



COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

ECONOMICS REFERENCES COMMITTEE

**Reference: Effectiveness of the Trade Practices Act 1974 in protecting small
business**

FRIDAY, 17 OCTOBER 2003

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SENATE
ECONOMICS REFERENCES COMMITTEE

Friday, 17 October 2003

Members: Senator Stephens (*Chair*), Senator Brandis (*Deputy Chair*), Senators Buckland, Chapman, Ridgeway and Webber

Participating members: Senators Abetz, Barnett, Boswell, Buckland, George Campbell, Carr, Cherry, Conroy, Coonan, Eggleston, Faulkner, Ferguson, Ferris, Forshaw, Harradine, Harris, Kirk, Knowles, Lees, Lightfoot, Ludwig, Mackay, Mason, McGauran, Murphy, Murray, Payne, Sherry, Stott Despoja, Tchen, Tierney and Watson

Senators in attendance: Senators Brandis, Buckland, Conroy, Murray, Stephens and Webber

Terms of reference for the inquiry:

To inquire into and report on:

1. Whether the Trade Practices Act 1974 adequately protects small businesses from anti-competitive or unfair conduct, with particular reference to:
 - (a) whether section 46 of the Act deals effectively with abuses of market power by big businesses, and, if not, the implications of the inadequacy of section 46 for small businesses, consumers and the competitive process;
 - (b) whether Part IVA of the Act deals effectively with unconscionable or unfair conduct in business transactions;
 - (c) whether Part IVB of the Act operates effectively to promote better standards of business conduct, and, if not, what further use could be made of Part IVB of the Act in raising standards of business conduct through industry codes of conduct;
 - (d) whether there are any other measures that can be implemented to assist small businesses in more effectively dealing with anti-competitive or unfair conduct; and
 - (e) whether there are approaches adopted in Organisation for Economic Co-operation and Development (OECD) economies for dealing with the protection of small business as a part of competition law which could usefully be incorporated into Australian Law.
2. That the committee make recommendations for legislative amendments to rectify any weaknesses in the Trade Practices Act identified by the committee's inquiry.

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Committee met at 9.02 a.m.

CHAIR—I declare open this hearing of the Senate Economic References Committee inquiry into the effectiveness of the Trade Practices Act 1974 in protecting small business. The terms of reference for the inquiry direct the committee to examine whether the Trade Practices Act 1974 adequately protects small businesses from anticompetitive or unfair conduct, with particular reference to whether section 46 deals adequately with abuses of market power, whether part IVA deals effectively with unconscionable or unfair conduct, whether part IVB promotes better standards of business conduct, whether there are any other measures which could help assist small businesses to deal with anticompetitive or unfair conduct, and whether approaches to small business and competition law in other OECD economies could usefully be incorporated into Australian law.

This is the second day of hearings on this matter. Before we commence taking evidence, I wish to reinforce, for the record, that all witnesses appearing before the committee are protected by parliamentary privilege with respect to the evidence provided. The committee prefers that all evidence be given in public but, under the resolutions of the Senate, witnesses have the right to request to be heard in private session.

[9.03 a.m.]

LANDRIGAN, Dr Mitchell, Group Regulatory Manager, Telstra Corporation

CHAIR—Welcome. I invite you to make an opening statement, at the end of which we will go to questions.

Dr Landrigan—Telstra Corporation Ltd welcomes this opportunity to respond to the inquiry by the Senate Economics References Committee concerning the effectiveness of the Trade Practices Act in protecting small business. Given that the Trade Practices Act applies to all markets in the Australian economy, including telecommunications markets, any findings made by the Senate committee relating to generic amendments to the Trade Practices Act are likely to impact on Telstra. It is with this background in mind that we participate in this inquiry.

Telstra's overall submission is that the Trade Practices Act is already effective and the committee should be cautious in recommending amendments in the absence of any clear evidence that the current act is inadequate. We submit that the committee should also exercise caution in recommending amendments that address concerns arising in particular industry sectors where such change is likely to affect other markets in the Australian economy.

Telstra's submission is that it is important for the Senate committee to test all amendments proposed against the overriding objectives of the act. As senators would be aware, the object of the act is to 'enhance the welfare of Australians through the promotion of competition and fair trading'. Importantly, this means that the act is not intended as an instrument to shelter firms from competition, whether those firms are large businesses or small businesses. In fact, the act is intended to achieve the exact opposite and to expose firms to fierce competition. It is through competition that the efficiency of the Australian economy is achieved and welfare is distributed to Australian consumers.

In relation to section 46, Telstra considers that section 46 already strikes an effective and appropriate balance between promoting conduct that enhances competition and ensuring that firms with substantial market power do not use their market power in a manner that would impede competition. As senators would be well aware, over the years there has been intense scrutiny of the effectiveness of section 46 through High Court and Federal Court judgments and through review by at least eight other independent governmental and parliamentary committees. This scrutiny has not identified any evidence that section 46 is ineffective and in need of reform.

In considering proposals to reform section 46, it is important to ensure that such reforms are consistent with promoting the objective that section 46 was intended to promote. That objective is to ensure that firms with substantial market power do not misuse their market power in a fashion that harms the competitive process. In this regard, Telstra does not believe that any serious problems have been identified in relation to the ability of section 46 to fulfil this important objective.

On unconscionable conduct, Telstra submits that, in the absence of evidence indicating that the existing provisions are somehow defective or inadequate—and we do not believe that they are—

they should not be amended. More importantly, we consider that any amendments would at this stage be premature—that provisions are still relatively new, having been enacted only in 1998. At this stage, the courts are still testing the scope and operation of these provisions. The provisions have not had enough time to develop a significant body of case law in order for the committee to properly analyse them and to make an informed decision regarding their effectiveness. More generally, we submit that a further broadening of the concept of unconscionability has the potential to increase uncertainty in commercial contracts and to adversely impact on legitimate and beneficial commercial and competitive behaviour to the detriment of small business. In short, we urge the committee to allow further time for the courts to develop the law relating to unconscionable conduct.

The third aspect of Telstra's submission, as the senators would well know, relates to the terms of reference on industry codes. We note that the telecommunications industry is already subject to a wide variety of industry codes under the Telecommunications Act 1997. These codes are both voluntary and mandatory in nature and generally result from detailed discussion processes within the industry, typically within the environs of what we call the ACIF, which is the Australian Communications Industry Forum. Telstra asks the committee to recognise the existence of these codes in so far as its deliberations relate to the telecommunications industry and the development of codes under part IVB of the act. This aside, Telstra is in general supportive of the concept of voluntary codes.

On the OECD position, we make little comment on the Senate committee's terms of reference relating to OECD approaches. However, our clear understanding is that Australian competition law is already consistent with international best practice.

On pragmatic solutions, which is another aspect that our submission addresses, we have made three suggestions in our submission as to potential solutions that the committee could consider to address small business concerns. First, consistent with our comments relating to industry codes, the committee could recommend that the ACCC provide greater support for industry self-regulatory initiatives. The co-regulatory approach adopted in the telecoms industry may provide a useful model for other industries. Such an approach may also allow the Senate committee to address concerns arising in the context of specific industry sectors, such as the grocery sector, without requiring wholesale changes to the act that may risk adverse spillover effects for all Australian markets.

Second, we submit that the Senate committee could recommend greater resourcing of the ACCC's existing small business program so that the commission could investigate complaints made by small business more speedily and efficiently. Third, we submit that the committee could make a recommendation that the ACCC provide greater public guidance to small business regarding the application of relevant provisions of the act and their enforcement by way of further guidelines and information papers. In conclusion—a very short conclusion—our submission is that the act is working effectively in its current drafting form and there is no need for any amendment in that regard, nor is there any evidence of any need for any amendment.

CHAIR—Thank you very much, Dr Landrigan. Can I begin with a very simple question from your submission: how would Telstra describe a 'substantial degree' of market power for the purposes of section 46?

Dr Landrigan—It is a very difficult question to answer in abstract. There are those who would want to apportion market shares to make a determination; there are those who might want to attribute financial strength to that question as well. The application of that particular question is very fact specific. I would be very hesitant to answer it in the abstract.

CHAIR—That is fair enough. Your submission takes the view that section 46 is fine as it is, that it does not require amendment and that it has not been watered down or weakened by the Boral case. But then you note that such cases have generally turned on the interpretation of taking advantage of substantial market power of section 46. This committee has already had put to it that Boral effectively replaced substantial market power with market dominance as the threshold for the section to be effective. Would you consider that was the effect of the Boral case?

Dr Landrigan—I am having trouble picking up some of your question, but I think I understand it. If I understand you correctly, what you have suggested is that the Boral case has raised the threshold for substantial market power to a test of dominance. Did I pick up that correctly?

CHAIR—Yes.

Dr Landrigan—I do not think that is the case at all. Rather, I think that what the High Court was quite concerned about in the Boral case was what it perceived to be the full Federal Court jumping from a conclusion in relation to purpose to an assumption that the Boral entity had substantial market power. There are reasons that we can explore a little later as to why the High Court was concerned about that. I do not believe that the High Court's decision raised the threshold of substantial market power in that regard. In fact, cases following the Boral decision have suggested that market share in the order of, say, 13 per cent to 16 per cent can potentially meet the requirement of substantial market power. I think in practice the Boral decision has not had that affect all.

Senator BRANDIS—Dr Landrigan, are you the author of the Telstra submission?

Dr Landrigan—I provided direction to the submission; I worked with a number of external parties in preparing the submission, but the overall direction and a substantial part of the substance is my own writing.

Senator BRANDIS—Do we have your CV, by the way? I see you are a doctor; I assume you are not a doctor of medicine. I am interested to know what your professional qualifications are.

Dr Landrigan—In an academic sense or with Telstra?

Senator BRANDIS—In an academic sense.

Dr Landrigan—I hold the degree of doctor of juridical studies from the University of Sydney. My doctoral thesis was in market definition under the Trade Practices Act.

Senator BRANDIS—Dr Landrigan, you say that there has been intense scrutiny of section 46 by the High Court, the Federal Court and by several parliamentary committees which have not

identified any evidence of section 46 being ineffective. You disagree then with Professor Fels, who does not say that; he says the opposite.

Dr Landrigan—I do not want to enter into public debate with Professor Fels.

Senator BRANDIS—I am just drawing to your attention the fact that the claim you make, which is obviously an opinion you genuinely hold, is at variance with, among others, what Professor Fels thinks, what Mr Graeme Samuel thinks, what the trade practices committee of the Law Council of Australia in their submission to this committee think, what all three of the specialist trade practices judges who constituted the full court of the Federal Court in the Boral case think and what many other specialists in the field think. I am just a little perplexed that you would make such a bold claim against such a body of contrary evidence.

Dr Landrigan—That it is an impressive array of authority that you have cited, Senator. That notwithstanding, there have been at least eight previous committees, including Hilmer, Blunt, Swanson, and, most recently, another High Court justice, Justice Dawson, that perhaps have come to a contrary view to that expressed by the commentators that you cite.

Senator BRANDIS—You say that but, early in this debate, I wearied a bit of hearing people tell me that there had been eight, or nine as some people have said, previous inquiries into the Trade Practices Act which have dealt with section 46. I actually took the trouble to look at them. It is right to say that section 46 has been considered on several previous occasions; it is not right to say that none of those inquiries suggested any reform to it. In particular, it is not right to say that any of those inquiries were seized primarily or to any significant degree with the key issue before us, at least in relation to the section 46 aspect of the inquiry—that is, predatory pricing. I wonder why you say that.

Dr Landrigan—I had understood that the key issue before this particular inquiry was in relation to section 46: the protection of small business. I did not understand that the key issue before the inquiry was predatory pricing.

Senator BRANDIS—If you would like to check the *Hansard* of our hearings, I think it would be pretty apparent to you that, at least in relation to section 46, the issue with which I have been most concerned—and I think other senators have as well—following from the Boral case is predatory pricing. May I interpolate and say that I completely disagree with you about the effect of the Boral case. The fact that we have heard from the ACCC—not in this inquiry, but in estimates—that, since the Boral case, the ACCC has decided to abandon several section 46 cases does not give much comfort to the view that the Boral case had no effect, does it?

Dr Landrigan—I want to make a comment on the so-called abandonment of cases. Whenever there is a substantial clarification of the operation of any law, it would not be surprising that, in view of that, the cases would be revised, perhaps the strength of the cases might be reconsidered. So I do not think it is at all surprising that the commission might have not pursued cases in light of the Boral finding.

Senator BRANDIS—I do not think that the cases would have been abandoned if the effect of the Boral case was to make them no more difficult to win. In fact, the very evidence the Senate estimates committee had from the ACCC was that, in view of their reading of the Boral case—

which, for what it is worth, is also my reading of the Boral case—a predatory pricing case would be that much more difficult to get up. I appreciate that there are litigants other than the ACCC, but the ACCC is the principal litigant in section 46 cases. It is the principal tester of the section, if you will. If they decide, in view of a decision by the High Court, to abandon some of their cases because they now think they cannot win them, that is hardly consistent with the view that Boral has not changed the law, is it?

Dr Landrigan—I think you are asking me the same question, and my response would be the same as what I said before.

Senator BRANDIS—All right. We will not waste time; I think I have tried to alert you to the point. Dr Landrigan, can you explain to us in what circumstances you say that pricing below cost would constitute a contravention of section 46? And, in informing us about that, could you tell us where you say the line is to be drawn or what test is to be applied for the point at which below-cost pricing ceases to be a misuse of market power and begins to bear the character of genuine price competition?

Dr Landrigan—Again, I would suggest that that question is very difficult to answer in abstract.

Senator BRANDIS—We are dealing here with abstract concepts. Section 46 is expressed in terms of abstract concepts. It speaks of taking advantage of market power and it does not even define market power. So we cannot have this discussion unless we are comfortable with the idea of debating abstracts or of debating at a conceptual level. The question I have put to you is a pretty straightforward question. In what circumstances do you believe that below-cost pricing constitutes a misuse of market power?

Dr Landrigan—And what I am saying is that that will very much hinge on the industry that is being looked at, the lead times involved in any investment and the contractual arrangements in the industry—a number of factors that I would need some more concrete information about.

Senator BRANDIS—Let me come at it in another way, Dr Landrigan. I can understand why you want to be careful and not too prescriptive, but what indicia do you say will tend to suggest below-cost pricing is or is not genuine price competition?

Dr Landrigan—If you take it back to the section 46 provisions then I think it is quite clear that, probably even before analysing what price or cost is being looked at, there are threshold considerations that need to be looked at—substantial market power, whether there is some prescribed purpose.

Senator BRANDIS—I understand that. Let us cut to the chase here. Let us assume that it is a given that a prescribed purpose exists under section 46(1) and that there is market power. What I want to look at is the conduct. In your view, what are the indicia to which one would have regard in deciding whether conduct by a firm with market power for a prescribed purpose constituted a misuse of that power—or, to use the statutory language, took advantage of that power—in circumstances where there is below-cost pricing?

Dr Landrigan—Again, there is an array of different views of this.

Senator BRANDIS—What are your views, Dr Landrigan?

Dr Landrigan—My personal views are that it is a very complex question and that personnel experts who are far better equipped in an economic sense to answer this question than I am have a wide array of views on whether the relevant cost is average variable, average, marginal, short-run marginal or whatever. What I am saying to you is that leading scholars in this area are divided on that very topic. What I think you will find is that, when sufficient clarity is around the facts to that kind of question, expert witnesses will be called and courts will make prudent judgments about the application of those opinions to the facts before the courts.

Senator BRANDIS—With respect, that merely tells us the way a case runs, which we know. Dr Landrigan, the reason I asked you at the start what your professional qualifications are is that all the witnesses we have had before this committee so far—and I mean no disrespect to any of them in saying this—have basically come before us with a vested interest in advancing a view that helps their sector of the economy, to put it crudely. I am just not sure how we are to treat your evidence. You have told us that you have a doctoral qualification in market studies, but you are here on behalf of Telstra. Are we to treat you as an expert witness who can give us information as a scholar, as you are, or are you here to protect Telstra's backside? There is a potential inconsistency between the two, isn't there?

Dr Landrigan—There are several assumptions loaded into your question. Let me deal with them, if I could, one by one. Firstly, if I have disappointed by appearing to bring some independence to the debate then I apologise for that. If I am not overtly self-interested in the way that I am representing Telstra's position then I apologise for that. What I do know, from looking at the kinds of questions that you have asked, is that there is divided opinion on that.

Senator BRANDIS—That is certainly so. You are welcome to refuse to do this, but what I would really like you to do is to take off the Telstra cap. You are the first expert, the first man or woman we have had before this committee who is well educated about these matters. I want to engage your mind so that you can be of assistance to us. I want you to express your views as a scholar, as an expert, about how one tests whether a pricing strategy constitutes a misuse of market power. What are the indicators one would look to, without being dogmatic or prescriptive about it?

Dr Landrigan—What I am saying is that commentators worldwide are divided on the very questions that you have asked.

Senator BRANDIS—I know that. I have read the debates; I have been a protagonist in the debates. I know that. But I am asking what your opinions are.

Dr Landrigan—My learning, understanding and study of this area has advised me very strongly that these questions are incredibly difficult to answer in the abstract.

Senator BRANDIS—All right.

CHAIR—Senator Brandis, I think we have to accept that Dr Landrigan is here representing Telstra.

Senator BRANDIS—No—

Dr Landrigan—If I could clarify that: that is unequivocally true. As I alluded to in the opening statement, Telstra is caught in the crossfire somewhat, given that—as has been pointed out—the focus of this inquiry is on small business and issues that relate to small business. As was pointed out, and as we have gone to some lengths to articulate in our submission, the amendment of what is a generic law does have cost impacts upon an entity like Telstra. That is the position we bring.

CHAIR—Thank you, Dr Landrigan. I know that many of us here around the table are interested in this issue as it relates to the communications industry.

Senator MURRAY—Dr Landrigan, do you not think that your hesitant and uninformative responses to the questions put by Senator Brandis consolidate or confirm the calls for section 46 to be elucidated by non-exhaustive sets of criteria so that, on the face of the legislation itself, these abstract concepts are put into better context?

Dr Landrigan—With all due respect, let me say at the outset that I do not believe that my responses have been uninformative. I think the fact that I have pointed out to the senators that the question put to me by Senator Brandis was difficult to answer in the abstract and have articulated some reasons why, while perhaps not giving him the answer that he desired, was informative in and of itself. On your question about the clarification of factors under section 46, I would want to know a bit more clearly what you had in mind before I responded to that.

Senator MURRAY—Other witnesses have put to the committee the desirability, in view of the High Court's attitudes, of elucidating section 46 by a non-exhaustive set of criteria to indicate or to confirm the original parliamentary intention—from which I might say no political party that I am aware of has resiled. That is in the documents before us. I say 'uninformative' because I do not take the view that Senator Brandis takes that in some way you can divorce yourself from Telstra when you appear for Telstra.

