HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

MELBOURNE

Thursday, 20 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

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

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MELBOURNE

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Present

Mr Beddall (Acting Chair)

Mr Jenkins — Mr Allan Morris

Mr Zammit

The committee met at 1.37 p.m.

Mr Beddall took the chair.

CROFT, Dr Clyde Elliott, Vice-President, Australian Centre for International Commercial Arbitration, Level 1, 22 William Street, Melbourne, Victoria 3000

ACTING CHAIR—Welcome. I note that the committee aims to wind up the evidence gathering stage of the inquiry this month. The aim of this February round of hearings is to 'test' policy options for addressing the concerns of small businesses, prior to the committee's consideration of what recommendations it will make in its report to parliament.

The committee's proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or an affirmation. You are reminded, however, that false evidence given to the parliamentary committee may be regarded as a contempt of the 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. Do you have anything to add to the capacity in which you are appearing?

Dr Croft—I am also, relevantly, the Senior Vice-President of the Institute of Arbitrators Australia. I have been an arbitrator under the Retail Tenancies Act 1986 of Victoria since 1989 and I am a barrister in Melbourne practising in this area.

ACTING CHAIR—You have given us copies of your book *Retail Tenancies*.

Mr ZAMMIT—I would like to move that the book *Retail Tenancies* and the 1995 supplement by Dr Clyde Croft be included in the committee's records as an exhibit to the fair trading inquiry, along with an extract from the book *Commercial Tenancy in Australia* by Adrian Bradbrook and Clyde Croft.

ACTING CHAIR—There being no objections, it is so resolved. Dr Croft, would you like to make an opening statement before questioning?

Dr Croft—Perhaps I could make some general comments in relation to the exhibits and some general statements in relation to the dispute resolution mechanism, particularly under the Retail Tenancies Act.

The book, *Retail Tenancies*, is obviously primarily directed to retail tenancies in Victoria, and this act. It is directed to the whole, all of the provisions of the act, the substantive provisions of mainly part 2, as well as the dispute resolution provisions of part 3. From time to time, I may refer to the table of contents which may assist. The chapter from commercial tenancy law is a chapter on the Victorian act. As you would be aware there is similar legislation now, enacted in other jurisdictions. That book also contains chapters on those jurisdictions, if that is of assistance.

The Retail Tenancies Act was one of the earlier state pieces of legislation which was enacted in Victoria in 1986. It grew out of a run of committees looking at problems mainly in shopping centres with retail tenancies which had spanned a period of approximately 10 years. There are all sorts of proposals

around in relation to how shopping centre leases and some of the perceived abuses in relation to the landlord and tenant relationship were to be dealt with. The proposals ranged from standard leases to rent fixing, the whole gamut of proposals you can imagine. The end result in Victoria was an act which was partly modelled on the ones in Western Australia and Queensland. It was an act which, as set out in the second reading speeches, was not intended to fix rents or to impose standard lease conditions but was rather intended to rectify what were thought to be some of the major difficulties with things like assignments, key money, outgoings—those sorts of primary problems.

There have been many views on whether the act has been successful. It has been partly successful and partly not successful for all sorts of reasons. The substantive provisions of the act divide into part 2 and part 3. Part 2 of the act contains provisions which might be summarised as affecting the substantive provisions of leases. One of the provisions most commonly encountered nowadays is section 10 which deals with the question of rent review. That section—and I pick it out as an example—renders void certain provisions in leases, in particular, provisions which provide that on a rent review, the rent after review is not to be less than the rent previously payable. That has caused all sorts of difficulties in terms of its actual operation.

Part 3 of the act is the dispute resolution code which the act provides. As you would expect, part 2 of the act applies to leases which commenced after the operation of the Retail Tenancies Act. Part 3 of the act, the dispute resolution provision, applies to all retail premises' leases as defined whenever they are entered into. The effect of the act is to bring within its operation, in terms of dispute resolution, all retail premises' leases.

Without going into some of the problems in some of the provisions in relation to the operation of prior leases and options and all that sort of thing, let me refer you to the retail tenancies book, if that should be relevant. One of the real difficulties with the act has been its definition of retail premises which affects parts 2 and 3, the dispute resolution provision. Perhaps, I should go back a step and say that retail premises are premises which are to be used under the lease in summary for retail provision of retail goods or services. There are a number of exceptions. The two main exceptions are premises that have a floor area that exceeds 1,000 square metres, and the franchise exception. There are some others but they are the main ones.

CHAIR—What do you mean by franchise exceptions?

Dr Croft—We are not quite sure. It is the exception contained in paragraph B of the definition of retail premises in subsection 3(1). Now, as far as one can gather from reading the second reading speeches and the committee reports that led to the ac, that exception was there to allow for Commonwealth legislation, which was being talked about in the mid-1980s, to regulate franchise operations. That legislation never happened, so this act never covered that gap. So, you have two omissions in the act immediately: one is that franchise operations are not covered and, secondly, public companies are not covered, nor are their subsidiaries. 'Public company' means a public company according to the corporations law, which means that quite small operations may, in fact, be public companies.

Perhaps I should say that all these exceptions are designed so that the act will operate with respect to small businesses, because it is a very hard concept to define and the act has defined it with some problems. The 1,000 square metres exception has caused all sorts of problems and has led to five supreme court

decisions on the matter. It seems that hotels in Victoria are very close to 1,000 square metres, so there is a problem in that respect. But having said that, the law on that definition has now settled down to a large extent and people have a fair idea where the act does operate.

The small business advisory network in Victoria has been reviewing the act and is about to report to the Victorian minister. One of the recommendations will be, it seems at this stage, that the retail premises definition be expanded to avoid most of these sort of jurisdictional problems, or it might be better if I described them as the substantive jurisdictional issues. Assuming a lease is a retail premises lease, the dispute resolution mechanism is part 3, and the effect of part 3 is that any dispute arising under a retail premises lease must be referred to an arbitrator appointed under the provisions of the act, or a conciliator, then an arbitrator.

ACTING CHAIR—For the record, what is the mechanism?

Dr Croft—I was just going to say that. The act provides for a panel of arbitrators and conciliators to be appointed by the Victorian executive council. Also, under the regulations, the appointing person, or the person who appoints the conciliator or arbitrator, is the secretary-general of the Australian Centre for International Commercial Arbitration.

I do not know if you know anything of the history of the ACICA. It was established in cooperation with the Victorian government in 1984-85. Four of its directors are nominees of the Institute of Arbitrators. One is a nominee of the Australian Bar Association, one of the Law Council of Australia and one of the Victorian Attorney-General. The Victorian government provided assistance to ACICA in its initial years of operation and assisted it to establish an arbitration centre in the World Trade Centre, which has subsequently moved to premises at 22 William Street, Melbourne. So it has had this history of connection with the Institute of Arbitrators, the legal profession and the Victorian government. Its chief executive officer is the appointing person under this act.

The dispute resolution process under the act is triggered by a notice of dispute which is given by the disputing party, whether it be landlord or tenant. The notice of dispute is quite a simple document, in terms of general court pleadings, so it can be produced quite inexpensively. Since mid-1995, the secretary-general has been required to appoint a conciliator from the panel of arbitrators and conciliators when the document is received by the secretary-general. If the parties agree on an individual outside the statutory panel, they can have that individual as conciliator.

If the conciliation process fails, the matter will then proceed to arbitration under the act, and the arbitrator may not be the conciliator, so another person is then appointed arbitrator. An arbitration under the act proceeds under part 3 of the Retail Tenancies Act, but also by reference from that act, under the provisions of the Commercial Arbitration Act of Victoria 1984.

Part 3 of the Retail Tenancies Act confers additional powers on arbitrators under the act. They have powers to grant specific performance declarations and injunctions in the same way as the Supreme Court has power to do so. Section 20 of the act also provides that the jurisdiction of the courts is excluded. There are, of course, rights of appeal under the Commercial Arbitration Act from the decision of an arbitrator and the

courts tend to give leave to appeal those decisions.

If a matter proceeds to arbitration, it will proceed by way of a preliminary conference. The parties will then agree, or the arbitrator will fix a procedure for the arbitration. Not all arbitrations are the same but they tend to follow the format you would expect, with some kind of points of claim, points of defence and points of reply. They do not always proceed to oral hearing. Many may proceed on the basis of written submissions with maybe some right of address on the submissions at some stage. The arbitrator, unless the parties agree otherwise, produces written reasons at the end of the proceedings with orders or no orders depending on what the result is and the parties may abide by that or appeal to the courts.

The jurisdictional problem under part 3 of the act is that it only applies to a dispute arising under a lease. In the early days of the operation of the act, the Victorian Supreme Court decided that that should be read very strictly. As a result, disputes within jurisdiction of the act do not include misrepresentation matters whether under general law, the Trades Practices Act or the Fair Trading Act. They do not include disputes between assignors and subsequent parties to leases because, for the act to operate, the parties must be in a landlord and tenant relationship at the time. So if they had signed the lease at some stage, the fact that there might still be contractual rights between assignors and assignees and between original tenants and landlords takes the dispute outside the act. Disputes with guarantors are not subject to the act, because they are not a dispute arising under a lease, and there have been some odd other decisions which indicate that relief by way of rectification, for example, of the provisions of a lease, is also outside the jurisdiction of an arbitrator.

