HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

CANBERRA

Thursday, 13 February 1997

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Members:

Mr Bruce Reid (Chair)

Mrs Bailey	Mr Jenkins
Mr Baldwin	Mrs Johnston
Mr Beddall	Mr Allan Morris
Mr Martyn Evans	Mr Nugent
Mr Richard Evans	Mr O'Connor
Mr Forrest	Mr Zammit
Ms Gambaro	

The committee will inquire into business conduct issues arising out of commercial dealings between firms, including claims by small business organisations that some firms are vulnerable to and are not adequately protected against 'harsh or oppressive' conduct in their dealings with larger firms.

1. The committee is asked to investigate and report on:

the major business conduct issues arising out of commercial dealings between firms including, but not limited to, franchising and retail tenancy;

the economic and social implications of the major business conduct issues particularly whether certain commercial practices might lead to sub-optimal economic outcomes.

2. The committee is asked to examine whether the impact of the business conduct issues it identifies is sufficient to justify Government action taking into account, but not limited to :

existing State and Commonwealth legislative protections;

existing common law protections;

overseas developments in the regulation of business conduct.

3. The committee is asked to examine options and make recommendations on strategies to address business conduct issues arising out of dealings between firms in commercial relationships, taking into account, but not limited to:

the potential application of voluntary codes of conduct, industry self-regulation and dispute

resolution mechanisms, including alternatives to legislation and court-based remedies, and mechanisms to support these measures;

legislative remedies.

4. In developing options, the committee will seek to ensure certainty in the market place, contract dealings and other commercial transactions, minimise the regulatory burden on business, and keep litigation and costs to a minimum.

WITNESSES

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STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

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CANBERRA

Thursday, 13 February 1997

Present

Mr Reid (Chair)

Mrs Bailey	Mr Jenkins
Mr Beddall	Mrs Johnston
Mr Richard Evans	Mr Allan Morris
Mr Forrest	Mr O'Connor
Ms Gambaro	Mr Zammit

The committee met at 1.00 p.m.

Mr Reid took the chair.

THOMSON, Mr Kelvin John, c/- 3 Munro Street, Coburg, Victoria

CHAIR—I declare open this public meeting of the hearings of the inquiry into fair trading. I take this opportunity to welcome Kelvin Thomson MP. In what capacity do you appear?

Mr Thomson—As a private citizen.

CHAIR—Thank you for the personal interest you have taken in the fair trading inquiry. I understand that you have given us some written material as well. I thank you for that. The evidence you give today will enjoy parliamentary privilege. This committee does not require witnesses to take an oath or make an affirmation. However, as you are aware, false evidence given to a parliamentary committee may be regarded as a contempt of parliament. The committee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private you may ask to do so and the committee will give consideration to your request. The committee has received your two submissions to the inquiry and authorised their publication. Do you have any alterations or additions to those submissions?

Mr Thomson—No.

CHAIR—Would you care to make an opening statement before we commence our questions?

Mr Thomson—Thank you, Mr Chairman. I do not make a habit of appearing as a witness before inquiries but this is an issue in which I have had some experience in my previous incarnation as state member of parliament and about which I feel strongly. I, therefore, greatly appreciate the opportunity to come before the committee and to make some observations about this inquiry.

The inquiry's terms of reference include consideration of business conduct arising out of commercial dealings between firms. Nowhere is the imbalance between firms more apparent than in modern suburban shopping centres, nowhere are harsh and oppressive conditions so evident as in suburban shopping centres and nowhere is the recourse for the smaller firm more difficult than in these shopping centres. I believe that the committee should, as a priority, address in its recommendations the imbalance evident between landlords and tenants at modern shopping centres.

I think this problem is a recent phenomenon and a recently emerging problem which is likely to increase unless action is taken. Committees members will be aware that the first modern shopping centre was at Chadstone, constructed in the mid-1950s, and in the 1970s and 1980s the phenomenon of suburban retailing in the form of numerous shopping complexes developed. So we have seen changes in retailing with the corner store and the shopping strip progressively disappearing and being replaced by suburban shopping complexes.