Dr Landrigan—I have not suggested for a moment that—

Senator MURRAY—You did not, and I acknowledge that. But it is uninformative in this sense, because I would have expected that if asked, for instance, what a case of below-cost pricing might constitute in your view to be an improper exercise of power under section 46, you would have answered specifically with respect to Telstra that if Telstra did such and such—because you are experienced as Telstra—in such and such a circumstance, that would be below-cost pricing, but in another circumstance it would not be. To give you an example, we had before us a very practical and experienced representative of the executive of Coles Myer. He spelt out specifically what he regarded as below-cost pricing which was legitimate under the law—namely, short-term specials and discounts in the ordinary course of trading. That is the sort of response we want. When is it below-cost pricing from Telstra's perspective—which you would regard as contrary to section 46—and when is it not? When is it predatory pricing from Telstra's perspective and when is it not? I ask you those questions. Can you tell us what sort of behaviour by a telecommunications provider in your view would constitute a transgression of section 46?

Dr Landrigan—And I repeat my answer that I do not believe that it is helpful to answer that question in abstract.

Senator MURRAY—Very well.

Dr Landrigan—Do you want me to address your question about codification of principles under section 46?

Senator MURRAY—Certainly.

Dr Landrigan—With respect to that particular suggestion, I do not think that is particularly helpful. The risk that such an amendment would run is that—although you say it would be a non-exhaustive list—enshrining into the law that particular set of considerations would almost stultify what is an evolving and dynamic piece of law. The risk is that in trying to catch all considerations you in fact miss some or, in focusing on particular issues in industries that are before the court at a particular point in time, you lose the ability for the statute to adapt to what is a dynamic economy with changing market circumstances, new industries and new sources of market power.

Some of the considerations that have been looked at to support the view that there should be such an enshrining are the factors and considerations under section 50(3). We are of course looking at an entirely different array of issues under section 46. One that is under section 46 looks at unilateral market power or unilateral uses of market power. The merger provisions are looking at concerted action merger activity, acquisitions and the like—in other words, structural factors as opposed to unilateral or market conduct factors. To take one set of provisions and to automatically or intuitively apply them under section 46, helpful as that might seem, is probably not a particularly helpful way to go about codificational clarification of the relevant provisions.

Senator MURRAY—You mentioned in your opening statement Telstra's strong experience of the codes of conduct and customer service obligations which are imposed on you through your own act as well as via the Trade Practices Act. With respect to section 46, how does Telstra actually experience it? What happens? Do the ACCC contact you or come to see you to discuss matters, do customers make complaints and say, 'You're breaching the act,' or do you get lawyers' letters? Explain to me what the corporation's experience of this would be in a typical year.

Dr Landrigan—I would prefer to address any specifics that you may have in mind perhaps in a more confidential fashion, but at a general level I can certainly talk about that.

Senator MURRAY—Let me interrupt you. The chair will advise you that if ever you wish to go in camera you are able to make that request of the committee.

Dr Landrigan—That is understood. I did not want to disappoint with the generality of the answer. We get complaints in all the fashions that you have suggested. Sometimes it is letters; sometimes it is the commission approaching us; sometimes we negotiate, deal with, contact or speak with customers or competitors—sometimes the complaints arise in that way. I would have to say that the bulk of complaints will come to us through the ACCC eventually and we have protocols and procedures in place for discussing those issues with the commission, nutting them

out and dealing with them. Some of them have gone to court, as you would well know. Some have not. There has been quite wide publicity for several of the commission's investigations in the past.

In terms of Telstra's internal procedures, the procedures that we have in place for dealing with section 46 compliance are extremely rigorous. There is no doubt about that. We deal with section 46 in a number of ways and not just about the question that has been put to me today about predatory pricing. We look at section 46 compliance in relation to issues such as vertical price squeezes—

Senator MURRAY—Such as what, I am sorry?

Dr Landrigan—Vertical price squeezes. If you want me to elaborate, I can.

Senator MURRAY—I know what you mean.

Dr Landrigan—Refusal to supply is another potential application of section 46. They are but two, plus predatory pricing. Issues are looked at and procedures are set in place with both internal and external advisers to make sure that Telstra is absolutely compliant in relation to all the various applications of section 46.

Senator MURRAY—Is it Telstra's legal officer or legal department which coordinates and manages all this or do you have a specific dedicated person who is the contact person? In the corporate structure, how is this managed?

Dr Landrigan—We have a legal directorate and a regulatory directorate that are in separate business units. The core interface between Telstra and the ACCC is the director of the regulatory area, who is my immediate superior. He is advised by economists, policy people, engineers and lawyers and we have a subgroup of lawyers within the regulatory directorate that is devoted to competition law issues and advises on the very kinds of issues that you have just touched on.

Senator MURRAY—That just does not just imply but confirms that Telstra take this area of law—as perhaps other areas of law—very seriously because you have dedicated and expensive resources committed to it. In the sense of a volume of work—the constancy and frequency of having to deal with issues arising out of section 46—would you regard it as a high-level concern or activity for that division or is it just an occasional thing you deal with?

Dr Landrigan—I regard it as something we give very high priority to.

Senator MURRAY—And it comes to you quite frequently?

Dr Landrigan—Yes, but not perhaps in the sense that you are suggesting. It is a compliance issue.

Senator MURRAY—Let me explain to you why I am going to this. I want to see, with respect to a very large corporation which self-evidently has very substantial market power, whether the regulatory interaction and the consequence of the law are such that you are

constantly activated to be concerned about it and to be vigilant about your own behaviour. That is really the context in which I have presented my questions.

Dr Landrigan—The answer to that is absolutely yes. We are very concerned about the operation of section 46. I will add one comment to what I have just said. It should be recognised that there is—and I know it is not directly within this committee's terms of reference—an interplay between section 46 and part 11B of the Trade Practices Act. Part 11B picks up section 46 and other provisions in part—

Senator BRANDIS—That is the telecommunications part of it?

Dr Landrigan—I beg your pardon, yes—the telecommunications specific market conduct laws. That picks up the part 4 provisions and applies them to telecommunications carriers and carriage service providers. So when we look at the application of section 46 it is not just with the operation of section 46 alone in mind; it is with respect to the operation of section 46 in tandem with part 11B—the market conduct provisions, as the senator pointed out.

Senator MURRAY—I specifically kept my questions relatively narrow just to be sure that it is that area of law with which Telstra is experienced. In that sense, another purpose of my questions was to indicate to the committee that you have expressed a great deal of practical experience with the operation of section 46. Yet your answers to specific questions from the committee—so far only from Senator Brandis and myself—have been answered in the abstract. We would have expected you to have said, 'In Telstra's experience, the question you ask would be such and such.' I recognise you as a highly intelligent and competent individual, Dr Landrigan. I think the problem with your style of answer is that it confirms to me that there is a problem.

Dr Landrigan—With respect, Senator, I think it was the questions that were asked in abstract, as opposed to my answers being provided in abstract.

Senator BRANDIS—That is perfectly fair, Dr Landrigan. I did ask questions at a conceptual level which you declined to answer. It is fair for you to point out that your answers were not abstract.

Senator MURRAY—Point of order, Madam Chair. I gave Senator Brandis the courtesy of listening throughout his very good interaction with the witness. He then left the room and has not followed the line of my argument or paid attention to it.

Senator BRANDIS—Can I speak to the point of order, Madam Chair. I really only interjected then out of fairness to Dr Landrigan because he was being, in a sense, accused of something which he was not responsible for because of the way I chose to ask my questions. I really only interjected to protect Dr Landrigan against a misattribution which arose from me.

CHAIR—Thank you, gentlemen. Do you have any further questions, Senator Murray?

Senator MURRAY—I will end on this basis, if I may. I have a document called a NARGA position paper. In that paper, it says:

Irrespective of how large the corporation or how financially powerful, a corporation will not presently come within s 46 unless it can raise prices without losing custom.

That is from page 2. It goes on:

Since only a monopolist or a corporation in dominant position can set prices without losing custom, it is clear that s 46 does not prevent large and powerful oligopolists from engaging in abuses of market power such as predatory pricing.

Later on, they come to the view that the threshold for succeeding in section 46 has been raised to such heights that the section now effectively applies only to monopolists or those in a dominant position. The implication is that oligopolists would rarely be caught by section 46; therefore, they would be able to freely engage in predatory pricing or in other abuses of market power without fear of the Trade Practices Act.

NARGA is known to be a very vigorous and quite openly self-interested group who are there to pursue the interests of their members—that is perfectly proper. The point very ably made by Senator Brandis earlier is that other authorities hold to the view that section 46 is not working as it was intended. You have countered, and I have heard your arguments, that the ACCC have said the courts are not consistently applying section 46 in accordance with the policy intention of parliament. Whether you agree or disagree with section 46, do you believe it is now fair for commentators to say that it is not consistently applied either in respect of regular interaction with the ACCC or with respect to the courts?

Dr Landrigan—We think that the section 46 provision is being consistently applied. It may not be being applied in a way that is entirely consistent with the ACCC's intention, and perhaps that is better reflected in what the commission has said as opposed to the legislative or parliamentary intention. On the question of oligopolistic conditions, those who are concerned that section 46 did not cover oligopolistic conditions would take some heart from the Safeway decision. As these principles evolve it is becoming more clear that section 46 can potentially, if not actually, cover conditions where more than one firm does meet that substantial market power threshold.

Let me also say that, in looking at oligopolistic conditions such as collusion or the like, while section 46 is the primary trade practices provision—apart from the unconscionable conduct provisions—before the committee, it would be foolish, I respectfully suggest, to look at 46 in isolation from section 45 and section 47.

Senator MURRAY—I accept that.

Senator BRANDIS—I agree with the observation you have just made but if I went back to my electorate—and I represent Queensland—and told people that at a Senate committee the other day the witness on behalf of Telstra came before our committee and said, 'Australia's competition laws operate perfectly'—or cannot be improved—'and section 46 operates fine just the way it is,' they would think I was pulling their leg. I am not having a go at you personally but the general public would think the whole notion of Telstra, of all companies, saying that the competition laws in Australia are just fine the way they are was a joke.

Dr Landrigan—It may be, with respect, that the general public is not aware of the myriad of other provisions that regulate the telecommunications industry and it may be that providing that kind of information to your constituents might be quite helpful.

Senator BRANDIS—That is a fair riposte.

Dr Landrigan—You should not look at these provisions in isolation. There is the telecommunications access regime, which regulates a number of core interconnect services, whether they be PSDN or mobile terminating access or whether they be digital data or pay TV. It would be quite illuminating and helpful for your constituents to know and understand that in addition to the operation of section 46—which we say is operating in a way that does not need amendment—there are other provisions which regulate the telecommunications industry, in addition to the universal service obligation, the customer service guarantees and the array of industry codes that we have included in our submission.

Senator CONROY—I want to follow up on one of those questions very quickly. You have obviously studied this area extensively, as you have indicated. I presume you have read Justice Kirby's dissenting opinion in the Boral case and perhaps have studied Lionel Bowen's contribution when the amendments to the section were moved in 1986. I was just interested as to whether you think the parliamentary intent that I certainly got from reading Bowen's and Kirby's contributions is being applied?

Part of the argument here is that section 46 is not being interpreted by the High Court in the way that the parliament intended, which both my colleagues have tried to drive to. After reading Kirby, and probably more importantly Bowen and what Bowen had to say when he was moving the amendments specifically to try and deal with some of the previous concerns, do you believe the parliamentary intent is consistent with the High Court interpretation now? That is really what this committee is trying to come to terms with. Has the High Court delivered the intent that the parliament was trying to achieve?

Dr Landrigan—On the question of Justice Kirby's judgment, with all due respect to that justice, I treat it with the weight I normally treat an individual dissenting judge. On the question of whether section 46 is being applied in a way that is consistent with Lionel Bowen's or the parliament's intention, we think that it is very clear that section 46 was designed to protect and to stimulate an efficient competitive process. In achieving efficient outcomes, whether some small firms or big firms are harmed, some are forced to exit and some have sustainable business cases ultimately does not really matter, with all due respect. Section 46—

Senator CONROY—And no-one, not even NARGA and the others who have come before this committee, have tried to say that competition means no-one leaves or enters the market. No-one has tried to suggest that and I do not think that is what the parliament's intent was.

Dr Landrigan—What I am saying—and perhaps I have not stated it clearly enough—is that competition, to use the words of the High Court, is by its nature ruthless. What I am saying is that, in the application of section 46, the High Court has not condemned practices that perhaps look a bit sharp, fierce or extremely vigorous, even if those particular practices have the effect of eliminating smaller or less efficient competitors—

Senator CONROY—I appreciate that and I do not necessarily disagree.

Dr Landrigan—and we think that is perfectly consistent with what the parliament intended.

Senator BUCKLAND—I do not want to interact with your intellect or anything like that, Dr Landrigan. The only thesis I have ever written is a greeting on a Christmas card. I do have some very real questions that I would like you to answer.

Dr Landrigan—In Christmas cards?

Senator BUCKLAND—Not in Christmas cards—I think we can leave them aside.

Senator CONROY—He will post them to you.

Senator BUCKLAND—If you give me your card, you might get one at Christmas time. There are some serious questions that do need to be answered by Telstra, as I see it. Coming out of what you have been saying to others this morning, how does Telstra actually set about protecting small business so that it itself complies with the intent of section 46 of the act?

Dr Landrigan—That is an excellent question. Let me perhaps put something into context that is not as clear as it might be from our submission. I would certainly like to make it very clear here today. We rely on small business both as customers of ours and as a source of supply to us. So we have every interest in ensuring that small business is able to operate effectively and competitively. We do not come to this table or to this forum with any view that suggests that small business is our enemy. To that extent, as we have highlighted in the submission, we try as best we can to promote small business activities through commercial offerings, small business awards, recognising important small business achievements and a number of other different ways that are outlined in the submission. I can happily provide you with more information about those. In terms of compliance, as I indicated to Senator Murray, we give very high priority to section 46 compliance as well as compliance in relation to unconscionable conduct and other provisions of the Trade Practices Act. We have legal resources, regulatory resources, external consultants and experienced advisers to advise on all of that. I do not know if that answers your question.

Senator BUCKLAND—It does, thank you. Having said what you have just said to me, how often would Telstra find itself in dispute with a small business operator pursuant to the terms of section 46?

Dr Landrigan—In my experience, I am not aware of a single case in which we have been caught up in a dispute with a small business as such. But I will happily come back to you with more details on that. There are certainly none at present that I am aware of. In almost six years that I have been with Telstra, I am not aware that there has been a dispute with a small business as such.

Senator BRANDIS—Do you mean a dispute in relation to a section 46 type issue?

Dr Landrigan—Yes—that is what I understood the question to mean.

Senator BUCKLAND—Are you aware that small business has complained to Telstra, having concerns that it may wish to proceed under section 46, but has not proceeded because of the cost and the difficulties imposed on small business?

Dr Landrigan—That small businesses want to launch a section 46 action?

Senator BUCKLAND—Yes.

Dr Landrigan—No.

Senator BUCKLAND—You are not?

Dr Landrigan—No. If I may clarify one thing, it is something that you may have picked up from the submission, something that has concerned me in thinking through the important issues that are before the committee. I have responded to your and the other senators' questions about small business. I think there is an important conceptual issue as to what small business is. In a sense I am responding to your questions as if I know what a small business is. I know what the threshold is in relation to the unconscionable conduct provisions in the act—it is \$3 million—but when the man on the street talks about small business I am not sure that there is that level of clarity around what a small business is. I respectfully suggest to the senators that, in looking at these important issues, that is a consideration that you might keep in mind, actually nailing what a small business is as part of this inquiry.

Senator BUCKLAND—I think you are very right to say that. I think some of us are still in part struggling with defining that in our own minds, although I think most of us would have a fairly clear idea as to where we are going with this. In your opening comments and also in your submission, you have clearly formed the view, and are passing that view on to the committee, that there needs to be no change to section 46 as it is currently structured. I was not here at the very start of Senator Murray's questions so I apologise for that and if I am asking something that he has already asked just tell me. We have also heard evidence from other witnesses from small business who think there needs to be in some cases quite substantive changes and in other cases some change. How would Telstra view the addition of 'harsh and unreasonable' being inserted in the act?

Dr Landrigan—In the unconscionable conduct provision?

Senator BUCKLAND—Yes, in that provision—section 46. That is what has been suggested by some. They say it needs to be broadened to take in 'harsh and unreasonable'.

Dr Landrigan—The unconscionable provision certainly goes a long way to—

Senator BUCKLAND—I will correct that question before you answer. It is 'harsh and unfair'.

Dr Landrigan—Just so I am clear, are you asking that in relation to section 46, or the unconscionable conduct provision?

Senator BUCKLAND—Yes, if you inserted those two terms for an additional strengthening, as small business sees it, of the provision.

Dr Landrigan—I think it would be a most unwise move. Competition, as I think I have said, can be harsh and unfair, so to have a provision that was inserted into section 46 that somehow suggested that the competitive process was inconsistent with harsh and unfair conduct would be a complete misnomer.

Senator BRANDIS—I suppose, Dr Landrigan, that you would say that the High Court has said—I think it was in the Moorgate Tobacco case, wasn't it?—that our law knows no such thing as a tort of unfair competition, so the idea of unfair competition is simply, as such without anything more, unknown to Australian law.

Dr Landrigan—I think that is right. I think that Justices Mason and Wilson, in Queensland Wire, expressed very similar views.

Senator BUCKLAND—It seems to me that you and Senator Brandis might be on common ground there because you make the comment in your submission against 'any suggestion that the recent High Court decisions amount to any reading down of protection' provided to small business by section 46, for reasons identified in your submission. Just explain to me what your rationale for that comment is. I have read some of the High Court decisions, not all of them, and I am not entirely without talent—many would disagree with me—and I have also taken legal opinions on that, opinions that I respect. I would have to say that if we had the time I would really want to debate that with you.

Dr Landrigan—As I have read the Boral and Melway decisions—and I might just spend a couple of minutes expressing a view on this—the High Court was in both decisions very concerned that the full Federal Court, in the case of Melway, jumped too quickly from a conclusion that there had been a prescribed purpose to a conclusion that there had been a taking advantage of market power. In the case of Boral, the High Court was very concerned that the full Federal Court jumped too quickly from a finding of purpose to a conclusion that there was substantial market power. On this point, the Federal Court was quite consistent with a number of other cases, one of them being the Telecom New Zealand case which, as you may be aware, was decided by the Privy Council. Looking at the purpose element of section 46 of the Trade Practices Act, or at its equivalent in the New Zealand statutes, section 36 of the Commerce Act, acting for a purpose of harming—if I may put it that way—eliminating, or substantially reducing the impact or effectiveness of a competitor is entirely consistent with both pro-competitive conduct and anticompetitive conduct. Whether you have market power or not, if you are trying to behave competitively, your purpose will invariably be to harm your competitor.