That, of course, brings with it the problems of split jurisdiction. It would often happen with a dispute in relation to a shopping centre, over representations alleged to have been given by a landlord as to tenancy mix location or something. If those issues do not fall within the terms of the lease, so that they can said to be a dispute arising under the lease, they are really matters that have to be dealt with in the Supreme Court or the Federal Court. The committee reviewing the act does not think that is desirable. It thinks that the jurisdiction under part 3 should be broadened very considerably, much like in New South Wales, to include all those sorts of disputes.

Now, going to perhaps the cost effectiveness of all this, one feature of the arbitration process which distinguishes it from the court, or tribunal, process is that the parties have to pay the arbitrator. The general rule is that the parties jointly bear the cost of expenses of the conciliator or arbitrator, unless the arbitrator makes some order to the contrary. That can only be done if the arbitrator finds that somebody has behaved in a frivolous or vexatious manner. That is fairly hard to establish, so it does not generally happen.

The difference is lessening when you look at the developments of policy in respect of civil justice. The trend in the United Kingdom seems to be in favour of user pays for civil justice so, in years to come, it may not be too different. But at present the arbitrator and conciliator has to be paid for. Nevertheless, I suppose the upside of is that the proceedings can be handled very speedily. I think the delays in the courts—whether it is in the Supreme Court or in the County Court, but less so the Federal Court—are such that disputes under this act can be dealt with far more quickly. In commercial matters, that is often very significant and, in fact, worth a good deal of money.

As I said, it is open to the parties to choose a more flexible procedure than the courts. An arbitrator,

under the Commercial Arbitration Act, is not necessarily bound by the rules of evidence. That means that the parties may agree on a more flexible procedure and may, if they choose, agree that matters be determined on the basis of justice and fairness and not according to law. That happens not all that infrequently. Perhaps that might be sufficient by way of opening remarks.

ACTING CHAIR—I have a number of questions arising. Perhaps I will start off with a three-pronged question. All these things start off with good will and the proof in the pudding is how they work. Can you tell me firstly how many retail tenants did the centre handle in the last full calendar year or financial year? What proportion of disputes were lodged by lessees compared to lessors? What proportion of disputes were settled in favour of lessees?

Dr Croft—The number of conciliators appointed under the act in 1996 was 109; remember that those matters do not necessarily lead to arbitration. In the same year, 45 arbitrators were appointed. In other words, 41 per cent of disputes went on to arbitration. In 1995, and that was the year the act was amended to provide for conciliation, 51 conciliators were appointed and 22 arbitrators, so 43 per cent of disputes went on to arbitration. The figures for 1995, 1994, 1993 and 1992 were only arbitrators and were: for 1995, 86 arbitrators; 1994, 145; 1993, 151; and 1992, 145. That would have declined from previous years as the economy declined from about 1990.

In conciliation as at 19 February, the percentages were 16.9 per cent by landlords and 83.02 per cent by tenants out of a grand total of 53. I can only take it that that is a sample over a recent period. And the percentages going onto arbitration? Sorry, I do not think I can give them. But the conciliation percentages are the more meaningful percentages, I think.

ACTING CHAIR—Are there any statistics about how many were settled in favour of the lessee?

Dr Croft—No, I do not think there are. One of the problems with the arbitration process is that it has always been regarded as confidential. That is perhaps no longer the case with the High Court decision in the Esso and Plowman case about a year or so ago. But certainly until then ACICA regarded the proceedings as confidential and those figures probably could be obtained but they are difficult to obtain.

In my own experience, I must say over the last eight years or so and having a fair degree of contact with the other arbitrators—bearing in mind there are only about 20 or 25 over that period active on the panel—that it does not seem to me that there is any bias one way or the other in the decision making. It seems to be pretty evenly balanced between landlords and tenants. I think by the nature of the members of the panel there is no reason why there should be any bias. That is just my perception.

ACTING CHAIR—Mr Zammit.

Mr ZAMMIT—Thank you, Mr Chairman. Dr Croft, I am very interested in how the arbitration decisions are enforced. I would also like to know what sort of cost would a retail tenant face in trying to enforce a decision that has gone his or her way?

Dr Croft—It really does not seem to be much of an issue. I have granted many injunctions under the

act. They have increased or decreased depending on the state of the retail trading economy. I think only one party has ever had to go to the Supreme Court to have my injunction enforced as an injunction of the court. I think it is very rare indeed.But to answer your question, the procedure is that if the order of the arbitrator is within the jurisdiction of the county court, which is $200,000, the parties can go to the county court, go to a judge and get an order under the Commercial Arbitration Act of that court. The same jurisdiction is available in the Supreme Court; that would be obviously a procedure with some cost. The parties would have to use a solicitor and perhaps counsel and make an application to a judge in chambers—so that may cost a significant amount of money.

Mr ZAMMIT—Please walk me through it. A tenant has a fight with a shopping centre management or owner, no settlement can be agreed upon amicably, they come to you and you award in favour of the retail tenant.

Dr Croft—It goes through conciliation and arbitration.

Mr ZAMMIT—Yes. The shopping centre management or shopping centre owner says, 'No, I am not going to pay.' What happens then?

Dr Croft—It does not seem to happen.

Mr ZAMMIT—If it did?

Dr Croft—If it did happen, the tenant will have to get legal advice and employ a solicitor and make an application to the—

Mr ZAMMIT—And invariably they will not because they know that they cannot afford to. If the tenant is in a situation where the best he could hope for is something that is within acceptable bounds as far as he is concerned, he knows that he will have to settle for something less than he should have settled for, because he cannot afford to go to court.

Dr Croft—With respect, I do not think that is right. If your example is a tenant with an order from an arbitrator for $100,000 damages—presumably you are talking about a tenant having that order in his or her hands—and presumably the landlord or shopping centre has got money or they would not have run the arbitration, the enforcement by the court is a formality, unless it is going to be suggested there is something wrong with the award and there is an appeal by the landlord. As we are just talking about enforcement, you are looking at spending I would have thought the most $1,000 to $1,500 with a right of recovery against the landlord to get your order from the court to recover $100,000. Just on economics you would finance that somehow. You will get your money because you will have a judgment enforceable against a landlord with money or a shopping centre with money, so why would you not do it?

ACTING CHAIR—That is one of the things that is hard to get a handle on. Most of the disputes we have heard about would not come within the prerogative of the conciliation and arbitration process. They tend to be about misrepresentations, the opportunity to on-sell a business to someone else, which I gather would be outside your parameters. The landlord finds that purchaser unsuitable—

Dr Croft—It might be an assignment of lease issue that would—

ACTING CHAIR—That is outside your parameter?

Dr Croft—No, it is not. That is within.

ACTING CHAIR—That is within.

Dr Croft—That is within.

ACTING CHAIR—So you can arbitrate on that?

Dr Croft—Yes because that will be about the landlord's reasonableness or unreasonableness of refusal to consent. Perhaps I could just list the most common—

ACTING CHAIR—The number of things going to arbitration seem so small compared to the number of representations we get as a committee about the dispute level and I do not know how we marry the two together.

Dr Croft—The most common disputes that go to arbitration are rent review disputes, landlords' repossession disputes, existence of the lease, outstanding rent and outgoings, breaches of lease, failure to repair premises, disruption of tenancy, loss of rent due to repairs or floor area issues. That is what mainly goes to arbitration.

ACTING CHAIR—You are saying that overwhelmingly they are settled through the conciliation and arbitration process.

Dr Croft—Only 41 per cent go on beyond conciliation. That is the last 12 months, 1996.

ACTING CHAIR—It is 60 per cent are settled by conciliation, and 40 per cent—presumably the vast majority of that—is settled at arbitration level. Is that correct?

Dr Croft—Yes, that is right. Most of those will go to a hearing and final orders much like litigation generally.

Mr ZAMMIT—Under the Victorian retail tenancy legislation, as we understand it, the retail tenancy disputes other than those concerning rent, must go to the commercial administration. Why not rent as well?

Dr Croft—I think that was simply treated as a debt recovery exercise. I do not know the answer to that, but it is a specific exception.

Mr ZAMMIT—But the most important thing is the question of rent, isn't it, surely?

Dr Croft—The main areas of dispute are in relation to rent review. The rent review is covered by the

act, but the recovery of rent—I mean if a landlord wants to sue for arrears of rent and that is all the issue is—it is just rent. It is not outgoings, it is not rates or anything like that. That is a matter for the courts because it is a debt recovery exercise. Unless there is a counter claim which brings in other issues in which case it is an arbitration exercise.

Mr JENKINS—What are the differences in the cases that are bought by the landlords, as against the tenants? You said 17 per cent were bought by landlords. What are they, typically?

Dr Croft—I can only tell you from my own experience; for example, with floor areas. Landlords will be wanting to find a floor area in excess of 1,000 square metres to avoid the rent review restrictions imposed by the act and tenants will be the other way, so they will tend to go both ways. Assignment of lease questions will tend to be brought by tenants because they will be wanting to show that the landlord has acted unreasonably in confusing consent. Disputes in relation to exercise of options to renew will tend to be bought by tenants because they will be seeking to enforce that.

Repair matters will probably split a bit even because landlords will tend to be wanting to enforce repair covenants against tenants. Tenants often bring rather misconceived claims against landlords for breaches of covenants to repair but, as the law presently stands, landlords do not have any obligation to repair on the whole. That is a matter of substantive law, it is not a matter of this act. Apart from those peculiarities, it probably splits fifty-fifty in subject matter.