The laws and regulations that apply to retailing, however, have a much earlier origin. They are principally based on the 19th century law of landlord and tenant. It is important to recognise that the nature of retailing at modern shopping centres does not permit tenants an equal footing in dispute resolution. Unlike earlier retailing environments, suburban shopping centres place together in a business relationship parties whose wealth and commercial capacity differ and vary vastly, and never before in the history of

retailing has the commercial power of the two parties varied so greatly.

I will just give the committee two examples: Westfield Holdings—its net profit for the second half of 1995 was $35 million, its market capitalisation exceeds $1.8 billion and it is ranked as 55th in Australia in the top 500 of *Business Review Weekly*; and, secondly, Gandel Retail Trust—its profit for the second half of 1995 was $25 million, its market capitalisation exceeds $485 million and it was ranked as 77th in Australia in the top 500 of *Business Review Weekly*. So the strength of those landlords is in contrast to the typical tenant. Many of the tenants that I have dealt with would have equity in their business of around $50,000. Some have far less. So that means that landlords enter into agreements with tenants in a position of commercial strength up to 35,000 times greater than that of the tenant.

The second thing I want to talk about is the lack of specific dispute resolution mechanisms. I believe that, compared with other industries, retailing lacks adequate dispute resolution mechanisms. A bank and its clients also represent parties of vastly different commercial capacity, but they have the banking ombudsman, they have consumer credit watchdogs. Superannuation funds and their members have the Insurance and Superannuation Commission. But in Victoria at least a tenant at Box Hill Central or Doncaster has no recourse other than to litigate, and the absence of adequate of dispute resolution procedures in Victoria and indeed probably elsewhere exacerbates the weak bargaining positions of tenants.

Thirdly, I want to point to what I regard as an extraordinary rate of complaints. There would be a couple of dozen modern shopping centres across Australia yet, due to my knowledge of the industry, I have raised questions over the management style of at least half of them. Over the past five years I have received complaints from tenants at Altona Gate, Box Hill Central, Doncaster, Chadstone, Southland, High Point West, Knox, Melbourne Central and The Glen. The United Retailers Association suggest to me that 100 cases are pending across Melbourne. In an industry with relatively few players, that is an alarming rate of complaint. I believe that far exceeds anything one would wish to compare it with, like medicine, the law or comparable commercial fields like insurance or superannuation.

The next point I would suggest is that the reasons for these complaints lie overwhelmingly with management practices. In shopping centres, shopping centre managers have assumed great power at the expense of their tenants, and the inability of tenants to respond effectively to that power is a product of their weakened position and because modern shopping centre management practices employ the following features: refusal to negotiate with tenants as a group, which I have noticed at Box Hill and at Market Square in Geelong; spontaneous rent reviews which bear no relationship to tenant turnover—this is at Box Hill and other places; less than full disclosure of renovation plans to tenants upon entry; the use of renovation as a vehicle to destabilise tenants, which I have noted at Moonee Ponds Market and also Box Hill; refusals to compensate for damage done during renovations; frequent breaches of leasing conditions; poor professional standards; determination to appropriate good will; and even a blind eye to bribes.

Turning to the employment conditions of leasing managers, I believe that leasing managers are encouraged to terminate tenancies and force a turnover of tenants in order to maximise their own income. This is because their employment contracts usually include some commission based on turnover. If they believe that the centre's turnover can be enhanced by the replacement of one tenant with another, they will do so, often in flagrant breach of the terms and conditions of a lease. So leasing managers to whom I have

referred in the parliament, such as Vin Maranda and David Boesley, have flourished in an industry because the law has failed to keep pace with that industry.