What was certainly picked up by the Privy Council in the Telecom New Zealand case, and which has since been picked up by the High Court, is that a finding on purpose does not tell you anything about whether there is substantial market power, and it does not tell you anything about whether there is a taking advantage of market power. A court that jumps too readily to link the latter with either of the first two is in dangerous territory. So when we say we do not think the High Court has watered down section 46, or should be read to have done so, it is in this light that the High Court was very concerned to ensure that efficient, competitive conduct continued to

occur without there being any necessary inference, from a finding on purpose, that the other elements of section 46 had been satisfied.

Senator BUCKLAND—I think it would be unfair of me to expect you to comment, but, from what we have heard to date, it appears to me that there is a perception, rightly or wrongly held, within some sections of the community—and I will reserve where I sit on that for the moment—that large businesses, often thought of as monopolies or near monopoly businesses, develop a degree of arrogance, thus taking comfort in these High Court decisions and thinking they justify some of their unreasonable conduct against small business. I can honestly say that I have not formed an opinion on where this is taking us at the moment, and I can still see both sides of the argument, but I tend to think there is a degree of arrogance building up within large business in their attitude to small businesses, which sometimes do not have the resources to pursue or protect themselves in actions.

Dr Landrigan—I will address your point, at least as I have understood it. I refer to the answer I gave to Senator Murray. I do not believe that Telstra is arrogant in a compliance sense; we do not look at these High Court decisions and bask in the sun, as it were, in the comfort and knowledge that we are not going to be caught by section 46 any longer. If anything, we look at these decisions extremely closely and, day by day, try to have more vigilant and more effective compliance processes. We do not take these decisions lightly, nor do we go away from them believing that we somehow have far greater flexibility than we did in the past and therefore do not have to give due consideration to whether we are complying.

In addition to all that, of course we have a very effective and vigilant regulator—the ACCC—that is constantly looking at what we do, that is very alert to complaints about our conduct and which we are in constant contact with. We cannot afford to be lax, lazy or arrogant, as you put it. I cannot speak for other businesses but, certainly as far as Telstra is concerned, I would refute very strongly any suggestion about Telstra in that regard. I am not sure that you were making the suggestion, but to the extent you might have been, Telstra is not an arrogant entity.

Senator BUCKLAND—I was not identifying anyone. If I wanted to, I would have said it straight out. It was a general observation. I have no further questions. However, I really do appreciate what you have said because, as Senator Brandis said earlier, you are the first academic to appear before the committee, and I look forward to reading the transcript to pick up on some of the things you have said and put them into context. Thank you very much.

Senator MURRAY—Madam Chair, I want to clarify a point from something that was said.

CHAIR—Certainly.

Senator MURRAY—You made the point which I think is self-evident that the act of competition results in someone inflicting harm on another. I assume you do accept that there are types of harm that are outlawed and should be outlawed.

Dr Landrigan—I do accept that, absolutely.

Senator MURRAY—Thank you. I wanted that on the record.

Senator BRANDIS—Presumably you also accept—this is what we have to grapple with in this committee—that there are forms of market behaviour which constitute the use of a power to price which, although ostensibly competitive by delivering a low price, may in certain circumstances in fact be anticompetitive if they are intended to drive competition out of the market. We have to define what the point is at which the use of pricing power, if I can use that expression, is an example of genuine price competition or an example of predatory conduct for an anticompetitive purpose. I do not understand you to be saying, Dr Landrigan, that not every offer of a lower price in a market is of itself indicative of competitive conduct. There may be circumstances, otherwise we would not even talk about predatory pricing, in which pricing behaviour may be anticompetitive, and it is a question of defining the point at which one distinguishes between genuine price competition and anticompetitive pricing practices.

Dr Landrigan—I accept that.

Senator BRANDIS—I thought you did.

Dr Landrigan—If I could elaborate a little—and it is a point I made in response to one of your earlier questions—as Telstra had understood the terms of reference for the inquiry in so far as section 46 is concerned, it is about the effectiveness of section 46 in protecting the interests of small business. Predatory pricing is just one factor that may affect small business. It may well be that vertical price squeezes affect small business.

Senator BRANDIS—They do.

Dr Landrigan—It may be that some other form of market foreclosure affects small business. It may be that bundling affects small business. It may be that a refusal to supply affects small business. If I could, I respectfully suggest that your questions are focused on predatory pricing. However, in terms of our compliance procedures and in terms of my own understanding of section 46, it is much broader in its application than perhaps that particular and specific concern about predatory pricing. It just so happens that the Boral decision has brought some of that debate about predatory pricing to the fore, whereas perhaps it has not been in the past.

Senator BRANDIS—I think it is very helpful to have that on the record. The sort of market behaviour prohibited by section 46 is not just pricing behaviour. The reason it has been foremost certainly in my mind and in the minds of others is because I, with respect, do not agree with you about the effect of the Boral case. We have perfectly good protection about, for example, constructive refusal to supply from the Queensland Wire case, so that is not an issue. The High Court has never dealt with price squeezing to the best of my knowledge, but a lacuna in the law, as it seems to me—and we respectfully agree to differ about this—is in relation to that species of conduct loosely called predatory pricing, because of what Boral decided.

Senator WEBBER—I wanted to touch briefly—because I think briefly is about all I am physically capable of at this point this morning—on the aspect of your submission that goes to codes of conduct. You talk about the telecommunications industry being bound by a series of them already—both mandatory and voluntary. As I understand it you therefore argue that your industry should be exempt from provisions of part IVB. I am fairly sceptical, particularly about voluntary codes of conduct, but there are lots of other industries that have mandatory and

voluntary codes of conduct which are not exempt from the provisions of part IVB. What makes the telecommunications industry so special?

Dr Landrigan—Generally speaking, it is the effectiveness of those codes as they have been applied to the telecoms industry. Clearly if voluntary codes are not routinely being complied with then there needs to be some greater sanctions to give them teeth, if I can put it that way. With the telecoms industry codes, a number of the codes are registered with the Australian Communications Authority, the ACA, which is kind of the technical regulator in the telecoms industry. Upon being registered, they are given teeth in the sense that the ACA can then enforce sanctions and, I understand, penalties as well for non-compliance with the code. So it is kind of a hybrid but voluntary-with-teeth set of arrangements. There is an enormous number of codes that are listed in our submission. If you are happy for me to pick them out, I can, but I would need to refer to the submission.

In the telecoms industry, apart from the codes working effectively the process is important as well. Very early on—in fact, when the 1997 regime or the 1997 amendments commenced—industry self-regulation was established as a kind of touchstone of the telecoms industry. To that end, the party I referred to before as ACIF, the Australian Communications Industry Forum, was set up to oversee the development of codes within the industry in collaboration with the ACCC, in collaboration with the ACA and in collaboration many times with consumer groups as well. You would need to call evidence from the CEO of ACIF to give a better view on all this but, as far as Telstra has been concerned—and, if I may, I will speak on behalf of other members of the industry—the process has been an incredibly effective one.

It should be said—and it may be that the Senate committee goes down this path—that in the early days when this was all being looked at Telstra did express some reluctance about being involved in that process. I would not be surprised that, if the committee were to make a recommendation about the use of codes, you heard some complaints—gripes, if I could put it that way—about big business or any business being involved in that process. Over time we have learnt, and we have come to accept and enjoy taking part in it as a very effective process.

Senator WEBBER—But there are other industries that have their own codes that still have not argued to be exempt from part IVB.

Dr Landrigan—I cannot speak for those industries but it may well be that they do not have the authority of a regulator, such as the ACA, that has enforcement powers and that has power to apply for, if not issue, fines for non-compliance. To the extent that you would be capturing this under the Trade Practices Act as well, it would be redundant.

Having said that, we can provide considerable guidance on what works and what does not work in relation to industry codes themselves. I do not know if the senators have picked this up but I might just mention this in passing: I do not know whether the ACCC foresaw the direction of this particular inquiry but they have publicly sought comment on two documents relating to voluntary industry codes. They posted it on their web site a couple of days ago and have sought comment. As far as I can understand, it is not industry specific but is obviously seeking comment from various industries. I do not know the details, but I would suggest that if the Senate is not across it then it would be important to look at it.

Senator WEBBER—How many of your codes are voluntary as opposed to mandatory?

Dr Landrigan—I would like to refer you to our submission. Do you have that with you?

Senator WEBBER—Yes.

Dr Landrigan—In terms of the codes listed on sections 46 and 47, the ones that have ticks have been registered with the ACA. I hope you have the same pagination as I do.

Senator WEBBER—So the ones with ticks are registered.

CHAIR—Attachment F.

Dr Landrigan—That is not to say that the others will not be registered; there are ongoing processes to determine whether they will be registered or not.

Senator WEBBER—Right. As I read this list, most of these codes go to the provision of specific services by Telstra.

Dr Landrigan—Some of them are very technical in nature.

Senator WEBBER—It is very industry specific. Therefore I would not see those as being a justification to avoid being caught up in part IVB because these are just purely for your industry. They cover things such as call charging and calling number display. Having that as a mandatory code of conduct is not necessarily the strongest argument I have heard for being exempt from a section of the act.

Dr Landrigan—In a sense, I am not sure that the points we are making are that diametrically opposed. What we are saying is that there are a range of codes that apply to the telecoms industry, many of which are enforceable. To that extent, adding another layer of authority to the codes is not a useful exercise.

Senator WEBBER—Fair enough. I remain to be convinced, but there you go.

Senator CONROY—Would you concede that Telstra has substantial market power in many of the markets in which it operates?

Dr Landrigan—Which markets are you referring to?

Senator CONROY—I am looking at the Telstra annual report on market share. I can go through them all if you like. In terms of market share, Telstra has: 76 per cent of local calls, 66 per cent of domestic long-distance calls, 53 per cent of international long-distance calls, 46 per cent of mobile services, 78 per cent of basic access services, 63 per cent of data revenue, 57 per cent of subscription TV services, 13 per cent of Sensis advertising revenue, 27 per cent of narrowband Internet services and 50 per cent of broadband Internet services. How about any of those?

Dr Landrigan—I would not concede that in any of those markets we necessarily have substantial market power.

Senator MURRAY—I think you should join the Treasury. Your answers are just wonderful!

Senator CONROY—Excellent; you will make the comedy highlights package for that one. So you just have a large part of the market but no power.

Dr Landrigan—That may, and I apologise if it did, sound rather flippant.

Senator BRANDIS—It did not sound flippant at all. It simply seemed to me, Dr Landrigan, that you were declining to make a concession—which, of course, you are perfectly at liberty to do.

Dr Landrigan—The questions you ask cannot be looked at in isolation from a number of other factors that operate in the telecoms industry. With respect to most of the services that you have identified, there is in fact highly regulated wholesale access to the core services, and many of the services you have just identified are downstream products. So, to that extent, there is some very significant constraint on the exercise of any market power.

As I mentioned before to Senator Brandis, whether it be the copper network, which is regulated in myriad forms, whether it be PSDN interconnect, whether it be unbundled local loop, whether it be spectrum sharing, whether it be local call resale, all of those are core wholesale inputs to some of the services that you have just identified and which would need to be taken into account.

In addition to that, you need to look at the strength of many of our competitors. What you will see—and perhaps this is not so apparent from our public materials and Telstra could provide this to the committee—is that clearly over time in relation to many of the services that you have identified, taking market share as one indicator of market power, there have been substantial declines in Telstra's market share across those services. In a sense, taking those static market shares does not necessarily provide a full or meaningful picture of market power. A much more meaningful indicator is how market share has declined over time, and there have been significant declines, looking at it in a perhaps more holistic fashion.

Senator BRANDIS—I agree with you that a large market share is not conclusive evidence of substantial market power and you can have a situation where a corporation with more than 50 per cent of the market might properly be held not to have substantial power in that market—I am with you on that. But you would agree that a large market share is an indicium of substantial market power?

Dr Landrigan—It is one factor. As I have said, a more meaningful consideration in relation to market shares is what has happened with those market shares over time.

Senator CONROY—I appreciate that. When you go from being a completely 100 per cent regulated monopoly and you open it up to any form of competition you are bound to see some change in the market. I do not know if it necessarily weakens the discussion about market power

but you have to know where you started and where you have finished if you want to run that argument.

Dr Landrigan—If I could pick up on it, the point that Senator Brandis made is an important one, given some of the shares that you have identified at the lower end of that list that you cited. My reading of cases like the Safeways one is that even the market shares—taking that in isolation—at the lower end of that spectrum that you have identified may meet the substantial market power threshold. I decline to concede that we had market power in relation to any of those services but it is a factual issue; it is an empirical issue.

Senator CONROY—True.

Senator MURRAY—Fifty per cent is a substantial market share.

Senator CONROY—That is factual; thanks, Senator Murray—I am glad you helped me out there.

Senator MURRAY—None of these legal tricks are going to get us out of that.

Senator BRANDIS—Dr Landrigan's point, Senator Murray, is that market share and market power are not the same thing. But he quite properly agrees that a large market share is an indicium of market power.

Senator CONROY—It is not often you meet someone with a 10 per cent share that has enormous market power.

Senator BRANDIS—I have, as a matter of fact.

Senator MURRAY—As someone who has been in business for many years, I can assure you if I had 78 per cent of the market not only would I have market share but I would have market power.

Senator CONROY—Thank you, Senator Murray. But there are not any witnesses who want to concede it.

Dr Landrigan—Can I add one very basic point? I do not wish to be trite about this but it is quite clear that, even taking into account the fact that market share may be one factor, it is well known—and this is a very basic point—that even a firm with 100 per cent market share, given very low barriers to entry, may not have substantial market power. But that aside, I agree entirely that it is an important consideration.

Senator CONROY—Okay. I will move on. In your submission you oppose an effects test in section 46. But you already operate under an effects test for anticompetitive conduct under part 11B of the TPA. That is the specific competition for telecommunications. Could you tell the committee about your experience with that regime? Do you feel you are able to price competitively under this regime?

Dr Landrigan—Part 11B, as I have pointed out in my responses to Senator Murray, adds an overlay to the operation of section 46.

Senator CONROY—It adds an effects test.

Dr Landrigan—It adds an effects test but it also adds competition notices; it also adds a reverse onus of proof in relation to certain competition notices. There are a myriad of other layers of regulation that are included in part 11B as well, of which the effects test is one factor. The first problem as we see it with an effects test is its propensity to blur the distinction between legitimate pro-competitive conduct and conduct that harms the competitive process.

Secondly—perhaps this is more interesting, given the current debate around the section 46 cases—as we understand it, the overriding impetus for reforms from a purpose to an effects test is to ease difficulties of proof in respect of purpose. So the complaint is made that purpose is awfully difficult to prove, and we need something that makes it easier for us to meet that threshold.

Something that I think is very interesting coming out of some, if not all, of the recent full Federal Court and High Court decisions is that proof of purpose has not been an issue. To that end, you would have to wonder whether an effects test replacing it—or adding it as an overlay to the purpose test—would be at all useful. Nevertheless, at the conceptual level, I think the problem is that there are real risks that an effects test will blur the distinction between pro-competitive conduct and conduct that actually harms the competitive process. That is why, since 1997, we have consistently opposed, notwithstanding the operation of part 11B, the test within part 11B.

Senator CONROY—In its review of the telecommunications competitive regime, the Productivity Commission stated that the evidence appears to indicate that the ACCC is cautious in commencing a formal investigation. Further, they stated that Telstra was unable to point to any particular instance in which competitive behaviour by it had been deterred by the ACCC's administration of part 11B.

Dr Landrigan—That is my understanding of the Productivity Commission report, yes.

Senator CONROY—They supported the retention of part 11B?

Dr Landrigan—In their final report, they did. In their draft report, they recommended the abolition of part 11B.

Senator CONROY—Of which one should we take notice?

Dr Landrigan—The final one, obviously.

Senator CONROY—Do these findings indicate that concerns about the impact of an effects test are a bit overstated? I appreciate your conceptual blurring. The reason the debate keeps kicking along is that maybe, at the moment, it is too stark, and people are unable to mount the cases. As Senator Brandis said earlier, the ACCC, who are the people responsible for mounting most of them, are simply unable to find enough ground where they think there is a legitimate

case but there is that starkness, as opposed to your concern about blurriness. I appreciate that, in your capacity right now, you are not in a position where you can assist us. That is what we are trying to work our way through—between two polars—and you are worried about the blurriness.

Dr Landrigan—The polars being purpose and effect?

Senator CONROY—Possibly, but just in respect of trying to find substantial proof under what I would describe as the new determination following Boral.

Dr Landrigan—What is the starkness to which you are referring?

Senator CONROY—You are worried about it being blurred. It may be that we have misunderstood each other, but I don't think we have.

Dr Landrigan—To clarify it, in referring to the application of any provision of the Trade Practices Act under part 4, whether it be the Sherman Act, the Commerce Act in New Zealand, the Treaty of Rome, the Treaty of Amsterdam or whatever—and picked up by commentators much more learned and experienced in this field than I am—there is always tension in the application of provisions like section 46. How do you distinguish hard competition, even fierce competition, from conduct which has a genuinely harmful effect on consumer welfare and the competitive process?

I am saying that the purpose test acts as a useful filter in making that distinction and that, if you replace that with an effects test, that is the blurriness you get. The inherent difficulty, which sits there all the time, becomes that much more difficult to set apart.

As a pragmatic point, the philosophy, if I could put it this way, about introducing an effects test instead of, or as an overlay to, a purpose test does not stack up, because what we have seen in the recent cases that have been referred to here today is that the purpose test is not an issue. If anything, what the High Court has done is to say, 'The full court's finding on purpose was fine. We're not going to look at that at all. What we're concerned about is the inferences that are drawn about that in relation to the other provisions of section 46.' As I think has been seen in the cases that are coming up under Boral and Melways, purpose is not an issue.

Senator BRANDIS—Nor was purpose an issue in Queensland Wire, the third of the section 46 cases in the High Court. If I may say so, I am in entire agreement with Dr Landrigan on this matter. Although we have had all these debates about whether there should be an effects test in section 46, all of the big three cases in the High Court would have been decided the same way if there had been an effects test. I think it is a bit of a false issue.

Senator CONROY—What is the panic?

Senator WEBBER—What is the problem with having an effects test?

CHAIR—Senator Conroy, do you have a final question?

Senator CONROY—No, I am finished.