Mr JENKINS—What about disputes over refit or disputes during renovation of centres?

Dr Croft—There tend not to be many arise under the act. The problems with some of those disputes is they may arise under prior agreements to the lease. There may be an agreement, or not even an agreement for lease but some prior agreement which would not be covered by the act, but if the refits come under provisions of the lease agreement they will be caught by the act. And the act does apply to leases and lease agreements, it is not restricted just to formal leases.

ACTING CHAIR—One of the pieces of evidence we got when we did hearings in Perth, which has a sort of similar type of commercial operation, was the long delays in getting the matter to arbitration or conciliation. How does that compare here and what is the cost roughly for someone who goes for a conciliation process?

Dr Croft—Victoria is unique in not having a tribunal and relying on private practitioners really to act as arbitrators. I suppose the pluses of that mean that you have infinite judge power, if you like, and the theories of efficient court administration seem to boil down to a court will run most efficiently if the judge has responsibility for particular files and you do not have things just running loose in the court system. I suppose the plus of this system is you do have an infinite number of judges, given the sort of demand, and you could appoint more people to the panel if demand exceeded the panel capacity. The state does not pay for the on-cost of the judicial officers, it is all picked up by the private sector.

The experience that seems to have followed in Queensland with the domestic building tribunal, and seems to be the situation in Victoria with its domestic building tribunal, also with Western Australia and I

think Queensland with their retail tenancy tribunals, is that things work all right for a while, but then of course the tribunal is under resourced and the delays blow out very severely. My understanding is you are looking at delays of two or three years with the Queensland building tribunal and, I think, with the Western Australian commercial tribunal.

Now that just does not happen under this act because as an arbitrator you feel some obligation to make sure it does not happen. If need be you can call the parties in and push things along if it needs pushing along. My experience, and of many other people on the panel, is that very significant disputes can be dispatched really within weeks if need be and that is just not possible under a court or tribunal system.

The other side of that is, of course, as I said before, you have got to pay for the tribunal. I tried to pull out some rough figures on that and, making a few assumptions to average lengths of dispute, that is hard to estimate. But let us say the average hourly rate of a conciliator or arbitrator is about $200 to $250 an hour and a conciliation goes for two or three hours, then it is going to cost the parties $500 to $700 to have that conciliation in terms of the conciliator, and that is the conciliation.

Let us say the average arbitration runs for a couple of days, and that is only an average. Arbitrators sit the standard five-hour day that the courts do unless there is some reason to sit longer. That is about $1,250 to $1,500 a day. You then have about $2,500 for the sitting cost of the arbitrator, and remember this is divided between the parties. The arbitrator has to write the award. The time spent writing the award does not necessarily bear much relation to the sitting time because you may have written submissions, witness statements, lever arch files full of authorities and all the rest of it. Let us say it costs about $2,500 to write the award. That means you are looking at about $5,000 to run the arbitration, as a rough average. Certainly, the parties have to find that money but they are also not waiting two years. You have got to balance that.

ACTING CHAIR—So, on average, a lessee would be up for $2,500 to $3,000?

Dr Croft—Probably, yes.

ACTING CHAIR—Is it always split fifty-fifty?

Dr Croft—No, it is not. The act gives the arbitrator a power to make a costs order both in terms of the parties costs for their own advisers and advocates and the cost of the arbitrator, if there is a finding that a party has been frivolous or vexatious. That is a very high test and not many of those orders are made.

ACTING CHAIR—On top of the sitting fees that at the time are undertaken by the conciliator and arbitrator, is this an arbitration process that involves legal representation or is it a common language operation?

Dr Croft—No, it generally involves legal representation. It should be borne in mind that the Retail Tenancy Act is a procedural act that is designed to make some changes to the general law of landlord and tenant. It is an act of about 26 sections but sits on top of other legislation such as the Landlord and Tenant Act in Victoria, which is a big act on the whole of the law of landlord and tenant. For some reason, the law of landlord and tenant is one of the only unreformed area of property law. It is an extremely complex area of

law. One may have views as to why that has happened and why it has been allowed to continue but it is a very complex area. I think, on the whole, if you were a landlord or a tenant, you would go into some of those disputes very much exposing yourself without some good advice and some good representation. I have seen, as a practitioner and as an arbitrator, some absolute disasters where people have got wrong advice or no advice and gone into the jaws of the general law.

ACTING CHAIR—One of the problems we have is looking at a tenant in a shopping centre under financial and emotional stress. By the time they get to that phase, they usually have not got that money to spend on anything else. So there seems to be here at least some barrier, financially. I imagine you have to have the money available at the end of the process. Do you see it as a barrier to people taking action?

Dr Croft—It must be. If you have struggled to trade under adverse circumstances, and every penny counts, obviously the last thing you want to do is spend money to resolve a dispute or to get some sort of justice, as you see it. Perhaps I should stress that it is not simply a procedural matter. If we are looking at shopping centres, there are real problems with shopping centre leasing. In some respects, it would be better if shopping centre leases were not called shopping centre leases but they were called trading licence agreements or something because they are not like freehold leases. Most leases give you something like freeholders tenant. That is not what you get at a shopping centre.

The Retail Tenancies Act in Victoria decided not to prescribe standard leases and you can see the arguments for and against that. But, as a practitioner, a barrister some time ago, I was presented with a lease in a large commercial development to advise a tenant on it. The document was inches thick. To advise someone as to their rights under that document really means you have got to read it. How long is that going to take, if you are going to read it properly? To advise properly on that sort of document, you need a good deal of legal knowledge and expertise, so you are entitled to some compensation for that. Who is going to pay for all this? I have every sympathy for the poor tenant in that situation, but how does the system deal with that situation?

If some dispute arises in relation to that document, it is going to go to a court or a tribunal or an arbitrator. It has got to go to a good court or tribunal or arbitrator, because the issues are significant to the parties and they are complex, not simple legal issues. So you have this difficulty. It is not simply a procedural matter; there are problems with the substantive law.

I mentioned some problems with tenants instituting disputes, say, in relation to landlords' repair covenants. The present state of the law is that the courts will not imply an obligation on a landlord to repair premises. Some recent High Court decisions suggest that the High Court is moving to the position of treating leases as contractual arrangements—and much more balanced contractual arrangements—so the courts may, with some further High Court decisions, decide to apply those sorts of covenants. But one would have thought that someone could have got around to legislating some implied covenants that are thought to be generally fair.

You are seeing that developing a bit in standard documentation. For example, the Law Institute of Victoria standard commercial lease is starting to move towards placing repair covenant obligations on landlords, but it is only happening very gradually and it is not really addressed in the Retail Tenancies Act.

ACTING CHAIR—There are two final questions from me. Firstly, what proportion of the disputes that you see would come from enclosed shopping centres—the ones we have come to see as where the real problems are? Secondly, in country areas is there much usage of the arbitration process? Is there a fairness and access issue about country Victoria?

Dr Croft—Taking the first one, I am sorry I cannot give you an accurate figure but I think the proportion of shopping centre disputes is quite low—quite surprisingly low. It is said that many tenants are frightened to take disputes to arbitration. That may or may not be right, but certainly some anecdotal evidence in some shopping centres seems to confirm that. You know as an arbitrator, because you see the disputes under the act, that some shopping centres just never have disputes. Maybe that is a good thing, but maybe that is not a good thing.

As to country areas, we have had a policy of making the act available throughout Victoria and we have all conducted telephone conference proceedings as far as possible so that people do not have to travel around Victoria to have access to this act. The arbitrators have always been willing to sit anywhere in Victoria. There is some cost in that, but I think we have all tried to keep that within reason. I live in Geelong and have often sat in Geelong; I certainly do not charge for sitting in Geelong as a sitting out of Melbourne. I think it is fairly accessible.

Mr JENKINS—Some disputes involve franchises and, typically, the franchisor holds the lease but the franchisee is the person with the beef. Does that set them outside your mechanism?

Dr Croft—Yes, they are generally outside the act, as one of the exceptions in paragraph (b) of the retail premises definition. That was specifically put in the act to allow for the operation of Commonwealth franchising legislation in the mid-1980s, but that legislation never happened.

Mr JENKINS—The exception was in expectation of something happening?

Dr Croft—Yes.

Mr ALLAN MORRIS—I would like to explore two strands. On the first one, the question of goodwill, I am looking for your experience and understanding rather than the precision of your submission. It seems that what has been occurring is a transfer of goodwill from the tenant to the landlord in the shopping centres themselves so that, if an incoming tenant does have to pay goodwill, they can therefore afford to pay more rent.

Dr Croft—Yes.

Mr ALLAN MORRIS—That capture of goodwill is transferred to the shopping centre owner. The forces to arrive at that seem to be the centre of a lot of the disputes. Is that your experience, and could you comment—

Dr Croft—It is very hard to know what you do with that legislatively. The act presently prohibits key money, which is fairly broadly defined, but it is not too hard to get around those key money provisions. As I

understand it, the general practice in shopping centres is to give, generally, five-year leases and no options to renew. You do not have to be too commercially astute to realise that, if a tenant has gone into a shopping centre and established a good business over five years and fitted the shop out, they are not in a very strong negotiating position when it comes to the rent fixing for the next lease. That is a problem. The Small Business Advisory Committee has looked at some options to deal with that, but you have got to work through the options very carefully. If you impose some kind of statutory option you then might have some effects on availability of premises and rents throughout the term. So I do not know the answer to that.