So in terms of redressing the imbalance, I believe that the committee should give consideration to the following steps: encouraging uniform retailing tenancy dispute resolution mechanisms across Australia—perhaps the Queensland Retail Shop Lease Tribunal is one of the models that could be considered; encouraging the development of a code of conduct for landlords and tenants in shopping centres; modifying the Trade Practices Act to allow small tenants greater liberty to take action when confronted by harsh or oppressive conditions; giving the ACCC the power to act where market power is being abused—clearly tenants cannot afford to take landlords to court in many cases; and addressing the issues of association and the right to negotiate collectively.

I am less familiar with the area of petrol franchises, but I must say that what I have seen recently with petrol franchisees suggests that they have similar problems and a need for stronger rather than weaker protection mechanisms.

CHAIR—Thank you very much. I note that in your former role in the Victorian parliament you took an active interest in retail tenancy legislation and issues. Were you at that time the spokesman for your party on retail issues and business issues?

Mr Thomson—No. It was something that came to me as a result of constituent complaints. I have to say that the first couple of complaints that came to me seemed to be one-off complaints, but progressively the more I have seen of this the more I think there are conceptual and public policy problems, which need to be addressed by a change in the legislation rather than trying to right specific wrongs of specific tenancies. During my time in the state parliament the state parliament did endeavour to address issues in relation to retail tenancies. It is my view that it has not gone far enough, that there is a need for additional legislation.

CHAIR—You have said the 1995 changes have not gone far enough. How much impact did the 1995 changes have at that time? Could you point out some of the areas that you think still could be attended to?

Mr Thomson—The evidence that I have received from retail tenants in the last year or two suggests that the problems have not been fundamentally addressed, although the changes that were made in 1995 concerning key money and so on were of assistance. But you still have essentially this situation of one-sided market power, as I indicated in my opening remarks, and a situation where even if retail tenants have formal legal rights, which they do have under the contracts that they enter into and the legislation that is around, they are unable to effectively exercise those legal rights because the shopping centre complexes and managements are prepared to exhaust them at court and simply run them out of money. Several examples of that have been brought to my attention. I think that that fundamental thing has not changed.

CHAIR—You also mentioned the dispute resolution process. I thought that Victoria had commercial arbitration procedures in place. Are they not working, or can you perhaps tell us a bit more about the settling of tenancy disputes through that arbitration process?

Mr Thomson—I think the process requires a willingness on both sides to enter into it. For that reason I think you find that shopping centre managements are unwilling to be involved in that commercial arbitration process. In any event, retail tenants have certainly not been able to make use of it to address things like breaches of leasing conditions or renovation plans which effectively destroy their business and so on. If you are looking at dispute resolution mechanisms, it is possible to look at having something like a retail tenancies tribunal the same as many states have a residential tenancies tribunal to deal with ordinary disputes between landlords and tenants.

Mrs BAILEY—Kelvin, your evidence further reinforces a lot of other evidence we have already received. A couple of suggestions have been put to this committee, and I would like to hear your views on them. One is for greater disclosure in the lease contract between the tenants and the landlord. The other one was perhaps a more innovative suggestion that centre managers should be employed by the tenants and not by landlords. Could we have your views on those two points?

Mr Thomson—I think disclosure is a very important issue, so I would support changes in that direction. Tenants do not know what is happening in other contracts. They are not able to compare notes, as it were. There are some conspicuous examples of tenants being sold a lemon by the shopping centre management and then being forced to pay out on the terms of that lease even to the extent of losing the family home and so on. So, clearly, disclosure issues are important.

I might add another example. At Box Hill shopping centre retail tenants had a very strong suspicion that the shopping centre management was receiving money, in terms of electricity and other on-costs, from both the PTC and their tenants. The PTC, as you may be aware, have a very significant involvement in Box Hill. The management were in effect double dipping. They were getting money from the PTC as well as tenants for electricity and other outgoings—advertising and so on. But it was impossible for tenants to get information to be able to finally resolve an issue like that. So, clearly, better disclosure would improve things.