CHAIR—Dr Landrigan, thank you very much for your evidence this morning. It has been a useful and stimulating debate around those issues. We appreciate your time.

Dr Landrigan—Thank you.

Proceedings suspended from 10.31 a.m. to 10.40 a.m.

HUBBARD, Ms Melanie, Policy Adviser, Australian Retailers Association

LONIE, Mr Michael, Director of Tenancy, Australian Retailers Association

MOORE, Mr Stan, Chief Executive Officer, Australian Retailers Association

CHAIR—The committee now welcomes the representatives of the Australian Retailers Association. I now invite you to make an opening statement and, at the conclusion of your remarks we will go to questions.

Mr Moore—Thank you very much for the opportunity to respond to this inquiry. The Trade Practices Act is a very important tool to ensure the maintenance of a competitive retail industry. By way of background, because this inquiry is focusing on the Trade Practices Act and the protection of small business, I would like to inform senators—and we did touch on this in our submission—that, whilst the Australian Retailers Association does have major retailers as members, some 95 per cent of our membership—that is, some 10,000 members—employ 20 staff or fewer. Therefore, by way of our categorisation, they are small business operators. The Australian Retailers Association operates Australia wide, either directly or through affiliate organisations in the various states or territories.

In opening, I would like to indicate that we would like to deal with the first four questions in particular. We do not have any strong views in relation to question 5 of your inquiry. Therefore, I would like to move to addressing each of those particular questions that you posed to us. Of course, I am happy to receive questions, either at the end of each section or as we go. The first question that the senators posed was whether section 46 adequately deals with abuses of market power by big business. Our view here is that section 46 is about protecting a competitive market. The competitive environment is one that you really do see displayed in the retail industry. It is one of the most competitive industry sectors in the Australian economy. However, we believe that some businesses mistakenly believe that adding an effects test to section 46 of the Trade Practices Act would address concerns about grossly unfair conduct. We think that is ill-founded and will put forward some suggestions that we should in fact be dealing with section 51AC in dealing with that sort of conduct.

The use of section 46 is an issue that has not really been on the radar screen of ARA members as a solution to abuses and unfair practices. Competition, by its very nature, can harm a competitor. One knows, and the retail industry is very aware, that firms aim to increase their market share—they do that day by day—and as a result some competitors, alas, do exit the market. A scenario may serve as an example: under an effects test, a retailer that is small by, say, national standards but large in a local market could be charged with misusing its market power simply by doing things such as extending its trading hours, enhancing its product range or offering a new service—all the sorts of things that retailers do on a day-to-day basis. If the effect was that a smaller competitor was harmed, they could very well be in breach of that section of the Trade Practices Act should an effects test apply. Further, I think allowing retailers who are unable to compete in a dynamic retail sector to use an effects test would protect and condone inefficiency in our sector. Therefore, we believe an effects test in the retail industry is anticompetitive—it actually stifles competition.

Regarding the committee's term of reference 1(b), which relates to whether section IVA of the act deals effectively with unconscionable or unfair conduct in business transactions, we feel that as it is currently structured the act does not achieve this. The issue for retailers, and the one that constantly keeps coming before us, is that of retail tenancy. It is a clear example of where we believe specific legislation is needed to deal with an identified problem. Whilst the ARA's view is to ensure that we pursue on a voluntary basis the use of codes—which we will touch on later—this is one area where we have sought in the past the use of codes but with no benefit to the businesses involved in such a code. We would like to expand a little on this area because the issue of unconscionable or unfair conduct is a burning issue amongst all of our retailers, particularly our small business retailers. The tenancy point of view is the main area of concern, and I ask Michael Lonie to pick up the cudgel on that.

Mr Lonie—The unfair aspect is largely perceived to stem from the fact that planning laws deliver to the landlord a significant advantage throughout the states in the respect that they confine the areas in which the tenants can go. The by-product that arises out of that is that many tenants are limited in the landlords they can deal with through their particular types of operation, especially those that wish to operate within shopping centres, for example. Often, and especially at the end of the lease term, they are faced there with demands that they clearly see as being unfair. They are disappointed to some extent with the ACCC, which had indicated when 51AC was first introduced that it would test that particular aspect. To date there have been some cases but many of them have been resolved without requiring the full force of the High Court. So the case law there is somewhat limited.

Many of them believe that even certain aspects that exist within the state legislation at the moment give an unfair advantage to the landlord in assessing just exactly what they are doing with business. An instance of this is the disclosure of turnover figures, which tenants believe are used unfairly, especially during rent reviews or at the end of lease terms. More importantly, some of them clearly feel that, at the end of the lease term, there is a 'take it or leave it' attitude and they feel that the goodwill they have built up within that business often is transferred to a new tenant, because the new tenant may be treated differently to the existing tenant. In some cases where the existing tenant has refused to pay the high rent, the new tenant has been given a lower rent.

The other things they seek, in terms of clarification—and we would clearly like to do that through a code but it has not eventuated, even though it has been put forward—is a greater disclosure of what contributes outgoings and the recovery of outgoings, and especially a breakdown in respect of many of the outgoing categories. Management fees is one particular issue. We have seen recently in Victoria, for example, that legislation has sought to cap any increase in management fees going forward. It is interesting that, just recently, one particular centre clearly significantly changed their actual management fees for next year, which is their benchmark year. The actual cost of management fees for the year 2003 as audited was \$2.207 million. The centre has not been expanded or extended, yet, for the budget year 2004, that figure has risen to \$2.916 million. That will then form the basis of the benchmark figure moving forward that will be capped to CPI.

In the same instance, however, the 2003 actual for centre management, which is the recovery of wages and salaries and so forth, was \$3.132 million, but the budget for 2004 is \$2.782 million. The centre is one of the largest in Victoria and it has not been extended during the

current 12 months. When retailers try to ascertain these things as individuals—and many of them are not prepared to do that for fear of retribution—they do not get answers, other than that the arrangement of the management fee is between the landlord and the managing agent. They have signed a contract and a lease, so they are stuck with it. These are some of the areas where many of the smaller tenants believe they are being treated unfairly. Some might say it is just hard bargaining and cannot be deemed unconscionable. But, clearly, we as an association would see that a code that covers some of these issues on a national basis, because each state varies as to how this is handled in some of the legislation, would be well worth while.

Mr Moore—That point moves us on to the area of part IVB of the act, which deals with codes. In fact, the ARA is involved in quite a number of voluntary industry codes. Some of those, such as the supermarket scanning code of practice and the timepiece and jewellery code, as it is called, deal directly with consumers. We have a number of other codes that we are party to and that our members are party to. The common thread in the use of codes, and particularly voluntary codes, is that, if both parties act in good faith and with good will and if they are committed to making that code work, then the code is successful. Our experience has been that, where the parties come to the table and act in good faith, the codes work and they do seek to protect the business process and the competitive process.

However, in the past, as an organisation we have tried codes on a number of areas in relation to retail tenancies and those codes have effectively failed. I think Michael might touch on this point as well. Our view is that we are dealing with small businesses, but many of what we would call medium enterprises are also treated like small businesses in shopping centres when each of their lease spaces is treated in isolation. They are not treated as a larger organisation across a chain of shopping centres—each lease is treated as an individual lease and therefore they are treated as if they were a small business. In order to provide some protection, we feel that, without the support that we should be getting from section 51AC, we should move towards a mandatory code dealing with issues around retail leases. I am not sure whether Michael wants to touch on that.

Mr Lonie—I will touch on a couple of aspects of that. Firstly, in New South Wales we originally had a code of conduct back in 1989, 1990 and 1991 which both sides basically agreed to use. However, ultimately it failed: certain parts of it were used selectively because it was voluntary, and that really led to the legislation in 1993 in New South Wales.

We attempted, in the late 1990s, to develop a casual mall licensing agreement in Australia. We got some agreement from a small number of landlords but the industry itself opposed it vehemently until such time as, through an opportunity in South Australia, we were able to introduce legislation in that state to cover casual mall licensing. The point I wish to make is that our original code was less draconian than the end result, in respect of the legislation that came in, but there was no goodwill to introduce it. However, we are now rolling it out on a national basis because, once it was chipped away in one state, the property industry clearly saw an opportunity to have it on a national basis. We are endeavouring to do that now, with goodwill on both sides. However, we are now being confronted with the ACCC and the validation of that code on a national basis.

We have attempted to do a similar thing—not so much with small business, but covering the larger units—in respect of the code of conduct for outgoings. That has basically been ruled out

unilaterally, largely because it applied to the majors, but the application of many of the things within that code would have been equally applicable to small business. Whilst we seek to have voluntary codes—especially a code that would seek to cover all the difficulties—not all state legislation is the same. I will use the analogy of the railway gauge, if I may: each state has a slightly different gauge and handles things slightly differently. Management fees, for example, in Western Australia are basically not recoverable. In Victoria we have just had them capped. They still are recoverable in other states. In many states, land tax is not recoverable. There is no uniformity and, in some states, those things do not exist. We would clearly love to go down that road, but it has to be with goodwill on both sides, and we are at times fearful that that does not exist.

Mr Moore—In all matters dealing with business conduct, ARA's first choice is to apply a voluntary industry code approach. But, as we said in our opening, for that code to operate effectively, it relies on good faith and goodwill. I would like to turn to your fourth question, about whether there are any other measures that can be implemented to assist small business in more effectively dealing with anticompetitive or unfair conduct. I will ask our policy adviser Melanie Hubbard to run through that.

Ms Hubbard—The ARA makes two proposals for how the act could better assist small businesses in dealing with unfair or anticompetitive conduct. The first proposal relates to the development of an appropriate national body to oversee tenancy issues for smaller businesses. We can look at the successful example in Victoria, where the Small Business Commissioner supports retailers in ensuring their rights under the Retail Leases Act. This helps retailers with mediation and with commencing proceedings for offences against the act; it provides them with help and assistance. We think that, if a mandatory national code for ensuring that retail tenants are able to engage in fair negotiation with shopping centre landlords is to be effective, there needs to be some sort of national body to mediate it.

Our second proposal relates to collective bargaining for retail tenants. We support the review's recommendation that collective bargaining should be accessible by small business, particularly in the case of small retailers in shopping centres—they should be able to collectively bargain. We believe that the ARA and other groups of retail tenants should be authorised to negotiate on behalf of their smaller members. This would be in line with the authorisations granted to other industries that handle price negotiation on behalf of their members.

The Shopping Centre Council's 17 members, in particular their six most dominant members, operate across state borders and thus are able to explore inconsistencies in the legal requirements in the state acts relating to retail leasing, so we believe that retailers must also be able to act on a collective basis across the states—those smaller retailers who have operations nationwide. This would allow them to have more protection against the sophistication and the very large resources of those shopping centre landlords. That brings us to the end, I think, of our summary. Stan?

Mr Moore—Pretty much. Just to encapsulate, basically our view is that the effects test in section 46 should not be applied; we need to look at the definition of unfair conduct and how that could be applied in section 51AC; there needs to be a mandatory industry code for retail tenancy and a body with investigative and mediation powers, accessible by small and medium retailers in relation to that code; and small retailers need to be able to collectively bargain on

retail tenancies. That pretty much encapsulates our view, and I am very happy to take any questions.

CHAIR—Thank you very much, Mr Moore.

Senator MURRAY—Mr Moore, in the report of the House of Representatives Standing Committee on Industry, Science and Technology in May 1997, the Reid report, recommendations 2.1 and 2.2 both recommended the drafting of a uniform retail tenancy code by the ACCC which would be enforceable because it would be underpinned by the Trade Practices Act. I presume from what you have said that you continue to support that proposition and that you regret the fact that nothing has been done about it to date.

Mr Moore—We continue to support that proposition. There have been other attempts to deal with that issue via state based legislation and the drawing down of section 51AC into various states' legislation, but our view still is that the solution could very well lie in those recommendations in what you referred to as the Reid report. Interestingly, the issue of unfair conduct and amendments to section 51AC, or the introduction of new section 51AC provisions, was picked up in that very same report, but it did not go as far as we are now saying it should be going—that is, going beyond the restricted term of 'unconscionable' to areas such as unfair conduct.

Mr Lonie—I might put to you also that, as part of the recent national review that Eileen Webb undertook on behalf of the ACCC, we put that initial recommendation of the Reid report to her as being one of our policies.

Senator MURRAY—Before my next question, may I say to the chair that, since pricing of rents and outgoings is probably the greatest concern that retailers express about predatory behaviour, I would suggest that in our own report we might do well to encapsulate a summary of the Reid evidence and findings, because I think they are still current, given the evidence before us.

On the same thing, I assume you agree with my summary that rents and outgoings and the process of negotiating rental arrangements remain a very obvious and frequent instance of predatory behaviour and therefore specifically come under the committee's purview in terms of what we are looking at. If you agree with that view, do you believe that collective bargaining by retailers within large shopping centres, for instance, can be properly addressed if the limitations on the unconscionable conduct provisions remain at a threshold of \$3 million, as I think it is, as it is currently? Do you not think that that threshold needs to be quite significantly raised, particularly where you get high-volume, low-margin retailers who will often have fewer than 20 employees?

Mr Lonie—I will take that on board. Yes, there could be some difficulty with that \$3 million if you take that as being the contract price, for example. In respect of a term of the lease with some of the larger units and longer term leases, \$3 million is quite clearly chewed up if you take the whole of the \$3 million as including rent and outgoings. We have just seen in Victoria, for example, that they have sought their exclusion to be \$1 million a year for someone not to be covered by their act. So \$3 million for a five-year lease is well applicable.

Senator MURRAY—It is my contention that the greatest failure in competition law in this country pertains to rents and renting practices. I think the National Competition Policy, the ACCC and indeed present and past governments have utterly failed in this area. They have failed for one clear reason—that pricing in this industry remains secret. No other sector has secret pricing. Goods and services are known everywhere. But if you go into a shopping centre and say, ‘Show me your list of prices; what is the price for a shop which has good access from the parking lot or for a shop which has a bad position at the back?’ you cannot get it. You can get the price for the particular, individual shop you might be interested in. I regard landlords as retailers of space and they should be obliged to have a public, open and transparently available pricing list, the same as any other provider of goods and services. So with that context, I want to ask you: how can collective bargaining work for retailers if you do not have the pricing lists which every other sector provides in the provision of its services?

Mr Lonie—I will answer that in two parts, if I may. I think there are possibly two aspects to it. The lack of disclosure of relevant information is quite clearly common practice. More importantly, the disclosure of incentives that are being offered is also very tightly controlled. I am not suggesting price fixing, by the way, in what I am talking about either; but it is a fact of much better informed information being available even on an individual basis where the person who is undertaking the negotiations for and on behalf of that member is not accused of colluding in respect of price fixing. That is where we are coming from in talking about collective bargaining—in other words, that authorisation be given to the association to negotiate the rents for and on behalf of their members with major landlords for a particular shop or shops.

From an association’s viewpoint, we would have a much better understanding. I currently see, where I am advising people, someone being offered \$10,000 as an incentive versus someone next door being offered \$100,000 as an attraction to get them in. In many instances, their rents are still about the same—say \$1,200, \$1,300 or \$1,400 a metre—because that is what they want as the face rent for the valuation of the centre. But, if you were to take into account what the effective rent was, it would be significantly less.

The other thing we are also looking at in that collective bargaining is the fear that I raised earlier in my comment about outgoings—where a small tenant who might believe he is being ripped off about an outgoing cost is fearful of raising that for the fact that, if it comes to the end of the lease term and they feel he has been a problem tenant, he may be told, ‘Go away. We don’t want you.’ In his instance, it might only be \$3,000 or \$4,000 but, if you multiply that by 250 tenants who are in the centre, it is a significant sum. It could also be related to the way in which GLAs are applied differently to different parts of the centres. Many of the retailers do not know this on an individual basis, and that is where we would also like the right to be able to handle those negotiations.

Senator MURRAY—Yes, and I must confess a bias; I agree with you. I regard the practices of the major shopping centre owners as profoundly anticompetitive, and they result in much higher costs to the community than would otherwise be allowed if there was a properly competitive leasing supply situation. My question remains. This is an industry where secret pricing continues, and I cannot see how collective bargaining—as important a step forward as it is—can work unless secret pricing in shopping centres is outlawed and ended.

Mr Lonie—We would agree.

Mr Moore—We are in violent agreement.

Senator MURRAY—Good. I needed more than a nod, because *Hansard* does not pick up nods. I want to make a further point. Turnover based rent is based on the precept that the better-off lessee, because he or she has the higher turnover, should pay more. In *Ponsford v. HMS Aerosols Ltd* 1978 2 AllER 837, the House of Lords majority held that a reasonable rent was the rent at which the demised premises might reasonably expect to be let and not one which was reasonable for the tenant to pay. I think it is a profoundly anticompetitive activity for any landlord to be able to have a share of the tenant's business. It is grotesque, yet that is a practice in this country and quite common in tenancy circumstances. Is there any way in which this committee, within its broad terms of reference, might consider drawing attention to these kinds of issues through broad law changes? Or is it only possible to attend to issues such as these through those things we were discussing earlier, such as a retail tenancy code, which would then extrapolate on these things?

Mr Lonie—There are a couple of answers to your question. If you go back to the Reid report and look at the evidence in the *Hansard* about percentage rent given by Mr Newton—who was the then general manager of Westfield—the percentages that they had applicable were sitting at around five or six per cent but, because their rents were so high, the percentage rent was never ever applied. The reason that the percentage rent clauses exist in many leases, I would put to you, is that the landlord wishes to know the sales figures of that particular store. We hear that that is so they can basically work their merchandising mixes and the like to get the best performance out of the centre, but I would put to you that in many ways it is used as a tool to see how far the rents can be racked, knowing full well the rough GPs that many of these people operate on. When you sit in a major regional shopping centre, it is very interesting to see that the occupancy cost does not vary greatly from one tenant to the other. If the disclosure of turnovers were removed from all leases throughout Australia, you would see a significant difference in just how that aspect is handled.

Senator MURRAY—I think that is so, but you would confirm for the committee what every retailer knows, and that is that sales do not bear any relationship to profitability.

Mr Moore—That is correct.

Senator MURRAY—There is an authority called W.D. Duncan, who, in his book on commercial leases—and the reference I have is the second edition, 1993, Lawbook Co., chapter 5 'Rent and Rent Review'; there may have been subsequent editions that I do not have a reference to—stated that in the United Kingdom evidence of the lessees' turnover has been held inadmissible when considering market rental of the premises and there has been a tendency to restrict the necessity of such a disclosure. He uses *W.J. Barton Ltd v. Longacre Securities Ltd*, 1982, 1 WLR 399 as his reference. Is it your experience that elsewhere in the world they are starting to close out on these sorts of price gouging activities?

Mr Lonie—I am sorry, I do not know.