Mr ALLAN MORRIS—Are those options public?

Dr Croft—Not yet, at this stage, but it is anticipated that that report will go to the Victorian minister within the next few weeks.

ACTING CHAIR—We recently had a look at some of those issues in the UK, where by tradition the standard lease is 20 years, which I think a lot of people would not want to enter into either.

Dr Croft—No. The Law of Property Act 1969 provides a very elaborate procedure for statutory renewals. If people thought—

Mr ALLAN MORRIS—Mr Chair, we may try and follow through on that advice. The second matter I wanted to canvass, Dr Croft, was your suggestion about looking at shopping centres being different from strip shops and having a trading right rather than a lease. Has that been canvassed at all as a concept? I have heard general comments of that nature but I have not heard anybody actually expand on it.

Dr Croft—No. It is just a view I have had as a lawyer in the area and as an arbitrator seeing this act in operation. The reason for this suggestion—it is not entirely a light-hearted suggestion—is that the labelling of a shopping centre lease as a 'lease' is misleading, in a sense. Most people have an idea of a lease as being a lease of a piece of freehold, which makes you a bit like the freehold owner for the term of the lease. That means that if you comply with the covenant you can do what you like: you cannot be moved around, you can enter into anticompetition—

Mr ALLAN MORRIS—And it is for a fixed space only.

Dr Croft—That is right. You can control your environment generally much better under that sort of traditional freehold lease, whereas with many shopping centre leases you almost wonder if there is a lease according to the principles of law generally. The tenant can be moved around or whatever to such an extent that it is a very illusory sort of right.

Mr ALLAN MORRIS—That is interesting; I am interested in the concept, though. Just to go slightly further with it: I take it that what your thinking out loud was saying was that, if you defined it as a right to trade, that would allow you to draw up different parameters for it so it would be much more understandable, rather than the confusion of its being a lease and all of the complication as to what it means in the shopping centres. People could therefore sell their right to trade as they now sell a business.

Dr Croft—Yes, you would know what you were getting. Presumably, it would make no difference to financing because banks are pretty aware of what tenants are getting now. So it probably would not have any ill effects.

Mr ALLAN MORRIS—If Dr Croft has any more thoughts on that, which he would like to send to us, I would be pleased.

ACTING CHAIR—You could get in touch with us, Dr Croft.

Dr Croft—Yes.

ACTING CHAIR—Before I draw this part of the hearing to a conclusion, is there anything that we have not asked you but that you would like to put on the record?

Dr Croft—No, I do not think so. If you do have any further queries arising out of the exhibits, I would be delighted to assist if that would be helpful.

ACTING CHAIR—I thank you for attending the public hearing this afternoon.

Dr Croft—Thank you.

[2.25 p.m.]

MICHAEL, Mrs Lisa, President, United Retailers Association, 48 Timbertop Drive, Rowville, Victoria 3178

ROGALSKY, Mr Richard, Consultant, United Retailers Association, 48 Timbertop Drive, Rowville, Victoria 3178

RUSSO, Mr Paul Damian, Associate Vice-President, Association Solicitor, United Retailers Association, 48 Timbertop Drive, Rowville, Victoria 3178

ACTING CHAIR—Welcome. The committee's proceedings are recognised as proceedings of the parliament and warrant the same respect that proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or an affirmation. However, 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 authorised for publication as evidence three submissions from the United Retailers Association and a further submission from Mr Russo. Mr Rogalsky has also lodged a further submission dated 14 February 1997 and other documents for discussion at today's hearing, which the committee will receive as exhibits. Accordingly, I will ask a member to move the acceptance of these documents.

Mr JENKINS—I move that the committee receive as evidence to the inquiry into fair trading and authorise publication of the submission by Richard Rogalsky on behalf of the United Retailers Association, dated 14 February 1997. I further move that the committee include the following documents in its records as exhibits to the fair trading inquiry: documents relating to the Hamilton Island case, media releases and correspondence relating to the Hamilton Island case, provided under cover by Mr Rogalsky's letter of 13 February, and a letter from the ACCC to Richard Rogalsky dated 10 February 1997.

ACTING CHAIR—There being no objection, it is so resolved.I now invite you to make an opening statement before we commence our questioning.

Mr Russo—The submission prepared by Mr Rogalksy, who is a consultant to the United Retailers Association, essentially is our Magna Carta. We come before you much as the feudal barons came before King John at Runnymede on 15 June in the year 1215. Theirs was the great English charter of personal and political liberty. Ours is a charter of basic rights for retail tenants, particularly shopping centre tenants. If you do make recommendations along the lines submitted by us, we know that the fight does not end there. We do not have open cheque books to pay expensive lobbyists. We know that lobbyists paid by the shopping centres will urge government to maintain the unjust status quo. This must not happen.

Small business is, of course, the backbone of the country, not the shopping centre owners with their narrow interests motivated primarily by greed. Most importantly, the committee members must also keep

uppermost in their minds that the injustices suffered by shopping centre tenants do not arise primarily from these documents themselves. The injustices arise out of the representations made before the lease is signed. It is pre-contractual misrepresentation and misinformation that is the problem. This must be stopped.

No amount of education, legal advice or industry codes of conduct will protect shopping centre tenants against the duplicity of shopping centre owners and their employees when they make unwritten false statements upon which the tenants rely. Simply put, if they say it, it must be in writing. This is the thrust of the written submissions before you today.

Mr Rogalsky—The basic methodology of putting this before you is that I have been present at many of these hearings in Melbourne and I have also sought, through your secretariat, copies of all transcripts available. With the recommendations before you today, I state that I do not have, because of time and Hansard limits, the latest ACCC report to the committee. I do not know what was addressed with Mr Dee and others so I am putting forward recommendations. I would have liked to have balanced what that included but take that on board as a flexibility position, if it needs an adjustment to a recommendation.

My belief is that a lot of people have put a lot of work and effort into this. I have heard the emotion and all of the problems that we have. I am submitting recommendations to you. I am not interested in anything else other than the recommendations and for you to consider those. If you wish, criticise those, and let us get right to the nitty-gritty of what is wrong with the recommendations.

ACTING CHAIR—As you said, a lot of effort has been put in. The ACCC recommended that we look very closely at section 7 of the New South Wales fair trading legislation, with a view to that underpinning what may be required. What do you see as the major weaknesses in the Victorian retail tenancy legislation? I chaired this committee nine years ago and for nine years we have waited for the states to come up with a common retail tenancy act. I think what Mr Russo said is very true, that there was always a lot of people out there finding reasons why we should not do these sorts of things. We are coming to this, not with a new look, but we are coming back to it after nine years when nothing has got any better. In fact, arguably, it has got worse. You can start, either individually or collectively, and tell us what you think is the current weakness in the Victorian retail tenancy act, the one that you deal with.

Mr Russo—Primarily, I think Dr Clyde Croft summed it up very well when he indicated that the area of misrepresentation, misinformation is clearly not caught by that legislation, and there you have it, as I have already explained in my introductory statement. The problem is not what is in the lease when you sign it. As I have already foreshadowed in my submission, even the most sage QC could read the black and white of a lease, and in between the lines, and still not foresee what might come by way of misrepresentation.

The problem with the Victorian retail law, as it stands, is that it does capture those difficulties and does not provide a remedy for them. Accordingly, the only recourse that a disgruntled shopping centre tenant or other tenant has is to take action in the Federal Court under the Trade Practices Act with the attendant expense that goes with it.

ACTING CHAIR—Mr Russo, in your evidence, you submitted that a landlord should have a duty of care to disclose all information relevant to a tenant. However, in evidence to this inquiry, it has been said that

some lessors have failed to comply with the mandatory disclosure requirements already in place in state retail tenancy legislation. Therefore, do retail tenants need better law or just better access to law? Would there not be a heavy burden of proof to say that a landlord knew certain information when a lease was negotiated and deliberately failed to disclose relevant information?

You were saying that the real problem is that there is the nudge and wink approach when you are signing the document: they say, 'Don't worry about that, you will be looked after. Do not worry about a five year lease because you know that you will get another five.' How do we overcome that? How do you stop people from saying, 'nudge-nudge, wink-wink'?

Mr Russo—As I understand it, as the Victorian law presently stands, the provision of the disclosure statement is not mandatory. That is the problem. It should be, and it is not; that really is the basic problem. The disclosure statement should include all of those matters referred to by Mr Rogalsky in the submission that has been prepared on behalf of the URA. It should be comprehensive. These people have access to far-reaching studies that allow them to know what will happen to the centre in every respect. A retail tenant does have a right to know all that information so that they can make an informed decision. These decisions are very significant to the large part of retail tenants—they are putting their entire life savings on the line. Essentially, I see the difficulty as being that it is not really mandatory at all.

Indeed, as I mentioned in my submission, Clyde Croft did allude at one point in his book to it being the modus operandi of the retail shopping centre managers to avoid giving the disclosure statement, optional though it is, purely and simply because they do not want to give the tenants any ammunition whatsoever upon which they may rely. Therefore, it makes proving misrepresentations for the retail tenant significantly greater and more expensive. In the end we know, as we have already heard, money is an object towards the end of a situation in a shopping centre where everything is going bad—you are not making the money, so you certainly have not got the money to fight them with, and you go under slowly and agonisingly.