As for the employment of the leasing manager, certainly the retail tenants with whom I have dealt would find that a very attractive idea. They experience great difficulties in dealing with leasing managers, so it is an area that is well worth considering.

Mr RICHARD EVANS—I need a qualification, please. Leasing managers and shopping centre managers—are they two different people?

Mr Thomson—Not in my view. They are referring to the people who are responsible for entering into the leases with each of the shopping centre tenants.

Mr ZAMMIT—Kelvin, you made reference to a code of conduct for landlords and tenants. You did not make reference to a code of conduct perhaps for leasing managers or for companies that provide the leasing managers. There are three questions I want to ask you. That is the first question: whether you think that should be considered. Secondly, should there be a national standard lease so that we do not have these discrepancies between different states? Thirdly, should there be national legislation, as each state of course is different? The thing that is of grave concern to me is that each state has its own legislation

covering these issues and within each state there are differences of opinion as to interpretation of it. It makes it very hard for someone to know exactly where they stand. So do you think we should have national legislation covering that as well?

Mr Thomson—Yes. On the question of a code of conduct covering leasing managers, I think that is certainly an area that ought to be part of this. I have an open mind on whether it should be part of a general code of conduct or a separate code of conduct, but I certainly see those as being areas to be covered by a code of conduct.

Mr ZAMMIT—Just in regards to that, a lot of shopping centre management is done by real estate agents?

Mr Thomson—Yes.

Mr ZAMMIT—Do they have a code of conduct covering anything like this, or should that be looked as well?

Mr Thomson—Not to my knowledge. If they do, it is not enforced in a way which is helpful and ensures that retail tenants cannot receive the sort of treatment that they have done.

Mr ZAMMIT—Because the owners of shopping centres in many instances—I strike this all the time—say, 'It's not our fault. We've got real estate agents who specialise in that, and they are hands on. Don't blame us.'

Mr Thomson—Any code of conduct clearly would need to deal with the leasing arrangements and the conduct of leasing managers. In relation to a national lease, I am sure that you could get a uniform lease. I have not given that a lot of thought. Obviously, retail tenancies vary from circumstance to circumstance. In relation to national legislation, if all the states developed adequate legislation there would not be a need for this. In my view, as there is not adequate legislation, national legislation needs to be considered.

Mr BEDDALL—My question is similar. An article that appeared in today's *Courier-Mail* tells how a shopkeeper is, for the third time in 10 years, having to spend $100,000 refurbishing. I want to point out something to Kelvin, who, as a new member of federal parliament but an old member of the state parliament, comes to us with both clean and dirty hands. In my view, we as a committee have looked at this issue, not only in this inquiry but in prior inquiries; seven years have elapsed; if anything, the differences between states are bigger; and there is no uniform national legislation and no uniform code. In fact, the shopping centre owners are national. I just want Kelvin's view about whether he thinks it is time for us to bite the bullet and introduce a national code and national legislation that we would try to convince the states to enact.

Mr Thomson—If it takes that to address the problem, then a national code and national legislation do represent the way to go. I do not think it is good enough for us sit here and say that this is a matter for the states and if they fail to do it it is their lookout. I think our responsibilities are greater than that. If we

are able to develop a cooperative scheme with the states, who clearly have a role in this area, that would be desirable. I guess, as Mr Beddall points out, there is no evidence of that occurring.

Mr RICHARD EVANS—I have a comment on the code of conduct. Just to qualify something for Western Australia, to be a shopping centre manager working for a real estate agent, you have to have a licence in real estate. My question relates to goodwill. People all over Australia have given us a lot of evidence about goodwill. Most people suggest that goodwill does not extend beyond the period of a lease term and that a lot of people who move into tenancies, buy tenancies, do not understand that their investment of, say, $200,000 does not go beyond the 2½ years left in the lease. That is not fully explained to them. There has also been a lot of evidence to the contrary, that there is a lot of goodwill at the expiration of a lease. What is your view? How can we overcome the educational problem about people moving into a small business who do not understand that they do not have any tenure past the lease?