Mr Moore—We have not pursued that area so we cannot comment, but we could come back to you on that.

Senator MURRAY—I am interested, because I suspect we are out of step in Australia—but I do not know and I am not current enough to know whether that is true.

Mr Moore—We would be happy to take that on notice and to pursue and provide supplementary information to the inquiry.

Senator MURRAY—Thank you.

Senator BUCKLAND—I was particularly interested in the line that Senator Murray took on the disclosure of rents that shops pay. I think that is important. In fact, it has knocked out a great slab of questions I wanted to pursue, so I will be a lot briefer than I intended. I am certainly aware of situations because, sadly, I was involved in my former life in having to be a landlord for the property that we operated out of. I say, ‘sadly’ because it was a pain. Have you found, particularly in regional areas as opposed to suburban capital city situations, that when small traders have had enough, so to speak, and banded together and decided to move in block out of the shopping centre and into what you might call town centres, there has been a dramatic turn around in attitude by the centres in their views about renting and pricing of those facilities?

Mr Lonie—Not that I am aware of. I have to be honest in saying that—and I do cover most of Australia—but, in respect of what we call the provincial cities, it is quite clear from our observation of even some of the smaller retail chains that often the profit from one store in a provincial city is propping up 1½ to two stores in the major regional metropolitan areas, because most of those are running either at break-even or at a loss. I think there may have been some moves in certain areas, especially along the Queensland coast, largely related to what I would call the emerging retail formats, or those retailers who are wanting to use larger space. Quite clearly, they would not accept the rents of \$600 or \$700 a metre that were being asked of them in the larger shopping centres in those provincial cities. And, yes, they did move out to what is known as bulky-goods areas, or areas that are subject to urban renewal, where their rents varied from about \$190 to \$280 a square metre, and they were able to trade quite satisfactorily in those areas. A lot of that was driven by the rent but more importantly, as in Senator Murray’s reference, by margins and profits, because many of those did not have good GPs.

Senator BUCKLAND—I am concerned about the inability of small retailers to speak—and you have confirmed here this morning that you are aware of the situation—because if they open their mouths they are seen as bad tenants and might be asked to leave. Does the same apply to large retailers? Most shopping centres contain at least one of the major food chains, if not all of them. Are you aware that they sometimes complain about their rents?

Mr Lonie—They have their disagreements, yes. The disagreements are often not due to rents—because that is something that is locked up fairly early in the piece—but go to interpretations, for example, of outgoings. I am aware of some fairly significant arguments going on right at this very point in time between two of the major retailers and some of their landlords because they are being charged for outgoings that they should not be charged for under their leases. So they do have their disagreements.

Senator BUCKLAND—Yes.

Mr Lonie—But their disagreements are not in respect of rent, normally.

Senator BUCKLAND—Has your experience in the industry shown you that their disputes are settled more easily than those of a small dress shop?

Mr Lonie—No, they are just as protracted.

Senator BUCKLAND—They are?

Mr Lonie—Yes. Hence the code of conduct for outgoings that we have tried to put on the table to solve some of the problems that exist with a number of the majors with respect to how outgoing charges are recovered.

Senator BUCKLAND—It might well be that they can afford to have those protracted negotiations whereas the local dress shop would have to bow down to the pressure.

Mr Lonie—They have bigger pockets, yes. The dress shop could not stand it.

Senator BUCKLAND—So, in reality, there is a degree of unfairness that applies. A small retailer would have limited ability to exploit its case pursuant to section 51AC or section 46?

Mr Lonie—With respect to section 51AC, we sought to have those provisions drawn down into the various state acts because the dispute resolution procedures associated with the state acts were (a) cheaper and (b) in many instances quicker and more cost effective for them to handle. That is the reason this organisation sought to have those draw downs. Most of the states have done it, although we suffered some problems with respect to cross vesting for a period of time after those draw downs were taken from the Federal Court into the various state jurisdictions. That is why we went along that route. But those that I have known who have gone down the road are still looking at \$50,000, \$60,000 or \$80,000 in legal fees.

Senator BUCKLAND—Does the association represent members in respect of—excuse my ignorance of the proper terms—the strip shopping, where there is just a bit of a local shopping centre or the town centre?

Mr Lonie—The mums and dads, we call them. Yes, we do.

Mr Moore—And some of our major chains are also in strip shops as well.

Senator BUCKLAND—Indeed they are.

Mr Lonie—We cover the corner stores through to the general strip shops.

Senator BUCKLAND—Can you make a comparison of the number of disputes that you are aware of between the landlords and the shops in those strip or mums and dads shopping centres, and between the landlords and the shops in the major shopping centres—the big complexes? Are there twice as many or half as many, or can you make some other quantum comparison?

Mr Lonie—If you look at the ratio of what the space is, what I see across the board reported by the various jurisdictions that cover it, it is about 60-40 or 65-35 strip shops versus shopping centres. But if you look at what I understand in terms of the space, the shopping centres have

indicated through various reports prepared by Jebb Holland Dimasi—and I know they are coming after us and they might be able to tell you more effectively—that, in many cases, they control about 40 or 45 per cent of the space. The problems that one gets within the strip shopping centres are often related to the state of the premises—the fact that repairs and maintenance have not been undertaken—and those types of areas. Occasionally there are disputes about rent but, clearly, it is more the operational matters of the premises, from what I see going through the various units throughout the states in Australia.

Mr Moore—On that point, retail formats that you find in shopping centres are there because of the potential for high volume through those centres, and that particular format does not lend itself easily to coming back into a strip shop or a community based shopping centre. There is clearly a smaller market of opportunity for a retailer in a shopping centre environment than in a strip shop or a community shopping centre. So if you have a retail format that relies on the shopping centre format, you are restricted in where you can go to open that particular business.

Senator BUCKLAND—We were talking about the South Australian legislation—and I might have this out of context but it is where I wrote it down—and casual mall leasing. Is this where the rug people—

Mr Moore—Yes, precisely.

Senator BUCKLAND—go out of business every second week and want just a very short lease.

Mr Moore—No, it is twofold. One basically is the use of casual mall space within a shopping centre—that is, the walkways and the centre court areas—for commercial purposes, where they set up. It can be for a range of usages, be it charities, be it cards—the other day, with water restrictions coming on in certain states, I saw the new shower roses. It is that type of thing. They are usually in for a short period—seven days, some for perhaps two weeks—and it was becoming very much unfettered in the way in which it was being controlled. In many instances, there were almost half as many casual mall licences as there were normal tenants. We sought to have some controls, especially for the usages that did not conflict with the existing tenants that have a long-term lease there. We also sought to ensure that the moneys that were collected as rent also had outgoings taken out of those. But, more importantly, we sought to ensure that the areas that were available for casual mall leasing were declared up-front, so that when I was leasing a store I knew that at some stage there was likely to be someone sitting outside my store. Going with that, we then sought to put restrictions on heights and so forth so that the visuals and the sight lines could be maintained and the cross-flows of traffic were not interfered with.

Senator BUCKLAND—I appreciate that. What is your association's view on the addition of 'harsh' and 'unfair' as terms and application to section 46?

Mr Moore—Into 46 or into 51AC?

Senator BUCKLAND—It is into 51AC, I think.

Mr Moore—We are supportive of that. In fact, as Senator Murray mentioned earlier, it came out of the Reid report commonly referred to—the House of Representatives report. As we

mentioned in our submission, that is an area that we believe should be pursued, in that unconscionable conduct, I do not think, necessarily deals with the unfair practices that we are seeing in that area. In fact, that section should be expanded.

Senator MURRAY—The point has been made that ‘unfair’ is an uncommon thought in law. It is certainly so in this area of law but it is a very common thought in the plain world, the ordinary world; ‘unfair’ is a very easily understood concept. One of the devices that are used occasionally in legislation is to indicate that it would be one of the considerations to take into account, as opposed to saying it is the consideration to take into account, and that is a lesser test. The third option, other than to put it into the text of the act itself, is to put in an indicative box. It is commonly used in workplace relations law and the box will refer to either a case or a principle—such as in test cases through the IRC—or an example of what would be regarded as unfair. It is a legislative guide, as opposed to a legislative dictate. If the committee decides not to support ‘unfair’ going into the text of the act, do you have any views as to whether the second or third option I have outlined would be helpful?

Mr Moore—I think any exploration of those would be worth while. The other area which you could explore is common usage in a dictionary.

Mr Lonie—Senator Murray, we have sought in some state legislation to have that box inserted as a clarification in giving the example. In the New South Wales act, for example, there are about three or four of those texts that are a part of the act that give a guideline or a direction towards what is the particular matter.

Senator MURRAY—Thank you.

Senator WEBBER—In your earlier evidence and in your submission you have outlined your opposition to an effects test on section 46. Do you have a view on any other amendments to section 46 designed to restore its original intent? In considering that, would you support other amendments as suggested by the ACCC or the FTC to clarify the definition of ‘substantial market power’, which has been the subject of such controversy since the Boral decision?

Mr Moore—That is an interesting area, no doubt. We go back to what retailers have been bringing into our policy forums, and the issue that there is something wrong with section 46 is not on the radar screen. In recent times I am aware that the chairman of the ACCC has put forward proposals to put the law as it adheres to in section 46 back to what the ACCC believes the parliament originally intended. That is something that we would consider. That is something that we have not formed an opinion on.

Senator WEBBER—Do you think section 46 adequately captures predatory pricing?

Mr Moore—I think, particularly if you are relating to impacts on small business, that there are other sections of the Trade Practices Act, such as section 51AC, where unfair practices could be fixed and we would have a better outcome for retailers than through a long, protracted process which could be involved with any amendments to section 46.

Senator WEBBER—Do you have a view of what predatory pricing is?

Mr Moore—I think there are a number of views out there.

Senator WEBBER—What is yours?

Mr Moore—It would depend on the particular circumstances. But I think the issue here is to go back to the issues of a very competitive market and the retailers in that very competitive market, and what we have to do is address unfair, unreasonable and unconscionable practices.

Senator BRANDIS—You run those three terms—unfair, unreasonable and unconscionable—together as if they are synonyms. They are not.

Mr Moore—No, they are not. There are hurdle tests for each of those.

Senator BRANDIS—There are.

Mr Moore—But they are the issues. They are what we should be looking at in any of those cases.

Senator BRANDIS—There is a body of jurisprudence about what is unconscionable that goes back for centuries. The section is drawn from the equitable grounds for the rectification of contracts. But these tests of unfairness and unreasonableness do not have a large anterior body of law behind them so they are much more open textured, aren't they?

Mr Moore—They are. That comes back to what Senator Murray was saying before. Also, we could go right back to the Reid report in 1997 for some ideas about that.

Senator WEBBER—One of the arguments you make against strengthening section 46 is that grossly unfair conduct can be dealt with by section 51AC. But doesn't the fact that section 51AC is limited to contractual relationships mean that section 46 needs to be strengthened?

Mr Moore—Or you look at adjusting 51AC.

Senator WEBBER—To capture everything?

Mr Moore—To expand 51AC. Our view is that particularly in a competitive environment section 46 is seeking to maintain that competitive environment and any move towards an effects test in particular we feel will have unintended consequences.

Senator BRANDIS—But this is the problem with your thesis. Where section 46 operates on markets and conduct in markets, section 51AC operates not specifically in the context of the dynamics of a market but on specific individual transactions—not that the market conditions are irrelevant to that. But what section 51AC is about and what section 46 is about are really completely different things.

Mr Moore—It comes down to—and I noticed the Telstra guy had fun with this one—this: what is a market?

Senator BRANDIS—We know what a market is. A market has been defined time beyond number in cases in which section 46 has been considered. What market power is is perhaps a slightly more debatable concept. Irrespective of definitional arguments, section 51AC is about individual transactions which in all circumstances might be said to be unconscionable. It does not depend on the use of market power although the use of market power may be a circumstance from which a conclusion of unconscionability is reached. But section 51AC is about transactions. Section 46 is about conduct in markets. They are really quite different things.

Mr Moore—They are. But it is the effect. If there was, as you are saying, inappropriate behaviour under 46, that surely would be picked up in the individual transactions—

Senator BRANDIS—Not necessarily.

Mr Moore—which you could apply 51AC to.

Senator BRANDIS—Apart from anything else, 51AC operates upon there being a transaction. In a typical section 46 case, the firm that misuses market power for a proscribed purpose will rub out its competitor without being in a transaction with them.

Mr Moore—I am not in a position where I can sit here and differentiate between those two. I understand where you are coming from, I believe, but in relation to the response we have had from retailers it is all about individual transactions and it is about how they are treated in those transactions, and therefore 51AC is the focus.

Senator BRANDIS—I understand that. I understand why it is that that is the topic within the terms of reference of this inquiry which is front and centre of your concerns. I just want to caution against this kind of confusion of the different scope and operation of the two sections because they really address entirely different problems.

Mr Moore—Noted.

CHAIR—Thank you for that guidance, Senator Brandis. That is good. Senator Webber, do you have any final questions? We are over time.

Senator WEBBER—I have at least one more. As we are over time, I will restrict it to this one. You would be aware that in August Graeme Samuel announced a proposal in which the ACCC would endorse voluntary industry codes as a means to life standards. In your submission, however, you call for a mandatory code of conduct on tenancy issues. Why in your view is the ACCC's proposal inadequate?

Mr Moore—In fact, all voluntary codes, as we stated in our submission, rely on the good faith and goodwill of the participants to that code. The ARA has experience in a number of codes, and the participants do come to the table to address business practices with good faith and goodwill. We have tried in the past with various aspects in relation to retail tenancies, and our view is that they have failed because the parties have not been committed to that code operating. Similarly, as you have seen in the franchise area, our view is that it has been tried and it has failed, and therefore we should move towards a mandatory approach.

CHAIR—Thank you very much, Mr Moore, Ms Hubbard and Mr Lonie, for your evidence today. I note that your submission did go quite specifically to the issue of retail tenancies, and I wonder if there are any other issues that you want to raise with respect to this inquiry. If you want to make a supplementary submission, we would welcome that if there are other issues.

Mr Moore—Thank you for that opportunity. We will take that on notice. We will also come back to the committee in relation to some of the overseas experiences that we might be able to find.

[11.42 a.m.]

COCKBURN, Mr Milton Roy, Executive Director, Shopping Centre Council of Australia

SPEED, Mr Robin Roy, Lawyer, Shopping Centre Council of Australia

CHAIR—I now welcome the representatives of the Shopping Centre Council of Australia. I invite you to make an opening statement, and then we will go to some questions.

Mr Cockburn—I would like to thank you for the opportunity to appear before the committee today to discuss our submission. You will notice that our submission concentrates on item 1(b) of the inquiry's terms of reference—that is, whether part IVA of the act deals effectively with unconscionable or unfair conduct in business transactions. We have obviously also touched on item 1(c) dealing with industry codes of conduct. We believe it is important that consideration of part IVA does not take place in a vacuum. It is only one aspect of an extensive body of rules about acceptable behaviour by owners and managers of retail property in their transactions with tenants.

There is throughout Australia extensive state and territory legislation regulating retail tenancies. This legislation is industry specific and contains detailed provisions regulating retail-leasing practices. The general approach in the state and territory legislation is to lay down detailed rules on all aspects of the retail tenancy relationship and to seek to resolve retail tenancy disputes by easily accessible and low-cost mediation. If mediation is not successful, either party is able to refer the matter to experienced tribunals for a prompt and cost-efficient determination. Our council strongly supports this approach: it is an effective one for regulating retail tenancies. In addition, this state and territory legislation has generally drawn down the provisions of section 51AC of the Trade Practices Act—that is, in New South Wales, Queensland, Victoria and the Northern Territory—or is in the process of doing so. In fact, Western Australia introduced legislation to do that this week. Tasmania has also announced the intention to introduce retail tenancy legislation, of which section 51AC will be part.

The relatively few actions brought by the ACCC under section 51AC is claimed by some small business organisations as evidence that the section is failing. This is not correct. We have demonstrated in our submission that the number of complaints of unconscionable conduct received by the ACCC is very small when considering the number the retail leases in Australia. On the most generous of interpretations, fewer than two in every 1,000 retail tenancies results in a complaint of unconscionable conduct. I should point out that a complaint is not obviously evidence of unconscionable conduct. It should also be remembered that leases run for a minimum of five years, day in and day out, which means the number of complaints is really infinitesimal.

This very small number of complaints has occurred despite the fact the ACCC, as part of its functions, has been conducting in recent years a very substantial publicity and education campaign to make retailers aware of the provisions of section 51AC. Nor should the effectiveness of 51AC be judged only on the number of scalps hanging from the ACCC's belt. It has led to significant behavioural change in the industry. The threat of prosecution under part

IVA has certainly caused shopping centre owners and managers to place much greater emphasis on staff training and education and on strict compliance procedures to ensure that leasing and management practices do not leave the landlord at risk of prosecution.

We believe there is no justification for changes to section 51AC. We particularly believe there is no justification for introducing concepts such as ‘unfair’ or ‘harsh’ in this section. These concepts are unnecessary and unworkable in business to business transactions. The concept of unfairness in business is subjective. It provides no meaningful guideline as to how business is to act in a particular transaction with another business. Business cannot wait several years for an arbitrator or judge to determine on a case-by-case basis whether in his or her subjective judgment one business has acted unfairly to another business. We have said in our submission that this would be a cop-out or a sop for failing to think out sensible rules on particular points of concern. We have instead made the constructive suggestion that in order to add value to the present retail tenancy regulatory system both tenants and owners should be encouraged to bring forward matters of concern and reach a balanced solution. This solution could then be the subject of a voluntary code or a statutory requirement. This does not require any changes to the Trade Practices Act and is in keeping with the philosophy of the ACCC as expressed by the new chairman, Mr Samuel, in a speech on 11 August 2003.

I would like to take this opportunity to respond to the claim by the ARA on page 7 of its submission. It states:

... there has been a lack of commitment from the Shopping Centre Council of Australia (SCCA) in this area—

that is, in voluntary codes—

to date.

This is not correct and seems to be a case of one part of the ARA not communicating with the other. We have, for example, just concluded a voluntary code of conduct on casual mall leasing, which has been agreed by the councils of the SCCA and the ARA but is not mentioned in the ARA submission. That code has not begun operation yet because of advice from the ACCC that the code will have to be authorised under section 88 of the Trades Practices Act, because it is probably anticompetitive. We are in the process of making application to the ACCC on that matter.