ACTING CHAIR—What do you see are the desirable elements of retail tenancy dispute resolution procedures? Provided everything is signed and it is all there, you will still get dispute. If people are in dispute at a time of financial and emotional stress, how do you see the resolution process working? From listening to what Dr Croft said, this is still an expensive process and, in many instances, people are reluctant in an enclosed shopping centre to take it to those processes.

Mr Russo—I see a low cost tribunal as perhaps being the answer and I refer to the Queensland experience in that regard. I have noticed from my reading of *Hansard* of 17 September 1996, when Kelvin Thomson addressed parliament, that the number of owners and agents being taken to the Queensland Retail Shop Leases Tribunal for misrepresentation had increased by 40 per cent in just the last two years. So it could be the province of a similar, low cost tribunal here in Victoria and it would therefore be able to perhaps enforce the notice of disclosure being submitted and also any breach of that.

ACTING CHAIR—I do not disagree. But, as I mentioned when I was talking to Dr Croft, the evidence in Western Australia is that once you get this thing up and running for a while, government withdraws funding for all sorts of reasons and you can get a two-year waiting time, which is virtually happening in Western Australia. Those things are very good if they have to be resourced and there needs to

be a political will to resource them. I do not know how you do that.

Mr ZAMMIT—Mrs Michael, in September you made a submission regarding the problems that you had. You have a shop. How large is it?

Mrs Michael—I am an ex-retailer. I am now the president of the United Retailers Association. I started this association because of my own litigation with a large shopping centre and how frustrating I found the legal system.

Mr ZAMMIT—How large was your shop?

Mrs Michael—I have been in retail for 20 years. I had 13 shops. I come from a retail background, so I was not naive. I was not daunted by the lease when I signed it. I will not go into my particular case, but that was why I started the United Retailers Association to help small businesses. I do not want anyone to go through what I went through. I have hundreds of phone calls from very distressed small business people and there is a common problem out there. As I see it, they are not being informed when they are negotiating for their lease. The landlord is withholding vital information.

You ask me what information—something like the fact that you are going to be relocated in two years at your expense. We all know that to get into a shopping centre it costs hundreds of thousands of dollars, not to mention the security deposit. The lease has to be paid for by the small retailer. They are also up for their solicitor cost and the landlord's cost. Don't you think it would be important for the landlord to mention, 'In two years time, we are planning to relocate you'? Where does the landlord think the small business person is going to get that money from? They have already mortgaged their home to move in. They have already got an overdraft. That is one problem—the landlord not disclosing everything.

The second huge problem, which absolutely makes me and my members irate, is that they are not being told the centre is going to expand. When a small business person looks to go into a shopping centre they look at their competition. They ask the landlord, 'What are your plans for the future?' They are being lied to, things are being misrepresented; they are virtually being told that the centre has no plans to expand. Yet, two years down the track, 30, 90, maybe 100 new retailers are going in and that is causing an oversaturation of tenancy mix. The problem lies at the initial stage—at the negotiating of the lease. This is where the problem lies. I do not care what you say, by withholding that information the landlord is not giving our members a duty of care.

Our members, from the phone calls I get, are losing their houses, borrowing money and selling the family jewels just to pay the rent. They are being chastised and bullied. I am saying to you that it is time that this stopped. I am very emotional and very passionate about this. It is not fair what is happening in Australia. The landlords have a lot to answer for because they will lose good quality tenants. Good quality tenants are leaving Australian shopping centres by the hundreds because small businesses have had enough.

ACTING CHAIR—I would like to follow that up with Mr Rogalsky, because in his submission he made recommendations about mixtures of retail tenancies. In New South Wales I understand that that is already the case—the disclosure provision is there and it is mandatory that people be advised of the mix.

What recommendations do you think this committee could take on tenancy mix, taking into account the commercial interests of the property manager who needs flexibility to introduce new retailers in a centre to maintain the interest of shoppers as well as the interests of retail tenants whose businesses suffer when they face more competition?

Mr Rogalsky—The real fact is that the first tenants in shopping centres are, in my view, the expert tenants. The landlord is a prudent individual, or group of people, and he sources out first the best tenants. The primary position on what we call the 20-year enclosed shopping centre structure, as we have now, encases at its start the best tenants available. Sure, there are the new ones that arrive on the scene. First of all, you will have your Red Earth, then you will have your black earth et cetera, but the general scenario is that they source out the good tenants. That is an expectation of a landlord.

To then say, 'We are going to put in competitive tenants or new attractive tenants,' is okay as long as it does not do damage to the tenants that are already in the centre. In other words, you have done an equity position with a tenant to go in in good faith and he has taken a position there. The expansion of the centre, or whatever is done to attract more people and more speciality, is correct as long as the protection of the earlier tenancies is there, because they are in a 20-year captive structure. They have not got the flexibility of the strip person to be able to say, 'I've had enough of this. They are going to put in another person here.' They can be flexible.

The person in the centre is constrained, captive. You must preserve the position of the people there. As long as they are abiding by the covenants of their lease with respect to rentals and everything else they should be protected first. Then you can look to other entities that seek to come in afterwards. It is good to have attraction, but not to do it in competition with others.

ACTING CHAIR—Mrs Michael, I would like to make a point to you. I encourage you to maintain your anger.

Mrs Michael—Thank you.

ACTING CHAIR—I had a recent meeting with the British Small Business Federation which was started by someone who had the same amount of anger, and now there are 100,000 individual members and it turns over $20 million a year and is a voice that government listens to. Maintain your anger.

Mrs Michael—Thank you.

Mr ZAMMIT—Mrs Michael, in your submission you made reference to class actions by tenants in the major shopping centres. Can you tell us about the class actions that have been taken against the lessors?

Mrs Michael—Yes, certainly. I have encouraged that to a certain degree because I get the phone calls to our association. What I am trying to do is marry the tenants together. In a few shopping centres where they have a similar situation—and legal costs can run to about $100,000—if you get 10 tenants it is only a matter of $10,000 per tenant to have class action.

Mr ZAMMIT—Only $10,000?

Mrs Michael—That is a lot of money but it is better than $100,000 and waiting for two to three years to get to court. I will not go into arbitration, that is another thing which Mr Rogalsky can handle, but the legal system has got to be more affordable for the little person to have access to. A few of our members have even had threats from landlords to the effect that, 'Take us on and we'll win, we've got more money than you'. It is a real David and Goliath battle out there. A lot of these pathetic souls have got a case but the landlord says, 'Take it or leave it, next please.' It is disgusting what is going on out there. I do not think anything had prepared me for the calls that I get every day.

Mr ZAMMIT—We have heard that if some tenants want to take on the landlord that the landlord can do a lot of things to stop them proceeding, like turning off the lights and all sorts of things.

Mrs Michael—That does happen. The landlord does not really care if he is right or if he is wrong. If a tenant is litigating for, say, $200,000, the landlord could not care if he spent $500,000 on the case. Whether he is right or wrong does not enter into it. We have members who have been forced to sell their homes just to fight the litigation. There definitely has to be some arbitration or some system set up.

Mr ZAMMIT—It is grossly unjust, so I come down to my next question. What form of dispute resolution would you like to see in place to help small business in the circumstances you face? For example, should there be a small claims court for small businesses?

Mrs Michael—I do not think so, no. I think there should be an arbitration process set up which is affordable. This is all new to me but I will say it as it is. I had one member who went to arbitration and it cost him $40,000 because the particular landlord brought in QCs and barristers and God knows what.

Mr ZAMMIT—So what Dr Croft said isn't right, is it?

Mrs Michael—What do you think, Richard?

Mr ZAMMIT—In practical experience, what he said isn't right.

Mr Rogalsky—With respect, Mr Zammit, part of what Dr Croft says is correct if we lived in an ideal world, but I say again, they are captive people and captive people are disadvantaged. The position is that landlords have the power. Dr Croft talked about conciliation costs per hour, arbitration costs per hour, but no one has really said, 'How much did the accountant cost the tenant to prepare his case? When did his cause of action accrue? When did his loss start?'. There could be up to $40,000 for accountancy fees for the last four years depending on what the matter is about.

Another thing that comes out of that, and this is one of the matters which causes people to be irate, is that arbitration decisions are not public, as Dr Croft said. I have been seeking to become a party to listen to arbitration cases. To be a party to listen to an arbitration case you must have the consent of the two parties. Unfortunately, there is one party—and you can guess who it is—that does not want observers.

In the Federal Court and in the Supreme Court and in the Magistrates Court we can get judgments and we can monitor so we can give to you recommendations. That is the basis of these recommendations. We can give you what has happened in the judgments, although not as a lawyer. We can say, 'Let's read these transcripts'. It is a very time consuming exercise.

As for the arbitration thing, it is all good and we can have committees and so forth but they are still missing the point. We need to know what the judgments are, what was his decision, not that someone gets it in confidence. They then say, 'I can't tell you how much money we got'. I read that in your transcript, you said that yourselves, it said, 'We don't know what they got but I heard they got this'. We all get the gossip but the fact is we are in a real world and we should know what the results were. The arbitration system is an infuriating thing. Presumably, you have my recommendations, I have given you the answer to the arbitration matter.

Mr ZAMMIT—Why were you not able to have your retail tenancy dispute resolved under the commercial arbitration provisions of the Retail Tenancy Act?

