced in submissions to the Standing Committee.
- A national Franchising Code of Conduct also provides, and aims to continue to develop, a uniform approach to the obligations of franchisors and the rights and remedies available to franchisees when those franchisor obligations are not met. However, where States enact different laws, the rights and remedies available to franchisees will differ from State to State. Whilst this may seem to address a concern within a particular State, it may impact upon a particular franchisee when there are a number of disaffected franchisees across one or more States; in particular, upon that franchisee's ability to seamlessly participate in a 'class' type action by those franchisees from other States asserting uniform rights and remedies, without the complication of having distinct and / or additional rights requiring separate determination.

Thank you for the opportunity to make further submissions on the Bill.

Please do not hesitate to contact myself or our Policy Solicitor, Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au if you require anything further.

Kind regards

Bruce Doyle
President