Our refusal to agree to a code of conduct on outgoings, which the ARA did refer to in its submission and referred to again today, is because much of the subject matter of that code is already the subject of retail tenancy legislation in all states. The code would therefore be superfluous and, worse, would be confusing since a voluntary code could not override legislation. We are also aware that the prime movers for adoption of this code are the major tenants of shopping centres—that is, mainly Coles Myer and Woolworths. These majors are not covered by retail tenancy legislation and have the ability and bargaining strength to make provision for matters relating to outgoings in the leases they negotiate and renegotiate with shopping centre owners. Indeed, at a meeting with the ARA on this matter on 11 August, one of these majors indicated that, if the SCCA did not agree to this code, his company would pursue the matters directly in lease negotiations with owners. We believe this is the appropriate course. We also advised the ARA that, although we do not agree to a code on this matter, we were very

happy to hold further talks on whether there is an opportunity for greater consistency and transparency in the preparation of outgoing statements. We are still awaiting a response from the ARA to this invitation. We would be happy to take questions.

CHAIR—Can I ask one not deliberately provocative question. You make the point very early in your submission, on page 3:

In its five years of existence the SCCA has participated in nine reviews of retail tenancy legislation ...

Why is this such a contentious issue that it has not been resolved through nine reviews? You make several comments throughout your submission about the Reid report.

Mr Cockburn—It has been resolved. The reason for the nine reviews is that the legislation in each state and territory basically provides that it must be reviewed every five years. That is a fairly standard provision these days in legislation. As far as I am aware, the only one in which it is taken seriously is in retail tenancy legislation. Every five years—in fact, on an even more frequent basis—retailer associations knock on the door of government and say, ‘It’s about time you reviewed the retail tenancy legislation.’ So we go through yet another review. To give you an example, we have just commenced a retail tenancy review in Queensland. The present legislation only came into operation in the year 2000. So three years later we are actually beginning a review of legislation that had an operative date of 2000. In Victoria, when the present government came to power, the first thing it did was to announce a review of retail tenancy legislation in that state. That was at the end of 2000. The legislation which that review was addressed came into operation in 1997. So one of the frustrations we have in this industry is that the legislation is there, the legislation seems to be working quite well—the number of complaints about the legislation is actually very small—but we seem to have these very frequent reviews of the legislation. That nine, by the way, does include some reviews such as, for example, here in the ACT where they introduced retail tenancy legislation for the first time and there was a very extensive review leading up to that legislation. Similarly, in the Northern Territory, where they have only just past retail tenancy legislation for the first time, there was quite an extensive review, obviously, leading up to that legislation.

CHAIR—Thank you.

Senator BRANDIS—I want to pursue this issue of expanding the range of transactions that would be caught by section 51AC to introduce words like ‘unfair’ or ‘unreasonable’ or ‘harsh’. Let me put a proposition to you and invite you to comment on it. It seems to me that there is a lot of data which suggests that the more parliament legislates to make transactions reviewable on expanded grounds, and thereby necessarily attacks the certainty of transactions, the greater the risk that the party in the stronger bargaining position will seek to protect itself by increasing its price in order to ensure against the perils of it arising from the insecurity of its contracts and that in fact drives the marginal customer out of the market. Do you want to comment on that?

Mr Cockburn—I will make one brief comment and hand it over to Mr Speed, who will probably be better placed to respond to that. I am not sure we are actually in an industry where we are able to do that. Ours is essentially an industry in which prices are determined by bargaining between the shopping centre manager and the prospective retailer or the retailer. At the end of the day, rents in our industry are determined by the forces of supply and demand—the

same as they are in any other industry. In our case, obviously it is the supply of available retail space and the demand that exists for that space. There are occasions when supply factors favour the landlord; there are cases where supply factors favour the tenant. At the end of the day it is a bargaining transaction and I suppose the outcome of that is determined by market forces. Nevertheless, your point is very true that, when further regulation is imposed on the industry, our members must look to ways in which we can recoup that additional administrative cost.

Senator BRANDIS—It is more than an administrative cost. My very point is that, as statutory reform attacks transactional security, that itself is an economic cost which must be built into the cost structure of the offer of the good or service. If it has that effect—so the cost structure of the offer is elevated—the only effect of that is going to be to drive the marginal consumer of the product out of the market.

Mr Cockburn—Yes, and that does happen. Certainly, those sorts of defensive actions are taken. One of the ways, for example, is that a landlord may not be really willing to take a punt on a novice retailer—someone who wants to come in for the first time. He may have a couple of people seeking tenancies in the centre and he would much prefer to go for an established retailer or retail chain rather than for the person who may well have just taken a superannuation entitlement and is seeking to go into retail for the first time.

Mr Speed—You can test that in a slightly different way. Assume for the moment that all of the retail legislation in Australia was abolished—everything—and there were no requirements to make disclosure and none of the other black and white requirements. If you imposed a simple rule that owners should not act unfairly, then that would dramatically increase the costs, for the reason you have given. America has the experience of having unfair legislation and it simply becomes a nightmare in administration, neither for the benefit of the tenant nor the owner.

Senator BRANDIS—Are you aware of any studies that have been done that you could direct our attention to that explore this proposition—that is, that try to quantify the economic costs of transaction insecurity in your industry?

Mr Speed—I have never seen a study. I have certainly seen a commentary on the US position.

Senator BRANDIS—Perhaps you could send that along to us, Mr Speed.

Senator WEBBER—As you are aware, section 51AC lists a number of factors that may be taken into account by a court in assessing whether conduct is unconscionable. Submissions to this inquiry have recommended that this list be extended to capture conduct such as, for example, the presentation of take it or leave it contracts, unilateral contract variations and the termination of contracts without just cause. What is your view of the proposals to expand this list?

Mr Speed—The difficulty with most of the additional requirements to 51AC is that there is a real danger that they become absolutes in themselves. What tends to happen in practice when these are administered at the level of a tenancy dispute is that there tends to be a great emphasis on the paragraph itself, as if it is in fact the guiding principle. For example, if you have a requirement that an owner should not require a tenant to incur an unreasonable amount in fitting out the premises, what tends to happen in practice is that it therefore becomes a situation where

the owner cannot require the tenant to pay more than what is a reasonable amount. That then effectively becomes the scale you have to jump over: did the owner require more than a reasonable amount? The subparagraphs tend to override the principle of what is meant by unconscionable. That is what happens in practice. Is a landlord saying to a particular tenant ‘You can take it or leave it’ unconscionable? That obviously depends very much on the circumstances at the time. In our experience it is relatively rare for that to happen and when it happens there tends to be a good reason for it. The problem with having too many paragraphs is that you lose the thrust of the actual principle itself.

Senator WEBBER—But, surely, if there is a good reason for conduct, it is not necessarily unconscionable.

Mr Speed—Sorry, there is a good reason for—

Senator WEBBER—For some form of conduct that is captured by that—

Mr Speed—There may be a good reason for it. It becomes a practical matter as to which drives which. Provided the person interpreting the paragraph approaches it as a guide and only a guide, then we have no objection to it. What tends to happen in practice is that it becomes more than a guide, and that is the danger.

Senator WEBBER—Earlier this year the ACCC lost the Farrington Fayre case, which you have referred to in your submission. As you know, this case concerned conduct which occurred prior to the enactment of section 51AC. The case concerned the actions of a landlord in refusing to renew the lease of tenants unless the tenants dropped action against the landlord in the Commercial Tenancy Tribunal. The court’s view was that it was a tough bargain but not unconscionable. Given the importance you attach in your submission to the state retail tenancy laws, which provide accessible and low-cost mediation, is there a case for specifically listing such a practice as an indicator of unconscionable conduct? Do you believe that the case would have been decided differently if it were based on section 51AC?

Mr Speed—I have a couple of comments. Firstly, I do not think the court did decide that it was a ‘tough bargain’. I think the court decided that you had to draw a distinction between something which was unconscionable and a tough bargain. I do not think the court actually decided in that particular case that there was a tough bargain. It just simply drew the distinction between saying, ‘The tough bargain is not necessarily unconscionable.’ If you actually look at the facts of that case, you have got to decide whether it was unconscionable or not in the ordinary sense of the words.

Because the High Court was looking at it in the context of 51AA rather than 51AC, your view of whether it was unconscionable may be different from my view about it. My view about it was that it was not unconscionable within the ordinary use of those words. But you looking at it may well take a different view. That is the flexibility that the word ‘unconscionable’ has. It is subjective. It depends upon your own experience. It is very much a judgmental matter and it is a decision you can only make after the event when you have seen all the facts. That is the difficulty with the test: it is subjective after the event.

Senator WEBBER—All the more reason for some guidance, I would have thought, but there you go.

Mr Speed—That is assuming that you had a paragraph in there that said it is a guide to whether it is unconscionable if it is a hard bargain. Where does that advance you to say that it is a hard bargain, therefore that is a guide to the unconscionable? I suggest that is simply no guide at all. I think you are only fooling yourself if you think you are providing a decent guide. If you want to deal with the issue seriously, what you should be saying is that, as a condition of renewing a lease, a lessor should not be in the position of making that demand. If that is a genuine issue, you should be addressing the genuine issue on that basis. Therefore, the tenant knows the position he is in; the owner knows the position he is in. We have no difficulty with that.

Senator WEBBER—Do you think the case would have been decided differently if 51AC were in place?

Mr Speed—If I had been the High Court judge, I would not have decided it differently. Why is that so? Because, in simple terms, it seems outrageous to me that you could say to a tenant, ‘I will only renew if you give up this legal action.’ That sounds outrageous. I accept that.

Senator WEBBER—Indeed.

Mr Speed—However, if I am the owner and I believe that claim is speculative, and if I believe it is worth only a couple of thousand dollars, which is what the High Court said it was worth, and if I was renewing the lease at, say, \$100,000 a year, I would say that was not unconscionable because it is a group of tenants that was getting together to make a speculative claim to put pressure on me. In that situation, I would have thought it was not in the slightest unreasonable to ask for it to be withdrawn. It depends how you quantify the claim. If the claim were a bona fide legitimate claim and it was grossly unfair to ask it to be surrendered, I would accept that that would then be borderline and most probably unconscionable. However, you have to weigh up the claim, the substance of it and the pluses and minuses, and you have to say, ‘I think the claim is reasonable,’ or, ‘I think the claim is not reasonable,’ and then you have to put it in the pot working out what the new rental is.

Senator WEBBER—It has been proposed that the Federal Magistrates Court be given jurisdiction over section 51AC matters to increase the access of small businesses to justice and to also resolve matters in a more timely fashion. Is that something that you would support?

Mr Speed—The present situation with retail tenancies is that we have an excellent system in relation to speedy and fast mediation. If a tenant has a problem—let us assume for a moment that in a shopping centre there is a disruption because suddenly there is building work being carried out—the tenant could immediately phone up in New South Wales the mediation centre and try to get the problem resolved. He wants the problem resolved. He does not want to go to court. That tries to resolve the problem because they pick up the telephone and speak to us. The problem is fixed or it goes off to a very quick legal system to deal with it. That is what tenants and owners need. So, if the Federal Magistrates Court were to take the place of that, we would be opposed to it because both parties are trying to get on with business.

Mr Cockburn—That is one of the reasons why the draw down of 51AC took place in the state retail tenancy legislation as well. The argument for that was that tenants needed a lower cost, more easily accessible forum to hear these sorts of complaints and that is now, as I said, progressively happening around Australia.

Senator WEBBER—Couldn't this be complementary to the tribunal's approach?

Mr Speed—It depends on what you are trying to achieve. If what you are trying to achieve is having the tenant carry on business as efficiently and as fast as possible, you have to ask, 'What is wrong with the present system?' I think it is agreed on both sides that the present mediation and resolution of tenancy situation is a good system. If the magistrate system is a better system, we would be in favour of it, but what I would not be in favour of is having two systems which are running together and competing, in the sense that you do not know where you are. At the end of the day, you want to resolve the problem as quickly as you can to save costs and to get on with life. That is in fact what the present system does for retail tenancies.

Senator MURRAY—Section 51AC includes the specific words that you must not engage in conduct which is unconscionable. The proposition being put to the committee is that that should be expanded so that the words 'harsh' and 'unfair' are added to it, either together or just one. The proposition being put to the committee is that there is a great deal of jurisprudence surrounding the word 'unconscionable' historically and relatively little for the other two words. One of the prospects is, if the committee were to consider these useful additions, to add them not in the main text but as subsets. If that were done—for instance, in determining unconscionability you would have regard to whether a contract was harsh—I know there would be a legal consequence but it is not automatic that the court would set aside a contract because it was harsh. I refer you to the judgment in *George T. Collings (Aust) Pty Ltd v. H.F. Stevenson (Aust) Pty Ltd*, 1991, Nathan J in the Victorian Supreme Court, where the point was made that a court will not set aside a harsh bargain freely entered into unless the terms can be seen objectively to offend good conscience and equity. I am no expert in the law, but I think the words 'good conscience' and 'equity' tie back to 'unconscionability'. Would you be as strongly opposed to 'harshness' being a reference rather than a substantive part of the definition—in other words, a subset?

Mr Speed—I think we would be, for this reason: the word 'unconscionable' is a word which we all readily understand; I think it is a concept that the average person understands. I do not think it is true that, in relation to 51AA, it says 'unconscionable' in accordance with the unwritten law. It is true in that context that it has a special legal meaning; I think that is certainly true. If you ask a group of people whether or not someone has been guilty of conduct which is unconscionable, I do not think the average Australian would have the slightest difficulty in working out the answer to that question.

Senator MURRAY—Let us move to the word 'fair'. It is said that 'fair' is subjective; I think much in law is subjective, frankly, so I do not think that is a criticism that counts. But it is also said that it is not commonly a matter for legal determination. In my experience, the word 'fair' appears very frequently in landlord-tenant contracts—for instance, 'fair market review' is a very common term and it has a particular meaning. I will ask you the same question with respect to 'fair', which in my opinion is far more commonly used in the legal context than is the word 'harsh'. If 'fair' were to be used in a subset sense, as I outlined earlier, would you have the same objections to it?

Mr Speed—Firstly, I think that it is confusing to reject ‘fairness’ on the basis that there is no legal meaning for it and to say that we go for a word like ‘unconscionable’ because it has a legal meaning. I would not seek to criticise the use of ‘fair’ or ‘fairness’ on the basis that it is not tried and tested. I have no difficulty with the word ‘fairness’ in the context of employment law, and I have no difficulty with its use in the context of certain other transactions. So I would not be seeking to oppose the use of the word ‘fairness’ on the basis that a court or anyone else might have difficulty with the word. I think that is false; I think the court would have no difficulty in working out what is fair and what is unfair, so I would not oppose it on that ground. I do oppose it, however, on the ground that I think that the hurdle is not the correct hurdle, and that the correct way of dealing with any issue, particularly a retail issue, is to find out precisely what the problem is and to address that in a black-and-white sense. I think it is raising a false hope in tenants to say that they must rely upon a fairness provision rather than laying down a precise code which people are required to follow. Of the two things, one is much more preferable.

Senator MURRAY—Is my understanding of your response correct—that the word ‘fair’ is not in the text of the law; nevertheless, any court would accept its argument as a concept relative to contractual law? In other words, they would not rule it out of order; it is automatically in order, isn’t it?

Mr Speed—It is quite in order and they would have no difficulty interpreting it.

Senator MURRAY—Let us deal with this word ‘reasonable’, which is also being offered. I do not think you were in the room earlier on when I quoted the case *Ponsford v. HMS Aerosols Ltd* 1978 2 ALLER 837 which found that, while the addition of the words ‘fair’, ‘open’ and ‘rack to current market rent’ had little effect on the definition, the addition of the word ‘reasonable’ could have some effect. In *Email Ltd v. Robert Bray (Langwarrin) Pty Ltd* 1984 VR 16, the full court said that ‘reasonable rental’ had no fixed or precise meaning and, in this case, did not mean ‘market rental’. In the same way in which we have been discussing it, if ‘reasonable’ was a subset, what would your views be on it and, as a follow-on, would you argue that, in the same way that ‘fair’ may be raised legitimately in argument and would not be ruled out of order, ‘reasonable’ is probably capable of being raised as well?

Mr Speed—There is no difficulty with the legal concept of reasonableness. That is used, for example, when you do not have a written contract between parties and you are trying to work out what should be reasonable remuneration or a reasonable price. The concept of reasonableness is an accepted legal approach to what a court might do. So there is no difficulty with that concept.

The problem that occurs in practice—to take something that you were saying earlier in relation to percentage rent—is that you personally might have a violent objection to percentage rent in leases. You might regard that as unreasonable. You might regard that as unfair. I do not think that is the approach that most lessees have. For example, if you are dealing with Coles and Woolworths, they always want percentage rent. You, the owner, do not talk about it; they want percentage rent. There are many instances where lessees want percentage rent. I think you can test that by this proposition.

Take the present review that the government of New South Wales is conducting on the Retail Leases Act. I do not think the ARA or anyone is saying that the percentage rent should be illegal or banned. They want it, from their point of view. The danger is that, as soon as you introduce

something like ‘fair and reasonable’, somebody else comes in from outside the industry and says, ‘In my judgment, it is unfair and unreasonable.’ He may be right from his perspective, from where he is coming from. But those are not the rules under which people are operating. No-one is seeking today, for example, to say that percentage rent should be outlawed. No-one is making that submission, because they have determined it to be in their best interest. As soon as you overlay ‘unreasonable’ or ‘unfair’, a third party—usually a judge—comes in and says, ‘I think this is unreasonable.’ You then take it out of the normal running of the landlord and tenancy matters and you make it very difficult then for both sides to carry on business.

Senator MURRAY—Let me move on to something else. Thank you for your answer. I will clarify for the record—I do not think it was your inference—that of course I do not disagree with a contract on percentage or turnover rent if it is freely agreed. What I object to is the imposition of it as a standard term, because I think that is absolutely wrong and should be outlawed. But if two parties equally agree that is the form which they want their contract to take then obviously that is reasonable, to use the word!

Mr Cockburn, I want to ask about the issue of landlord tenancy acts and codes, without going to content. Let me start this way. I understand most of your members would have operations in more than one state. In contrast, most retailers probably do not; most retailers would be just in one state, because they are small business. Do you think that it would be far better for Australia if there were a single national landlord-tenant act, as opposed to the multiple acts you have in the different states? And, if that was incapable of being achieved, would you support the ARA in believing that a uniform national retail tenancy code which was enforceable would be to the advantage of your industry?

Mr Cockburn—I think if we were all going back to the early 1980s when retail tenancy legislation was being introduced in Australia, there is no doubt that all of us now would say that the proper way to go would be uniform national legislation. Regrettably, that was not the case, and so we saw the gradual introduction of retail tenancy legislation state by state. I think Western Australia and Queensland began in about 1984 and the others followed thereafter.

The reality is that we have now reached the situation where five of the six states have specific retail tenancy legislation; the sixth has a code of practice that operates under its fair trading legislation, and it has already announced its intention to introduce specific retail tenancy legislation. The two territories now have their own legislation. The egg has already been scrambled and I do not think it is possible to unscramble the egg; I do not think there is any chance of the states giving up their powers to legislate in this area.