Mrs Michael—I went down that road and the door slammed on me. They did not want to know. They did not understand. I got a 'dear John' letter. While we are on this subject, I will also bring up the ACCC and Professor Fels' department. I started at the basement. I could not get to the top floor. I ended on the third floor. I also got a 'dear John' letter. I found it just like a circus. It was just like being on a merry-go-round. They could not even explain the act to me. They could not really define misrepresentation or unconscionable behaviour. My barrister said to me that he could not really define unconscionable behaviour; it was very grey and it was very weak. But yes, I tried not to spend $100,000 in legal fees because that is what it nearly ended up costing me.

ACTING CHAIR—It has been argued before this committee that we should wait for the courts to develop case law on section 51AA of the Trade Practices Act, the unconscionable conduct provisions, before considering amendments. Do you consider that beefing up part 4 of the Trade Practices Act would help retail tenants?

Mr Russo—I do because unconscionable conduct, as it appears in that section, is very vague and the case law is also less than clear cut in terms of defining it. I know it has been argued that the insertion of the words 'harsh and oppressive' may lead to further interpretation by lawyers on what those words mean. But I do personally believe that it would be easier to get a handle on what 'harsh and oppressive' is than it would be to leave the section as it presently stands. Whatever words are inserted into that section will of course always still be open to some judicial interpretation, but I believe that it would help very much to clarify the matter.

ACTING CHAIR—I notice, too, from your submission that as a practising solicitor you found it difficult to understand the lease that you had to sign.

Mr Russo—Indeed. I say that with a degree of sheepishness, but it is true, and that was a plain English lease, I might add.

ACTING CHAIR—That leads to two questions. Should there be a standard form of retail lease basically across the country? Do you have any suggestions as to how to address that problem?

Mr Russo—It has taken a long time—as Dr Clyde Croft alluded to—to get to the point where we have a standard form law institute type commercial lease here in Victoria. I think that is the ideal position to move towards and, if it can happen, it would be a desirable outcome. Yes. I believe that that would be desirable.

ACTING CHAIR—So that any state changes would have to be justified on a reasonable basis and be quite transparent if you had a national lease.

Mr Russo—Yes. Indeed, it really defies the imagination as to why such a situation exists in large part in England and we cannot have the same system here.

Mr ALLAN MORRIS—Somewhere in amongst all this we need to get some sense of independence, arm's length or some other form of evaluation. I notice your comments about the Lend Lease internal proposals about independent reviews and so on. How do you establish a system without going to a legal system where at those initial stages there could be some confidence on behalf of the tenant or the shopkeeper that they can talk to somebody who is not owned by the landlord?

Mr Russo—That is difficult. I think really the only thing that you can do in those circumstances is to get some sort of dialogue going between the two sides, try to agree on a party that appears to be relatively independent and just take it from there. Otherwise you get into a situation of formal arbitration where you do have to draw upon those established arbitrators. But the problem with the Lend Lease proposal in particular is that, quite frankly, I do not think that they are fair dinkum. It is as simple as that.

Mr ALLAN MORRIS—If they were, if Lend Lease were to institute an internal independence, such as the internal auditor function in companies, and quite strenuously so, there is no reason why a company like Lend Lease or Westfield or anybody else could not have an internal independent review process.

Mr Russo—I agree, there is no reason why they could not.

Mr ALLAN MORRIS—If we were going to argue that—in fact, I have argued that to some degree—what provisos would you put on that? How could we be confident? How could we test it? How could we make sure that it had a chance at least of being successful? You have given examples here and said it is lip-service. I accept your comments. Tell us the yardsticks to measure it by.

Mr Russo—Given that you have posed a hypothetical situation, in a sense the only yardsticks that would be available would be, in my view, outcomes, to the degree that there was a fair representation of findings in favour of the tenant on a given set of facts and, similarly, if there was—

Mr ALLAN MORRIS—But it is too late then. If you had a client who said to you, 'This company is offering me independent arbitration within their company. Do I trust them or not?' You would then say, 'If they do A, B, C, D, E, if these things are there, then you can. If those things are not all there, then you

can't.' The question is, what are those things?

Mr Russo—Right, I follow you now. In that sense, I would expect to see the curriculum vitae perhaps of the person involved as to what experience they had, particularly in the area of determining disputes. It may be that that particular person is in fact drawn from the arbitration pool but perhaps is on retainer to the company. In that sense, that person's bona fides probably would have been already well established. Perhaps I would be seeking that that particular person had some legal training in terms of being able to assess information in an objective way, in a rational way. That is not to say that those people who are not lawyers are incapable of doing so, but that would be something that I would like to see.

Mr ALLAN MORRIS—Would you not also say you would need to see the reporting structure, so who from Lend Lease or whatever could talk to them or could not talk to them? In other words, the provisions of the professional barriers that would be placed there in terms of privacy or protection of the information so that they could not get a phone call from the centre manager or they could not be pressured in any way or be misinformed.

Mr Russo—Indeed, that is a very good point and I must say that I had not thought of that. But certainly I would like to see that there was a certain amount of quarantining of the individual so that they could not be, as it were, got at from the inside or the outside.

Mr ZAMMIT—Mr Rogalsky, in your submission you suggest that landlords deliberately avoid giving anything in writing. You also point out that small business does not rely on representations made in original negotiations for a lease or other contract, and that they also rely on statements made in the course of a business relationship. Firstly, should there be continuous disclosure of requirements in retail leases imposing ongoing disclosure obligations on property managers, and how would this operate in practice? Secondly, should small businesses be educated to get everything in writing?

Mr Rogalsky—Mr Zammit, without going to the big report and the exact parcel, because there is a supplementary recommendation submitted and tabled, the simple fact of this is that you start with a statutory disclosure statement or a document, and I have itemised for you 15 elements that I believe should form part of what people should be told before they do anything, other than on the front of the disclosure statement. 'Smoking is a bad health habit', or 'Your house is at stake', 'Don't cross against the red light'—something simple like that. Not a big brochure, just say, 'Read this carefully.' Effectively the disclosure statement covers 15 items that I believe are reasonable, intelligent things to seek and would clear the air so much of all this litigation and misrepresentation.

I spent a lot of time putting those together, I have done them on the basis of the transcripts and the questions you people asked others and I have addressed them. I have not done it with any bias against the landlord. I have done it simply on what I believe the questions are. I have addressed the Retail Act of Victoria, the disclosure statement there. I have addressed it back to the second readings of *Hansard*, one under a Labor Party and one under a Liberal Party, to try to assess what, in the initial act, and what, in the second act, it was trying to lock into the disclosure statement.

The basic fact is that the disclosure statement has to be in a form that answers all these situations and

a person commits to it. If there are changes or anything happening subsequent to it, or ongoing changes, the landlord as at law has to be aware that further representations that have been held at law are misrepresentations. So if someone says to you, 'You have been trading. Look, stay on, things are better, they are going to get brighter on the horizon,' you have to go to the case law. In the case Karedis v. Antoniou in the Federal Court it was said there that there were further misrepresentations. So you then start another action of misrepresentation.

So I am saying that all parties have to be educated. Everyone has to be educated—the landlord, too. Perhaps a 'landlord' is partly ignorant of the problem, but if we could get all this misrepresentation, find out what is cooking with this centre—what it is about, what it's going to do—and put it all out in front, we will get rid of a lot of this litigation. If it is in subsequent representations we will be able to clear the air with that also.

ACTING CHAIR—This directly links in with what has been a concern for many years. In many ways, it is an opt-out for a lot of people. It is about education. Who do you consider should be responsible for educating small business as to their rights under retail tenancy legislation and also the obligations that they have as well—because there are both rights and obligations by tenants. For a long time we have said that the solution is education; therefore you do not have to do anything if you educate. But nobody does the education. How do you reckon you can close the loop?

Mr Rogalsky—Regarding education, I do not really know what we are going to tell people to educate them. We can tell them what the shop is and you can educate and educate people. I have read all that about education but the significance of that worries me. How do you educate them? Do you get them in a room and United Retailers tells them what a shop or a shopping centre is about?

ACTING CHAIR—Basically everyone talks about what an education is. It is more awareness raising about things like the fact that smoking will kill you and so on. Everyone says it needs to be done but to date nobody does it.

Mrs Michael—As far as education goes, I think it would be good if our association put a booklet out to let tenants who are contemplating going into a shopping centre know the pitfalls.

ACTING CHAIR—And it would be compulsory before they signed a lease that they get it.

Mrs Michael—Yes, compulsory, and I think they should read that. They should know and understand that if they are relocated it is going to be at their expense.

ACTING CHAIR—One of the things this committee has dealt with is the fact that, in many instances, small businesses are not businesses in the sense that they are actually consumers. They need as much protection as consumers do from small business. The customers have got more protection than the business has from other businesses. That is one of the issues I think we need to address about how we get that education. If you sign a consumer document for finance or whatever, you have to sign a disclosure that says you were fully informed, and perhaps all leases should have a disclosure in there. Would you agree with that sort of thing gives an obligation on people?

Mrs Michael—Certainly.

Mr Rogalsky—With respect, I believe that in a pure world—to answer the thinking you have put forward—you need education in some form. My belief is that this statutory disclosure statement should form part of the information booklet. Like the credit act, it should have what are you paying, what percentage, et cetera. But if you give people a little booklet like the unconscionable conduct book, I read that and I am still confused about what it is saying. It talks about unconscionability, and when you ask what it is defined as it says, 'Well, it is a common law definition.' So I do not think the man in the street is going to get an answer.