Mr Thomson—This is an area, as you have identified, of great controversy. Shopping centre managements are effectively saying that goodwill belongs to them, and they demonstrate that by their actions in turfing out retail tenants who build up the business in order to put in a new retail tenant and actually capitalise on that goodwill. The tenants believe that the goodwill ought to rightly belong to them, and they seek to sell the lease to somebody else but are frustrated in their efforts to do that.

I believe that the shopping centre management's view of goodwill is not explained to tenants who enter into retail tenancies. They are encouraged to build up their business. They are given the expectation that they will be able to renew their lease. Often that expectation is not honoured. So shopping centre management is not up-front about that with prospective retail tenants. If there were a way of guaranteeing that retail tenants are made aware of that issue, we would have a better outcome than we presently have.

Mr RICHARD EVANS—Do you have any solutions in mind?

Mr Thomson—We talked before about a code of conduct. A code of conduct ought to resolve the issue of goodwill, if you like, and make it very clear to both sides how goodwill is to be organised so that retail tenants do not have any misunderstandings when they enter into leases. There ought to be some provision within a code of conduct, I would have thought, that required retail tenants to be informed of that at the outset—that, if it is a three-year lease or a five-year lease, that is all it is and there is no prospect of them being able to capitalise on having built up the business. But I would suggest to you that shopping centre managements and so on have encouraged people to build up their business because they see that as being good for the shopping centre and good for them, but they have no intention of allowing the retail tenant to benefit from their efforts.

Mrs JOHNSTON—You stated in your October 1996 submission that you felt that shopping centre managers would evict the tenant so they could secure the goodwill for themselves and sell that on. I do not quite follow your argument. I understand goodwill to be something different from what you are saying here. Could you clarify exactly what you mean by that?

Mr Thomson—I can outline the sort of situation that occurs. There is a tenant at Box Hill Central by the name of Clare Hofmann, who endeavoured to sell her store in Box Hill. She was told she could not

sell it and, when she brought along a prospective buyer, the shopping centre management went behind her back and did a deal with the proposed purchaser, so that purchaser comes in, the shopping centre realises the goodwill and her lease simply expires and all the investment that she has put into the property and so on disappears. That is just money down the drain. That is one of a number of examples I have come across where shopping centres have acted that way in order to capitalise on goodwill for themselves, leaving the retail tenants with nothing to show for their efforts over the life of the tenancy.

Mrs JOHNSTON—Are you saying that the lease was not up—in other words, the lease was still current—the owner of the shop wanted to sell their business and then the prospective buyer was told by the shopping centre management, 'Don't put in a bid for this business. I'm going to cease their lease, evict them and then you can buy the shop from me'?

Mr Thomson—In this particular example, the company entered into a contract to sell the business in the January when the lease was not due to expire until the June. So the negotiation went on over the last few months of the lease. But I guess there was this expectation on the part of the tenant that they would be able to renew the lease, that there was something there of value. The shopping centre management's view is that, if there is anything there of value, they will have that.

Mr FORREST—I would like to ask Mr Thomson for some information about the details of leases. The committee has heard from the Property Council, who represent some of the managers, that people get themselves into these circumstances by making bad business decisions. I am interested in the lease that is signed in the first place. For example, if you and I are going to go into a business arrangement and the lease I sign says that it is a five-year lease or I can have a five by five with an option for another five but I must renovate the premises, at the end of the five years it is hard to justify me saying, 'I'm sorry but I can't afford to spend the money on renovations.' I am yet to see a detailed lease. I am hoping you have. Is there some truth in the argument that people do make inappropriate business decisions and that then creates the situation we are all concerned about?