The problem I have with a national code, whether voluntary or mandatory, is that by and large it will create great confusion. As I have said, the state legislation will not be repealed—there is no doubt about that—and so what would the relevant provision be? If the national code were mandatory, presumably it would have some sort of precedence in law. I think it would just lead to massive confusion. I am not sure that a national code is uniformly sought by retailers. The Australian Retailers Association said that that is their policy, but I notice that the National Retail Association in their submission said they would not accept any code that meant the supplanting of state legislation. I think that is certainly true of a lot of what I would call the small state based retailer organisations, like the South Australian Retailers Association or the Western Australian

Retailers Association in your state, Senator. So I think it is somewhat academic to talk about that.

Where I think there is a common approach between the ARA and ourselves is in recognising there should be greater harmony amongst the legislation—not necessarily uniform legislation, because we realise that is probably an impossible dream, but perhaps we could have greater harmony in the key aspects of the retail tenancy relationship. As you say, a lot of landlords do operate in more than one state or in most states. There are, of course, national chains that operate in every state as well—and not just the Woolworths and Coles, for example; the Sussan Group and those sorts of national groups operate in every state.

We are not just sitting around saying that greater harmony would be a good thing; we are actually doing something about it. A bit over a year ago the Shopping Centre Council and the Australian Retailers Association agreed that we would try to achieve greater harmony in retail tenancy legislation. As I said, we recognised that tackling the idea of uniform legislation was a Herculean task, but we agreed that the way to go was just to say, ‘Okay, what are the key elements of the retail tenancy relationship, and it is possible for us to reach agreement on those aspects? And if we do reach agreement on those aspects, let’s go into these regular state and territory reviews of legislation with a common submission and say to the government, “We, the key players, have reached agreement on this; we want you to legislate this way”.’

As I have said, we have already reached agreement on a Casual Mall Leasing Code. To a certain extent that was probably the easiest task, because that was an area that was not regulated already by retail tenancy legislation. But at the present moment we have defined the prelease negotiation as being a very important area. So at the moment we are seeking to reach agreement on a common lessor and lessee disclosure statement. If we do reach agreement—and I am confident that we will—we will then go to each state and say, ‘It’s silly for us to have a different disclosure statement in each state. These are the elements of disclosure which we believe a lessor and a lessee need; this is the disclosure statement we would like you to adopt around Australia.’ Once we have that out of the way, it is our intention then to move on to another aspect of the retail tenancy relationship. I actually think that is a far more productive way to go than to sit around and talk about a uniform national code.

Senator MURRAY—The device that is used by the government to investigate difficult and complex matters which have productivity and efficiency cost outcomes—you might not be familiar with it—is to ask the Productivity Commission to examine the area. To give you an example, they examine the area of differential fees and regulations in the states and territories and what effect they have on efficiencies in business. Do you think the committee could look at recommending to the government that it pursue that route to try and assist in this process of creating better process, better practice and more efficient and more productive outcomes, or would that be interfering in something which you are resolving anyway and you do not need any more intervention?

Mr Cockburn—As I have said, I am very happy with the way our approach to greater harmony is going, and also I would be surprised if the ARA were unhappy with the progress we are making. I believe that is the best way for us to go, because we are the parties that have to deal with this legislation on a daily basis. So it is far more important that the people who have to deal with this legislation get the opportunity to sit around the table to try and sort out the

problems. We did it voluntarily, by the way; the initiative came from the ARA and there was no pressure from governments to do so. It was an initiative that our council immediately adopted. I certainly think that is a far more productive way to go because, at the end of the day, these things really do not work until you have the agreement of the parties and the industry. Far more preferable than the top-down approach is the bottom-up approach of the parties themselves where, without any coercion, they are able to reach agreement and then go to the governments and say, 'This is what we would like you to do.'

Senator MURRAY—Mr Cockburn, you would know—and certainly Mr Speed would know—that I have strong views about secret pricing in the shopping centre industry. What objections would you have to being required in law to have a price list per shopping centre for the space you are retailing, with that list being available to tenants who come in so that they know the environment in which they are negotiating? At present there may be a shopping centre with 250 tenancies and three or four shops that are available, and the person negotiating is in a situation of market ignorance; they have no idea of what anybody else is paying and therefore can be put upon, to put it politely, by the shopping centre manager in negotiation.

Mr Cockburn—The reason we cannot have such a system is that there is no such thing as a price for any particular shop. I cannot go to you with a slate of prices as I could with a hotel and say, 'This is the rate you will pay for that particular room.' At the end of the day the price I get for that space is the price I am able to negotiate with the person who wants to rent that space. I might have an idea that the rent that I want to get for that space is \$300 per square metre. But at the end of the day, my price might be well above market expectation; it might be well above what people are prepared to pay for it. I might like to think it is a \$300-per-square-metre piece of space, but it may turn out to be a \$150-per-square-metre piece of space. It is a bargaining transaction.

With hotel rooms, as you would know, I might be told, 'Look, this room is going to cost you \$265.' But if I haggle with them I might get it for \$165; certainly if I am coming at the weekend I might get it for \$100. So we are not the only industry where this occurs. In fact, in most industries where space is being leased, whether that space is commercial, industrial, retail or hotel, the price is arrived at through a bargaining process. It is just not feasible for us to produce a suite of prices to a prospective tenant because at the end of the day, as I have said, we bargain with that tenant as to what that price will be.

Senator MURRAY—So you do not accept the proposition of like terms for like customers. You simply think that on each occasion, if the person arrives and they are ignorant of the market, have no market aids and are in an inferior bargaining position, that is just the way it is and they have to accept it.

Mr Cockburn—It is not as if they are arriving in ignorance. They arrive with a business plan. They arrive probably as a retailer in some other location or certainly as someone who has substantially researched that aspect of their business plan, so it is not as if they arrive in my shopping centre in a position of complete ignorance.

To give you an example of that, there was an independent study of lease renewals in shopping centres in your own state. As you are aware, there is currently a review going on of the Western Australian Commercial Tenancy (Retail Shops) Agreements Act. As part of our submission, we

commissioned a firm of retail advisers—JHD Advisers—to conduct a review of lease renewals in Western Australian shopping centres in the years 2001 and 2002. They found that in 24 per cent of those lease renewals the lease was renewed at a lesser rent than the previous lease. In another five per cent of cases, it was actually renewed at the same rent as the previous lease. That basically means that, in nearly three out of 10 leases, the lease was actually renewed at the same rent or a lesser rent. That is not surprising because, as I said, it is essentially a market force negotiation. It is not surprising that in some areas and at some times, in order to keep that tenant in his centre, the landlord has to accept a lesser rent for that person to stay there. The overall rent renewal, by the way, in those shopping centres was 2.2 per cent, which obviously means that some leases were renewed at a much higher rent.

So it really is, as I said, the operation of the force of supply and demand. Sometimes there is an oversupply of retail space for lease and, when those situations occur, obviously a landlord is not in a particularly strong bargaining position with a tenant. On other occasions, there is an undersupply of retail space for lease and the balance of power swings to the landlord.

Senator MURRAY—I do not agree with you, but I respect your opinion. If I were to carry on any further, we would end up in a debate, and it is my job to get you to answer questions, not to engage in debate. Thank you very much for your responses here.

Mr Cockburn—Thank you.

Senator BUCKLAND—We talked a bit about voluntary codes. What is your members' attitude to voluntary codes applying?

Mr Cockburn—We certainly are not opposed to voluntary codes per se. As we said in our submission, we think a far more practical approach in the retail tenancy relationship overall is that, when a problem arises, we look at whether we can achieve a solution—whether that is a legislative solution or a code solution. One example of that recently was the one you raised with the ARA on casual mall leasing. We have now reached a voluntary national code and, once we receive authorisation by the ACCC, it will then be adopted and implemented by my members.

Senator BUCKLAND—Who adjudicates when a voluntary code is in dispute?

Mr Cockburn—The code itself would probably have a dispute resolution process contained in it. If a dispute arises as to the implementation of that code, then the code will probably have a system whereby that dispute can be resolved.

Senator BUCKLAND—Excuse my ignorance, but I have not seen any of these codes. Can you provide the committee with any so that I could look at what is built into them?

Mr Cockburn—In the retail tenancy area, the only voluntary code I am aware of that is still current is in fact the Casual Mall Leasing Code, but I know that there are other codes. For example, I think the franchising code was attached to the ARA's submission, and the ACCC have certainly approved a number of other codes. When Mr Moore was here, I think he indicated that the ARA themselves are involved in a number of other codes as well, not with us. There is now a code that is being negotiated or has been agreed on the use of plastic bags in retail. It is probably more a case for Mr Moore to—

Senator BUCKLAND—But that is a code that would get public support, isn't it? When it comes to a code for setting rents or allowing people to take up a little bit of space outside their shop occasionally, when they have their sales on or something, who administers that?

Mr Cockburn—In terms of the retail tenancy relationship, by and large that is regulated by legislation. The only state that does not have legislation is, as I said, Tasmania, which has a code of practice, which to all intents and purposes apparently works quite well. The Casual Mall Leasing Code arose only because that was one area—I might add, a very odd area—of the retail tenancy relationship which was not regulated by legislation. That is why that code was negotiated.

Senator BUCKLAND—If I was paying attention correctly, I heard that if the code breaks down it would then go to a more formal tribunal for settlement. Is that right?

Mr Cockburn—It varies from code to code. Some codes may, for example, use—

Senator BUCKLAND—Let us stick with tenancy.

Mr Cockburn—As I said, at the moment tenancy is not covered by a code; it is covered by legislation, and the legislation in each state and territory does provide for a dispute resolution process. As Mr Speed said, in New South Wales the first point of call for me as a tenant, if I am aggrieved and cannot resolve it with my centre manager, in the case of a shopping centre, is that I go to the New South Wales retail tenancy unit. They provide very successful mediation services: their success rate is in excess of about 80 per cent. If my dispute cannot be resolved by mediation, it then goes to the retail leases division of the Administrative Decisions Tribunal for arbitration. That is basically duplicated in each state: they have mediation and arbitration processes for resolving our disputes.

Senator BUCKLAND—Do you think there is a danger that voluntary codes could be manipulated by one party?

Mr Speed—What you are raising about the mediation and how to enforce it I think is the most important point, because you can have a voluntary code dealing with plastic bags but, as soon as you have a code which is dealing with matters on a day-to-day basis, you have to have an independent third party that can immediately come in to mediate and resolve it. The only way you can do that in practice is to have a government body that does it, as occurs in retail tenancy. As soon as you move outside that and you have it done by the parties, our view is that it breaks down, because the question is: who is going to pay for the mediation? You also have to have a secretariat available. Codes, in our view, do not work as soon as you are dealing with day-to-day relationships, because you do not have any of that mechanism in place.

Senator BUCKLAND—Let us then move on to a dispute over a tenancy agreement. Where is the equality for both sides of the argument to fairly and properly put their case to a tribunal, given that one side is often a publicly listed company—and I would think they have a few shillings in their pocket—and the other one is a small business trying to make a go of it and needing relief on rent because they are struggling? Where is the equity? There are no cheap lawyers out there, in my experience.

Mr Speed—Perhaps I could explain how it works in practice, because I think that is the equity. If you have a problem in New South Wales, you pick up the telephone. You do not speak to your lawyer; you go straight through to the people who are expert at dealing with it in the government appointed body. They will then contact the owner and see whether it can be resolved on the telephone—no lawyers, nothing involved.

Senator BUCKLAND—That is fine.

Mr Speed—Therefore it is equal. I should say that as far as owners are concerned they are desperately keen to resolve them. Why are they desperately keen? Because I can assure you the big owners are as concerned about their legal fees as anyone else is. The last thing in the world they want to do is to get us involved as lawyers. What will then happen, if it is not fixed on the telephone, is that they will see if they can deal with the person in a meeting with a separate mediator face to face, on most occasions without lawyers. Their brief is to get it resolved.

Senator BUCKLAND—If that is the case, why would there be opposition to the proposition of having collective bargaining?

Mr Speed—The opposition to collective bargaining is largely because of a philosophical problem. The philosophical problem is that it is regarded as being anticompetitive to have a group of so-called small retailers getting together to deal with one particular owner. If you notice in the ARA submission their definition of a small retailer is anyone who occupies one shop. In their view, Woolworths is a small retailer.

Senator BUCKLAND—I do not read their submission the same way.

Mr Speed—If you have a look at paragraph 4, it says you look at each shop separately and you treat that as being a discrete business.

Senator BUCKLAND—I might need to reread that. You were here earlier on and heard the evidence from the previous witnesses and particularly that part of it that Senator Murray took them through. Senator Murray made some very good points about tenancies and particularly disclosure. I have a lot of evidence that goes to that because I have investigated this a little bit. I have an interest in it and I think it is a fascinating area. Quite often a person will take out a lease and it is very specifically pointed out to them that they should not discuss the terms of their lease with any other tenancy holder within the group. Is that fair?

Mr Speed—The difficulty with that question is that you have to say on every occasion that it depends upon the circumstances. Perhaps I can tell you why. Assuming for the moment you have done a special deal with that tenant where because of his difficulties you have rebated the rent, you may be worried as the owner that that will have a tremendous knock-on effect if you do it for everyone else. The problem the owner has is: what does he do in that circumstance? From the owner's point of view, he might say, 'I'm prepared to give you the discount but I'm not prepared to give it to anyone else because I know that I'll have everyone else complaining of it.' In that circumstance, I think that is quite fair. You could have another set of circumstance where it would be totally unfair to have such a clause in there—unfair and obnoxious. So my answer to the question is that it depends upon your facts.

Perhaps I can answer this way: let us assume for the moment that that sort of a clause was an industry problem. The answer to that is to bring it out on the table and say, 'This is a major problem. How are we going to deal with it?' You then have the arguments for and against, and you ask the state government—as happened over the last five years in the nine reviews—to act as the arbitrator and resolve it. Sometimes it will resolve the matter in favour of the tenant; sometimes it will resolve the matter in favour of the owner. Our view is we will abide by whatever the state government decides.

Senator BUCKLAND—My view from looking at this is that the small tenancy holders are basically told, 'Keep your mouth shut and just cop it sweet.' They cannot afford time, effort and money to challenge the major landlords. I cannot see where there is equity in this whole thing.

Mr Speed—Perhaps I can answer that this way: the purpose of the ARA organisation is to represent small and large people. To join the organisation costs a small amount of money. All they have to do is to raise that issue. They do not have to disclose who they are. They can raise it with their own association. The ARA is a vocal organisation that is out there every day of the week seeking to persuade governments to change the law. That is all they have to do.

Senator BUCKLAND—One of the things they want to do is have collective bargaining, from what I see.

Mr Speed—We have a different view, and Dawson has a different view from us. As I understand it, the government is going to support collective bargaining. We therefore accept what the government is going to do.

Senator BUCKLAND—Because it favours you!

Mr Speed—No. We regard collective bargaining as not in our interests—we regard it as anticompetitive. Nevertheless if, having heard the arguments for and against, the government decides, then we will accept the decision. We have a different view, but we will accept it.

Senator BUCKLAND—I accept decisions that favour me too, I must say, but that is another question.

CHAIR—Thank you, gentlemen. We will have to leave it there. We have gone well over time. Thank you for your evidence.

[12.46 p.m.]

GOODWIN, Mr Shane, Chief Executive, Operations, Housing Industry Association Ltd

SIMPSON, Mr Glenn Ives, Executive Director, Industrial Relations and Legal Services, Housing Industry Association Ltd

CHAIR—Welcome. Committee members have noted that your submission goes extensively to the issue of collective bargaining. I invite you to make an opening statement and then we will go to questions.

Mr Simpson—Thank you. Since HIA made its submission in August, we note that the debate has moved on. While we are here to answer questions from the Senate about the original submission, in an effort to progress the debate, and while not resiling from that, we are seeking to come here today with some additional suggestions which we think might progress things. For that reason and to assist the committee, I seek leave to hand up a further paper from HIA.

CHAIR—Thank you. Are there any objections to the committee accepting this additional submission? There being no objection, it is so ordered.

Mr Simpson—This HIA submission is again about collective bargaining or collective negotiation. As an industry organisation, we do not have views about most of the other areas in the Dawson committee report, although we are happy to answer questions to the best of our ability. Our main objection to the Dawson report and any consideration which may flow from it—I appreciate that this committee has a wider remit than Dawson—is that the Dawson committee, perhaps inadvertently, mixed industrial relations considerations into business considerations.

It is clear that the review did not seek to do that—it did not seek to deal with agreements relating to conditions of employment. At paragraph 4 of page 118, it specifically states that the industrial relations bargaining model is not appropriate for small business. Nevertheless, the report talks about collective bargaining by competing small business to balance the bargaining power of large businesses. If that were all that were proposed, HIA would have no objections. But, like many other legislative proposals, the focus is on an outcome without appreciating that it may have consequences for other areas and, in particular, consequences for the housing industry.

Housing itself is one of a number of areas where small business is operating alongside of and competing with the performance of work by employees operating under the industrial relations system. Other areas of this nature would include the transport industry, cleaning and information technology.

The Trade Practices Act, of course, regulates business contracts. It is HIA's position that the Trade Practices Act should continue to do just that and that businesses should not have the benefits of operating as a business but the protections of the industrial relations system. That, in

our view, is what would occur if the Dawson committee recommendations 7.1 to 7.5 were given effect to in the form in which they were made.

Our supplementary paper draws attention to the fact that, if this amendment were to be implemented, it could lead to a 30 per cent increase in the cost of building houses in Australia. I would indicate to the committee that this is not an unreasonable or hypothetical issue. HIA has recently been doing a lot of work on housing affordability for the purposes of making a submission to the Productivity Commission. Some of the figures we have come to under that are quite relevant. A recent study done by HIA in Victoria in association with a major Australian house-building company indicated that the square metreage rates for a six-storey commercial building were 23 per cent higher than for a six-storey residential building. Those differences do not go to construction, methods, technology or techniques—they go purely and simply to the influence of having union agreements restricting hours of work, providing rostered days off and imposing additional non-productive costs on that site. Likewise, studies show that a medium density building is 28 per cent more expensive per square metre than a single dwelling. So anything which would tend to implement commercial building practices in the housing industry would clearly have major effects on housing affordability and on HIA's members. All of this has been canvassed, of course, before the Cole royal commission and I do not seek to re-canvass it here, but I would not like the committee to consider that HIA is being alarmist in any way about this issue.