I still say, if he is intent and excited about going into a shop or whatever it be in a shopping centre, 'Give him an education. Give him a warning. Give him a copy of a disclosure statement.' I believe that he should then go with his solicitor and read it—not having the full facts of the specific shopping centre in that there will not be the mixes of this and that. Do not get to the finite but, as I say, a blank credit document that tells people the rate of interest, such as the pro forma that the Credit Act has now brought out, something along those lines.

I do not believe we should get everyone in a room and tell them what a shop is about. People are really motivated to do something and we will never stop motivation. No doubt there is a percentage of fools—there always will be—but at least we can give them some benefit that they know what they are doing and then give them a book.

We can say, 'This is what it is about. This is the warning department. This is a copy of the disclosure statement. This stops the misrepresentations. Hopefully, we will keep you out of the litigation court and, hopefully, we get rid of all these court actions presently on foot and see that it does not happen for new tenants.' We can then move forward on that. If we could get that disclosure statement sorted out properly, I believe a lot of misrepresentation and the worry and the emotiveness that we have been hearing for months on end would be a thing of the past.

I go on from that, as I have said in this report, that you are talking about who is going to hear these cases. I have put in the recommendations that you should look to the ACCC. Then I put in a secondary report to you, because I know governments now say it should be user pays. I have explained to you in that—as a subsequent recommendation, because I have been terribly concerned that, depending on what 'faction' you are from, user pays is a thing that could be coming—the methodology that the system will pay. It is a method.

But I believe that these tribunals and all these people that are really making a bit of a welter of it, if you can get on some of these things and so forth, are still partly indifferent. They mean well but they go home at 5 o'clock—pack the bag, go home to mum—and the poor tenant is still stressed out of his brain. I think it should be a closer interactive position. I have taken on board the ACCC, as I have said, in the position. I am not doing it with disrespect to them; I think it has got enormous capacity. But it is a very forward thinking recommendation.

Mr JENKINS—The disclosure document goes to things that are not a static situation. Many of the elements will be dynamic, and within the period of a five-year lease there are going to be changes. If all we are going to do is to leave it that, if there are changes, they should be put to the tenant in writing, we will be

overlooking a missing element. That has been the lack of a proper business relationship between the landlord and the tenant.

Some of these things that you list, and that I would see might change over the course of a lease, should be things which a tenant is able to discuss with the landlord. For instance, if the tenant is putting money forward for promotional activities, it would be silly if we said that at the start of the lease we would get the landlord or the management to say, 'This is what is going to happen,' if two years down the course they could just say, 'Well, that did not work so we have changed it.' What would be missing is for them to have used the pool of talent which is their tenants to help them in the running of the centre.

Likewise, it may be legitimate that, two or three years into an individual's lease, the landlord or the manager on behalf of the landlord, because of circumstances in the commercial world, will say, 'We would like to be changing the tenant mix.' They could decide that unilaterally. Under this system, because we are into disclosure, they could just say two years down the track, 'Well, this was the case when we entered into the lease but we have decided, because of circumstances, that we want a change. Here is your notification in writing.' Again that would overlook that it would have been helpful if, under a proper business relationship, the landlord or the manager had sat down and talked with the tenants.

Mrs Michael—I totally agree. Could I just add to that? Getting back to the tenancy mix, there seems to be just open slather in the shopping centres. They are not being managed properly by centre management at all, particularly to judge by the calls I get in the food area, where there is just so much overlapping. Centre management just does not seem to care. It is just not an issue with him.

You have got this oversaturation of the tenancy mix. You have got a landlord who is totally unapproachable. He has got such a callous disregard for the retailer. There should be a lot more communication. I predict that there will be an absolute meltdown if we do not address this situation and get all these things set up in the federal government. I think it will all be over.

The landlord has a real problem out there. No-one is winning in this situation. The small business is not winning and it is inevitable that, in the long run, the shopping centres will not win. They will start closing down. They have invested a lot of money and if the small businesses are leaving—and they are leaving in droves—there is a huge problem in Australia out there. It is coming, it has started. Can't anybody see that? It is a no-win situation.

ACTING CHAIR—One of the more lateral suggestions put to this committee, which I think you might find has some merit, was put forward almost tongue in cheek, but not totally. It is that the tenants should actually choose the centre management.

Mrs Michael—Wonderful idea.

ACTING CHAIR—Obviously that is because they have very much an interest in making the centre work. They make the investment into the centre, not the landlord. The landlord owns the building, and anything that is changed you pay for. Do you think that is a realistic thing, and how do you think it could operate?

Mrs Michael—Most definitely. You would very rarely meet the landlord—I do not think any of us have met John Gandel or Mr Lowy—but you will certainly have contact with your centre manager. I would like to know what credibility and what experience these centre managers have got.

Mr ALLAN MORRIS—Mr Chair, it was not quite that. What was being proposed was that GPT, General Property Trust, is the owner; the tenants are the tenants; and they appoint the management, not Westfield or Lend Lease. In other words, Lend Lease and Westfield as the manager are not the appropriate body. There is no need for a third party.

Mr Rogalsky—The real fact of a centre manager is that the tenants pay the wages of the centre manager.

Mrs Michael—We pay the wages. The small business pays the wages.

Mr Rogalsky—Let us take a centre manager now. The real world is this: a centre manager turns up when the ticks are on the board. When the shopping centre is full of people, boopety-doo, who turns up? It is the centre manager walking around, saying, 'Ain't we doing well!' When it is dead, on a hot day like today, you try making a phone call saying, 'I'd like to meet with the centre manager.' 'Look, he is busy at the moment,' et cetera. When you next meet the centre manager he has got more files than I have got on my desk; he has got them like this. I say, 'Where are you going?' 'Oh, I've got a meeting with the owner to talk about the cash flow of the shopping centre for the next year.'

So you could be not doing well, you have got your complaint. He has got two hats. I will tell you what, you are paying his fees but who do you think he jumps higher for? He jumps higher for the one above. When he knocks on the door and he says, 'I want you in my office now,' you are there straightaway. You say, 'I am sorry I'm a second late. I would have been here earlier except I cannot run any faster.' But the tenant rings up and they say, 'Can I see you?' His answer is, 'Yes, but I am going to a shopping centre conference in Queensland. I will be back in two weeks,' et cetera. It is the system that is created.

You can blame landlords and that, but it is 20 years of a thing that has grown. It is a growing thing. I do not believe you throw dirt over a landlord—that is not the point of the issue. But I believe that is a very sensible suggestion. The centre manager is in a position that you should be able to knock on his door and see him. All of this is: if you do not talk to people you get this thing in your mind, 'What is he about?' He should be available to people.

All right, the landlord is too big now because of the monolith of what he is doing and his expansions and so forth, but there should be delegated a person and then there should be someone that can complain about a centre management if it is not performing. Perhaps it is that a lot of centre managers really are not up to scratch. They are causing the problem to a landlord when they say to people, 'Look, things are going to get better.' I do not think they understand enough. If you read the lease—and a lot of leases are naive—you see that the centre manager acts in the position of the landlord when the landlord is not there. Unless the landlord withdraws the statement of the centre management in writing, that word is a representation, and that creates further misrepresentation. This is crazy, and I do not think centre managers understand what they are doing.

Mrs Michael—They do not live in the real world. They are on $80,000 a year, with their pinstripe suits. They would not know what it is like out there in the shopping centre.

Mr ALLAN MORRIS—I do not know about that: they are not going broke when you guys are.

Mrs Michael—Exactly. That is what I am saying. They are not in the real world. You very rarely see a centre manager.

Mr ALLAN MORRIS—Their world is very real. They are getting increased salaries every year, that is pretty real. I would not look at it that way.

Mrs Michael—I only see my centre manager on Christmas Eve. He came in and gave me a handshake and a Christmas card. It is disgraceful.

Mr ALLAN MORRIS—He is in the real world—he is doing fine, thank you.

Mrs Michael—No, we are in the real world. These people behind me are in the real world.

Mr ALLAN MORRIS—I suggest that by thinking that way you are probably disadvantaging the way you approach it. I want to go on to the question of rent and centres. I want to take up a couple of different angles. I will put two things to you and try and canvass what you think of them. It has been put to us, firstly, that current rents in shopping centres are about 50 per cent over value. It has also been put to us that the average rent to turnover in shopping centres is up to double or more than that for the same kind of business in a strip shop. The Institute of Valuers also reinforced that rents were over valued and that they will probably come down; in other words, the bubble will burst some time. If it does burst, then obviously a lot of people are going to be hurt. A lot of people have been hurt already but more will be hurt in that meltdown that you spoke of, Mrs Michael. How do we get from where we are to where it is sustainable without destroying people?

Mrs Michael—As far as the rental goes?

Mr ALLAN MORRIS—Assuming rents are overvalued and there is going to be a meltdown of some kind, how do we stop the meltdown?

Mrs Michael—In the ideal world—and we would never get a landlord to agree to this, God help us—percentage rental of the turnover. Because the rentals are far too high. It is just the landlords' greed. I would say percentage rental of the tenant's turnover.

Mr ALLAN MORRIS—Does your organisation support that concept formally?