Mr Thomson—I have two responses to this. Clearly, people who sign leases and enter into them have a responsibility to look at the terms of the lease and be aware of what it is they are actually up for. But, if a retail tenant makes a bad business decision and buys a lemon and they go back to the shopping centre management and say that there is a recession or a downturn or that the business is bad so they want to have the rent reviewed down, they never, in my experience, have any success. So this can cost them their superannuation package, life savings, family home or whatever.Conversely, if the business is booming, as I was discussing with Mrs Johnston, the shopping centre management say they will take the goodwill which comes from that. So shopping centre management win either way—whether the business is successful or unsuccessful.

The second thing that I think causes a great deal of angst is the representations which accompany the actual contract which people sign. They may be told that renovations will occur and then years later they say, 'But these renovations have not occurred. The shopping centre management has not delivered on its undertakings.' Conversely, they are not told about renovations that are going to occur and they are placed down in some back alley where nobody will see them and their business quietly goes under. Also, someone who moves into a shopping centre as, say, a florist may be told there is no other florist in the

shopping centre complex and there will not be one but three months later another florist goes in a couple of doors up the road.

It is that sort of area which represents either breach of the lease conditions or breach of representations that have been made to people. As I said before, technically they could litigate, sue for these things, but in practice they cannot because the shopping centre owners or shopping centre management are just prepared to sit them out on any litigation.

Mr ALLAN MORRIS—Kelvin, there is a suspicion that, taking a goodwill factor of, say, $200,000 over a five-year lease, which is $40,000 a year, if the tenant can walk in for nothing, then the owner can take the $40,000 a year, which means what they are notionally doing is transferring into the rent factor a margin of turnover which was reserved to buy the business or to be picked up when the business was sold. Therefore, there appears to be a shifting of margins within the turnover—that the factor of rental as a percentage of turnover seems to be increasing quite substantially. Certainly the figures indicate a very big difference between shops in strip shopping centres and shops in shopping centre complexes. Is that what you are picking up? Does your experience reinforce that kind of suspicion?

Mr Thomson—I think that is occurring, although I do not have a lot of evidence precisely on that point. It is my view that strip shopping centres have a vastly different set of circumstances from the shopping centre complexes. I have had very little in the way of complaints about landlord retail tenancy issues concerning strip shopping centres.

Ms GAMBARO—The Retail Tenancies Act came into being in Queensland in 1994, and we have a tribunal there. How effective has the Victorian tribunal been? When people receive an unfavourable action from the tribunal, how many of them then go to court?

Mr Thomson—There is no retail tenancies tribunal.

Ms GAMBARO—You do not have one in Victoria?

Mr Thomson—No. As I indicated earlier, I think that is the sort of area which could improve the dispute resolution mechanisms—if we had something a bit like the Residential Tenancies Tribunal.

Ms GAMBARO—Who should be on that tribunal if one were set up?

Mr Thomson—You would assume that it would have some people with knowledge and experience of retail tenancy issues. A typical tribunal might have three people, one with experience from the shopping centre management side, one with experience from the retail tenancy side and then an independent chairperson.

CHAIR—Thank you very much for giving us your time today and particularly giving us the background to your Victorian experience, which has been valuable for the committee. Thank you very much for your attendance and your willingness to give evidence before this committee.

Mr Thomson—Thanks for the opportunity.

Mr BEDDALL—Just a point of clarification for the *Hansard* record. Mr Forrest referred to the Property Council and the giving of a five by five by five option as evidence. I thought most of the evidence we have received to date says that there are no options anymore—it is just a five-year dead lease. I think that is the case, so we should make sure that the record shows in fact the evidence we have had is actually only a five-year lease with no options. It used to have options.

CHAIR—But that may be a variable.

Mr BEDDALL—I do not think so. Not one witness I have heard has told us.

Resolved (on motion by Mr Zammit):

That this committee authorises publication of the evidence given before it at public hearing this day, including publication on the electronic parliamentary database of the proof transcript.

Committee adjourned at 1.32 p.m.