HIA's proposals are summarised on the first page of our paper. Those are that, while we would still prefer, as we originally suggested, that services should be excluded from any amendment to the act, nevertheless, if the Trade Practices Act were to be amended to provide for collective negotiation by small business, then that amendment should be as narrow as possible—

Senator BRANDIS—So you do not want the amendment at all, but you say that, if you have to wear it, you want it to be as narrow as possible. That is not a principled reason, though, is it?

Mr Simpson—It seems to us that, if you are seeking to amend legislation to remedy an ill and that is the purpose and point of doing it, then it ought not to inadvertently do other things which are not the intention of the movers.

Senator BRANDIS—That is a different point.

Mr Simpson—We say that, if it is remedial legislation, it should only remedy the problem. It should be enough to remedy that problem and it should not go unnecessarily further.

Senator BRANDIS—Nobody says that legislation should go beyond what the legislation is seeking to do.

Mr Simpson—With respect, part of the debate has been that the Trade Practices Act has a universal application. It applies to both goods and services and to both acquirers and suppliers. If you have identified a problem in relation to the acquisition of goods, the debate has been along the lines that you cannot amend the Trade Practices Act in a narrow way. It must be amended in a way which relates to both goods and services and to both acquirers and suppliers. This is what we are getting at when we say that the breadth of an amendment should not be too wide or unnecessarily wide. If collective negotiation is to be permitted, we say that it should not be

allowed to be used in furtherance of quite different and inherently anticompetitive industrial relations goals.

The Trade Practices Act, we say, ought to contain detailed criteria on public benefit required to be shown in any new notification process, including criteria about what specifically is not to be taken to be a public benefit. We believe that, if such criteria were spelled out in the act and the act specifically stated that industrial relations outcomes or motivations are not a public benefit, the ACCC would be in a position to far more speedily and effectively deal with notifications on an administrative basis. I note that the Dawson committee recommended that there should be a 14-day period before notifications come into effect, but 14 days is really very short when you are likely to be dealing with thousands of notifications. If there were some up-front criteria that the ACCC could use and that applicants had before them, it would be possible, we think, to ensure to a very large extent that, while these people who are seeking to use the new provisions to achieve industrial relations outcomes would not be totally deterred, the ACCC would be able to deal with them immediately rather than simply having them on the books until the ACCC gets around to looking at them in detail, holding public hearings and making an adjudication on them.

The concern we have is that the new notification procedures would simply allow the building industry unions to run these collective bargaining processes back to back with the existing collective bargaining processes they have through the state master builders associations so that you would have a joint rate not only for contractors but for employees doing work of the same nature. That would totally destroy competition for work in the housing industry. It would of course have every likelihood of importing union conditions into what is now a union-free subcontractor area so that there would be only one way of doing things, and that would be the way prescribed by the union agreement.

We go on to note that a number of submissions have been made to this committee suggesting that that outcome could be avoided if bargaining agents were restricted to trade associations. We do not support that. We do not think that is a solution to our problem. In particular, we could not do it ourselves because the Housing Industry Association is neither a registered industrial organisation nor an association of employers. Our members would be on both sides of the collective negotiation fence and it would be impossible, we say, for HIA—because of conflict of interest reasons, and very practical ones—to sit down and assist either side in those negotiations. We respectfully suggest that other industry organisations, such as the master builders, would be in the same position. The only organisations—in the housing industry, at least—which are in a position to negotiate for contractors without a conflict of interest are the CFMEU and other building industry unions, and we can see no reason why they would not do just that.

Senator BRANDIS—Mr Simpson, I have to go in a minute so pardon me if I jump in, but there are a couple of questions I would like to ask you at this point, if I may. I have listened carefully to what you have said. Would it sufficiently address your problem if, in any amendments to the act to permit collective bargaining by small business, there were qualifying provisions to prohibit collusion between, on the one hand, those groups of small businesses which are party to the collective negotiation and, on the other hand, industrial organisations—that is, trade unions—involved in the same industry?

Mr Simpson—That may assist—

Senator BRANDIS—That is what you are worried about it, isn't it?

Mr Simpson—Yes, absolutely. The difficulty we have is that trade unions are already entitled to enrol contractors as members, so there is already a legislative proviso for such collusion. They are in fact entitled to represent them in, for example, piecework negotiations.

Senator BRANDIS—Quite, but, given that any amendments will introduce a new bundle of rights into the act, there is no reason why, in introducing those amendments, it would not be possible to introduce new prohibitions as well, along the lines I have suggested. If that could be made to work—and I cannot pretend to have thought this through very fully—would it address your problem?

Mr Goodwin—I think the issue would remain that the bargaining agent for the small business would be an organisation with an industrial, not a business, objective, even if collusion was evident.

Senator BRANDIS—You cannot really go behind their objectives but what you can do is regulate their conduct. The government has announced that it will accept Dawson's recommendations about collective bargaining by small business. For people in the small business constituency this has been a tremendously popular decision, but you quite rightly point out that there is an externality here which is potentially not a beneficial outcome. Shouldn't we then explore the way in which that policy decision can be legislated for without attracting that externality?

Mr Simpson—I think we would prefer the conduct rather than the associates to be the focus of any legislative prohibition.

Senator BRANDIS—Quite.

Mr Simpson—It is one thing to say you cannot collude with the union, but the building industry, at least, is very polarised. For example, there are union-friendly labour hire firms and there are union-unfriendly labour hire firms. Would it be collusion if you went to a union-friendly bargaining agent rather than a union-unfriendly bargaining agent? It is difficult to—

Senator BRANDIS—You would presumably import the section 45 tests about contracts, arrangements or understandings.

Mr Simpson—Yes. The other thing, of course, is that it is clearly discrimination against unions and, as such, stands out as something that might be pruned at some future date.

Senator BRANDIS—Maybe it is and maybe it is not. What it is doing, I guess, is trying to segment the operation of the act sectorally.

Mr Simpson—Our suggestion was to take up a provision in a draft building and construction industry improvement bill which has been released by the minister. That draft bill has a definition of 'industrially motivated conduct'. While this has not been before parliament, we venture to think it might commend itself to at least one chamber of the parliament. Parliamentary counsel has felt it appropriate to make this provision, so it cannot be objected to as a matter of

law. If it appropriate for that bill, it might well be appropriate here to identify conduct that is industrially motivated.

We are not saying there ought to be a prohibition, but it is simply an area where public benefit is not available because, clearly, industrially motivated conduct is anticompetitive. The whole point of the industrial relations system is to legalise something which is a combination of workmen. Therefore, if you had this initial test, it would at least allow the ACCC to weed out such cases, put them aside, and say, 'If you really want to progress this, come back to us and we will have a hearing. But we cannot allow it to remain on the notifications register because, *prima facie*, it has an industrially motivated context.'

Senator BRANDIS—Thank you very much for those observations; that is very helpful.

Senator WEBBER—The Dawson committee recommended that notification procedures should only be available:

... where it is big business on the other side with whom the bargaining is to take place, that is to say, where there is a corporation with a substantial degree of market power.

So how can you be sure that the collective bargaining proposal would apply to many of your members?

Mr Simpson—Many of our members do include major corporations with substantial degrees of market power.

Senator WEBBER—So they do have substantial degrees of market power?

Mr Simpson—Senator, the housing industry varies very much from state to state. In your state, it is far more concentrated than it is, for example, in Queensland. There are a number of organisations in your state which, by any test, would have very substantial market power. If all the bricklayers in Bunbury got together to negotiate with one of those companies, and it turns out that they are all HIA members, where are the bricklayers from Bunbury going to go to negotiate? They may form their own organisation or they may listen to the local union organiser who says, 'We have a trained industrial advocate who does this sort of thing all the time, and we will get you better rates'—and that is what would happen.

Senator WEBBER—If they are big businesses with substantial market power, what is the problem with smaller businesses collectively bargaining against them?

Mr Simpson—If that were the case there would not be a problem. But what would then happen is that the Master Builders Association in that state—and, on behalf of the major employers, the Master Builders Association negotiates with the union on labour rates under certified agreements—would be confronted not only with the certified agreement negotiations but also with the negotiations on behalf of a group of subcontractors saying, 'This should be the subcontracting rate, and it should be the same as, or in some way related to, the certified agreement rate.' Typically, where the MBA is faced with this—and I am speaking as a former MBA employee—it might well say that it will not negotiate, and the union will pick off one of the large contractors and do an agreement for their employees and then seek to flow that on to

the rest of the industry. Clearly, what they would do with subcontractors is exactly the same. They would seek to pick off one large user of contractors, have a rate struck for that head contractor, and then say to all the other contractors in the industry, 'That is the rate and it won't be any less than that when we do an agreement with you.' They will say to all the contractors, 'This is the rate we got against the XYZ corporation and we can do the same for you as long as you support us'—which is what would happen.

The nature of the industry—I am talking about the commercial building industry—is highly polarised, and you get these collective rates struck which are generally recognised as being the correct outcome and anything you pay will be at least that rate, if not more. There is a rush to get in, of course, to be the first so that at least you do not get pushed down to the tail where you may end up having additional benefits imposed on you.

Senator WEBBER—The Dawson committee recommend that it would apply only where there is big business on the other side. They also propose that the ACCC will retain the ability to reject a notification if it does not believe that it will result in sufficient public benefit. If a collective bargaining agreement could be shown to lead to your allegation of a 30 per cent increase in prices, don't you think the ACCC would be likely to object to it?

Mr Simpson—I do.

Senator WEBBER—So there is a safeguard there.

Mr Simpson—It is not a safeguard. The difficulty we see is that, by the time the ACCC get round to looking at it and rejecting it, the deal will have been done: the negotiations will have been held, a rate will have been agreed and the industry will have been told by the union, 'It doesn't matter what the ACCC says about it; whether it is legal to negotiate in the future, it was legal to negotiate when we negotiated; that is the rate, and we will expect you to pay it. And if you don't pay it to your subcontractors, we'll pull the employees off on strike.' That is what happens. By the time—

Senator WEBBER—So enterprises, subcontractors or whatever should lose their right to collectively bargain because the ACCC will take too long to knock the deal out?

Mr Simpson—What we are saying, with respect, is that the ACCC should be entitled to make that judgment but it ought to have a mechanism, as we suggest here, with which, at the start, it can immediately identify collective agreements that are industrially motivated and say to the parties, 'We won't authorise this; we won't allow this to remain on the register. If you wish to have it authorised, we'll hold a hearing and it'll be up to you to demonstrate why there are public benefits in what you're proposing.'

We are not saying that it cannot be authorised or that the ACCC cannot see public benefit in them. We are saying that there needs to be a mechanism to filter out the anticompetitive ones, which would eventually fall to the ground. The ACCC would eventually, when it got round to doing it, knock them out. But that might be months down the track. We anticipate there will be a very large number of these notifications and the public hearing process is significantly resource intensive and time consuming. If we await that process to complete then the horse will have bolted.

Senator MURRAY—You want a real time mechanism.

Mr Simpson—We want something as an up-front filter.

Senator MURRAY—But the word used is ‘real time’.

Mr Simpson—Yes. Essentially, that such conduct will not be made legal by simply giving a notification to the commission, waiting 14 days, sitting down to two days of intensive negotiation, coming up with a rate and that rate then being promulgated as the industry rate for 2004.

Senator WEBBER—HIA obviously has significant issues with the CFMEU. My concern if we go down your route is that, because the industry does not like dealing with the union, independent contractors will be carved out of a procedure that is designed to benefit small businesses, subcontractors, if it yields a public benefit.

Mr Simpson—We are saying that people should not get through this process unexamined. Where there is an industrial relations motivation, there should not be an automatic right to legality; there should be a hearing with an independent ACCC looking at the agreement before it is made legal.

Senator BUCKLAND—In what you are putting to us, aren't you just trying to create a closed shop on the other side? Aren't you saying that contractors or subcontractors have to be a member of another association?

Mr Simpson—With respect, I am not quite sure I am following your line of argument.

Senator BUCKLAND—You do not want the unions representing them, but aren't you saying that they should be members of an employer association?

Mr Simpson—No, Senator, we are saying that they already are members of an employer association.

Senator BUCKLAND—Not all subcontractors are.

Mr Simpson—No, but 30,000 of them are, and many more are members of the Master Builders Association, the Civil Contractors Federation, the Master Plumbers Association or whatever.

Senator BUCKLAND—And my experience is that they do not represent them in these areas, that they do not get the satisfaction from them.

Mr Simpson—Precisely; that is what I am saying, Senator.

Senator BUCKLAND—So the unions can provide that satisfaction for them.

Mr Simpson—What we are saying is that we have no objection—and I tried to make this point to Senator Brandis—to the CFMEU representing contractors and we have no objection to

them collectively negotiating. What we do object to is collective negotiations for an industrial purpose with no public benefit being allowed to slip through the notification procedure and the fact that when the ACCC finally gets around to looking at them and knocks them out the deal has been done. We say that if these people want to come before the ACCC—with the CFMEU representing them—and argue it out and if they can demonstrate public benefit then that would be all very well and good. We would have no objections to it as long as somebody like the ACCC looks at it and concludes that, yes, there is a public benefit.

We have noted that there have been such cases under the authorisation procedure where the Transport Workers Union in Canberra sought to come for an authorisation. One of the reasons put forward was industrial harmony and that being a public benefit. That was considered by the ACCC and it was later considered by the Trade Practices Tribunal, and in that case it was rejected. But the ACCC still has industrial harmony as one public benefit in its public guidelines for authorisations. We are not saying that it might not be a public benefit; we are saying that it needs to be demonstrated that this particular collective negotiation will in fact generate public benefit. What we are concerned with is that things will simply be notified to the ACCC, the deal will be done and by the time the ACCC says, 'No, this is not in the public interest,' it will be too late.

Senator BUCKLAND—We could argue about that all day, but there are costs involved in taking something to the ACCC. Most small subcontracting companies—and I have had a little experience in that area—just do not have the facility to do it. That is why there is convenience and benefit in having union representation. We could probably argue all day about it if we had the time, but you are suggesting quite the opposite. That is why I say that you are looking for a closed shop on the other side.

Mr Goodwin—Most subcontractors tend to belong to employer associations or trade associations, not unions.

Senator BUCKLAND—Some of them belong to three or four unions too—for convenience.

Mr Goodwin—But unions do not have that function now.

Senator MURRAY—It seems to me there is a threshold position before you get to yours. The Trade Practices Act specifically excludes employees' labour from its purview, because under the Workplace Relations Act they are allowed to carry on activity which otherwise would be regarded as anticompetitive because it includes issues of collusion and collective bargaining. The difficulty that the parliament is increasingly facing is the definition of 'employee', and some state jurisdictions have gone much further.

The parliament and the government recognise that to some extent with the changes to the tax act to take into account the alienation of personal services income, which was supported by all parties, but the issue still remains live because of the desinence between state and federal law and the difficulties of interpretation. Accordingly, the Senate, at my initiation using as the background the work of Professor Stewart, recently passed an amendment to the Workplace Relations Amendment (Termination of Employment) Bill which attempted to address this issue. The House of Representatives rejected that amendment, amongst others, but that does not mean to say that the issue has gone away.

I think that, before you can deal with this issue, the collective bargaining provision in the Trade Practices Act needs to determine that anyone who is classified as an employee under a state or territory act, the tax law or federal law should not be able to access the collective bargaining provision. That will ensure that people who are genuine employees are dealt with as genuine employees and people who are not genuine employees can then access it. Then you need to move on to your consideration, which is whether anticompetitive conduct will be a consequence of the collective bargaining approach. You have altered your case and I want to think about it more, but would you agree that there are two steps that need to be considered: firstly, the one I have outlined of determining what an employee is, so that genuine employees do not have access to this business provision and, secondly, your point?

Mr Simpson—We would certainly agree that it is a two-step process. We have argued for many years that there ought to be not only a definition of an employee but also a definition of an independent contractor, rather than simply defining them by exclusion from the category of employees, which, as you rightly point out, seems to be getting wider as time goes on. Our view is that the Income Tax Assessment Acts provisions in relation to personal services income is an appropriate discriminator of who is an independent contractor.

Senator MURRAY—Is an ‘inappropriate’?

Mr Simpson—Is an appropriate, a good discriminator. It works and it is effective. Indeed, Queensland has recently passed legislation amending its Workers Compensation Act to do just that—to say that, if a person is a personal services business for tax purposes, they are not an employee for workers compensation purposes.

Senator MURRAY—That is very sensible.

Mr Simpson—Indeed; we think so. Having said that, I think we should also be clear that we do not support Professor Stewart’s efforts to come up with a classification of a dependent contractor. We do not believe that to be realistic, to have any basis in economic reality or to be helpful or appropriate.

Senator MURRAY—That is quite a strong rejection.

Mr Simpson—If I could make it stronger within the bounds of parliamentary language, you can be certain that I would. We are violently opposed to it, let us say, because our members, who would fall into these categories, are themselves violently opposed to it. They do not seek protection from industrial relations laws; they do not seek to be participants in the industrial relations system. They have joined the Housing Industry Association because they want to be business people; they want to run their own small business. They do not seek to be classified as dependent contractors and told when and where they can work. They see that as an impediment to their making money, quite frankly. So we would not consider that it is appropriate to extend the categories of employees beyond common law employees for most purposes, but we accept that, as long as matters are in the hands of different legislatures, there will always be differences in definition of who is an employee.

Our approach, as I suggested, was to exclude people who are contractors for tax purposes from all of this legislation. Having said that, even if our proposals were accepted, you would still

find people who are genuine businesses who are in the position of being able to take advantage of the Trade Practices Act provisions about collective negotiation and who may well still feel that, even though they are a business, it would be beneficial to negotiate collectively, and it would be beneficial to link their negotiations up with union negotiations for employees so that, whatever the outcome, they are at least as well off, probably in terms of cash in hand, rather than in terms of the sorts of benefits that unions are looking for under collective agreements. But there still would be a problem of the interface of the industrial relations system with the Trade Practices Act.

Senator BUCKLAND—That needs to be balanced up a little bit, doesn't it? In some construction areas, to be a subcontractor on site you are required to be a member of an association such as the HIA or some other building organisation. That is a requirement.

Mr Simpson—With respect, Senator, that is not a requirement.

Senator BUCKLAND—That is a requirement. In many situations where a construction or a building is taking place, the contractor and subcontractor must be members of the organisation controlling the site.

Mr Simpson—I think you will find that that is not a legal requirement. That is a requirement that has been entered into as part of the certified agreement.

Senator BUCKLAND—Exactly, and that is why they become members, whether it be legal or just as a matter of fact.

Mr Simpson—I can assure you that there is no requirement in existence in Australia that requires anyone to be a member of the HIA in order to get on a building site.

CHAIR—On that note, we must conclude today's hearing. I thank you for your evidence and your patience in waiting for an opportunity to give evidence. The committee stands adjourned until 30 October 2003.

Committee adjourned at 1.20 p.m.