Mrs Michael—Yes. I do.

Mr ALLAN MORRIS—Have you actually discussed it amongst your membership?

Mrs Michael—Yes, we have. Percentage rental of turnover.

Mr ALLAN MORRIS—I see heads nodding in the audience.

Mrs Michael—The people behind me; I can only speak for a few of them.

ACTING CHAIR—What would that do for the mix of tenants? If a landlord knew that all they would get is a fixed percentage of turnover, would they not go for the much higher turnover type of shop?

Mrs Michael—Yes, but does it not all come out in the wash, because then your rental is in line with your turnover? If the chains are turning over $1 million, they would not mind paying a percentage of their rental. It would all come out in the wash. The small business person who is only taking, say, $7,000 a week would pay $700 in rent. A person that is taking $1 million turnover a year would pay $100,000. It is so logical to me. But, God help you, as I said, you will not get the landlord to agree to that. Why would he? He is too greedy.

ACTING CHAIR—A variation of that theory—and I put it forward for you to respond to—is that different categories of shops should have different percentages of turnover. A high fashion shop has a very high profit margin. Your turnover should really be based on your profit margin in categories and that should be fully disclosed. You have one price. In that category of shops, maybe 10 shops in each centre, your rent is a certain percentage of turnover. Do you think that that is a workable option?

Mrs Michael—I think that would be very fair.

Mr ALLAN MORRIS—That was put forward to us as a preferred model—the different groupings of shops—because margins and so on are pretty relevant. That would require some other factors for situations such as when someone is not trading well or someone has a problem. You need some independence about that. Amongst your membership, have you attempted to establish those figures at all for your shopping centres? For example, I notice, Mr Russo, you have five shops in an eatery taking court action. Have they compared notes on their rent to turnover? Do they know what the rent to turnover is within their centres?

Mr Russo—Indeed they do. In fact, I would venture to suggest, speaking from direct experience, that each of those five have their rental as a proportion of turnover sitting at around about 40 per cent.

Mr Rogalsky—Whatever they tell you, it is always 30 to 40 per cent. Anyone who says they are 12 and 14 per cent is—

Mr Russo—Not in the real world.

Mr Rogalsky—If you took a line at about 30, 35, that is where it is.

Mr ALLAN MORRIS—What is that in? What kind of things are they?

Mr Rogalsky—That is your occupancy cost, which is your rent to your turnover.

Mr ALLAN MORRIS—For what kind of shop?

Mr Rogalsky—As enclosed buildings, are there all—

Mr ALLAN MORRIS—I was particularly asking about eateries because Mr Russo has an eatery.

Mr Rogalsky—Eatery is the highest, yes.

Mr ALLAN MORRIS—You have a large audience there. It would be helpful to us if we could get some examples of different shopping centres for, say, eateries or different kinds of activities—not today. We are looking at different parts of Australia so it is different in different parts and we are not getting the information for all areas. So it might be helpful to us to get some ideas about those differences.

Mr Russo—One advantage of the percentage turnover type rent situation is that it really does make the centre management accountable. Some of these blokes here are in centres that are so run-down it is not funny. They have tiles falling off walls, cockroaches scurrying out of openings in walls and they are still paying the same exorbitant rents.

Mrs Michael—Promotion does not exist.

Mr Russo—If the rent is tied to a percentage based on turnover, then you can bet your boots that the landlord is going to spend the dollars to make sure that they get that rent in, based on turnover. They will do anything they can to get the people through that centre.

Mr ALLAN MORRIS—So how would you move from where we are to where we could be? How do you make that move?

Mr Rogalsky—I have covered that matter for you in the recommendations. One of the things I have been concerned about is that it is a very big brush to just go to percentage rental with respect to a landlord. He has his present financing and funding positions. It is a worry that it is a new world, and in the real world we are going to confront everyone. All I have put in the supplementary recommendations to you is a trigger mechanism to create percentage rental. It is caused under the arbitration factor and it starts to introduce it. As I say in the clause subsequent to that, this at least gives you the opportunity to put your foot in the door for percentage rent.

Mr ALLAN MORRIS—What page, Mr Rogalsky? I just want to make the comment to our witnesses and to those in the audience that we are always interested in more information. If anybody wants to pass on some comments to us, a few more notes would be quite welcome.

Mrs Michael—Thank you. I welcome that opportunity.

Mr ZAMMIT—I have a question to ask. I am reluctant to ask it, but I will. I spoke to a former large shopping centre manager recently. I told him that I was very concerned at the practices employed by centre management and the owners of shopping centres as perpetrated against the small retailers, especially the small

tenants.

He said to me, 'Look, I wouldn't take a great deal of notice of that.' I said, 'Why not?' He said, 'Let me put it this way, there is absolutely no doubt that the centre management rips off tenants, but they in turn rip off the taxpayer.' I asked, 'What do you mean by that?' He said, 'Well, they do not declare all the things that they should declare. They take cash over the counter and so on.'

If we are going to come down hard on shopping centre management, if we are going to come down hard on owners of shopping centres, how can we guarantee that they do not come back to us and say, 'You are getting stuck into us, but you should get stuck into them as well.'? How does one overcome that? It is only one person who told me, but he is no longer in the business.

Mrs Michael—I am trying to understand that. I am appalled by that centre manager. If that is his justification for what is going on out there, I find that absolutely appalling.

Mr ZAMMIT—It is a valid question, I have to ask.

ACTING CHAIR—Talking about the black economy—

Mrs Michael—Talk about being fair—

Mr Rogalsky—The answer to that is very simple. There has been an example of it at the Myer Centre in Brisbane. If you go to percentage rental, everyone is playing the game. You used the naughty word 'black', but it has gone, and it helps government. What they do in Brisbane is, if you go onto the percentage rent it is a level playing field, because they set the computers, everyone is on computer line direct to the centre manager and he can come into your shop at any minute with a key and punch up and check it. He can come around with a policeman or someone and say, 'I want to buy something,' so he gets something and he can check it.

The landlord has the right to have policing: you have got to balance the field. But it is a matter of working it through. The penalty has got to be that if the person is a naughty boy once, he gets bang, bang; if he is a naughty boy two, three or four times, he is out the door. You have to protect the landlord. It has got to be level. The Brisbane shopping centre about four years ago used to do it. I saw the lady come around, and she said everyone was lovely. They would press a button: boom, boom, boom. And I would ask, 'What was she doing?' and they would say, 'She is checking the figures'—because they were on percentage rents in the food areas.

ACTING CHAIR—I am from Brisbane. I was not aware that the Myers Centre was still a percentage rent.

Mr Rogalsky—I observed the woman coming in and going into other shops. She seemed a nice lady and I wondered what she was doing and I asked a question.

Mr ALLAN MORRIS—How long ago was that?

Mr Rogalsky—It was in 1991-92, when the REMM were there, before the demise of the REMM group. But it was a Myer centre, and I was impressed by that. I believe that percentage rent is the answer to a lot of it, but we have got a transition. Mr Morris asked what part it was in, and it is on page 8 of 15. I believe that, in all of this, we can have a dream world but we have also got to have the practical world. All of the landlords have geared their properties on a funding position, so we cannot just say that the law is now percentage rent. That is not reasonable. What I have tried to introduce in this whole recommendation to you—

Mrs Michael—Can I add something? I am still very angry about that last comment with that landlord. What you were basically saying—

Mr ZAMMIT—Former landlord: he had no reason to—

Mrs Michael—Can I just qualify this? He is saying, 'Don't worry about the small business person. He is doing all right, Jack, because there is a bit of black money under the table.' Let me tell you that half of these people are not even earning a wage at the moment, and many of our members are going out and working at petrol stations after work just to pay the rent. I take absolute offence at that.

I also would like to add to this, because I am getting angry again—and as you said, Acting Chair, you should maintain your anger. I would like to ask this particular centre manager if he thinks it fair that small businesses are paying more percentage rental than the large chains. Do you know that we—small businesses—are practically running the shopping centres? Why is it that the chains are paying less than the small businesses? He has got the gall to turn around and make a comment like that. Many of these people behind me are not making a wage. They can hardly put food on the table, and I am insulted by that. Aren't you?

Mr ALLAN MORRIS—Yes.

Mr ZAMMIT—We are on your side, because we have had so many people come and tell us real life stories of how much they have suffered. I made it clear this was a person who was formerly in it.

Mrs Michael—I am glad you brought it up.

Mr ALLAN MORRIS—Can we get him as a witness?

Mr ZAMMIT—Yes, we should drag him in. The point that he made is that the larger tenants, because there are so many people involved, would not and cannot hide their takings, because they will get dobbed in.

Mrs Michael—No; they just invest it into stamp and coin collections and paintings.

Mr ALLAN MORRIS—Mr Chairman, I would like to come back to that question of the transfer from one to the other. I read your page. You raise it, but you do not necessarily give us a mechanism, and it is something you might—

Mr Rogalsky—Yes, I do, with respect; but you have got to sit down, have a cup of tea and read the lot four or five times. The time that is put into this has not been—

Mr ALLAN MORRIS—You were complaining about the brochures not being understandable, weren't you?

Mr Rogalsky—Yes, but I say that that is understandable.

Mr ALLAN MORRIS—It is okay. I said that in jest.

Mr Rogalsky—You have got to read it in full. I am aware of two things that worry me in this: percentage rent is the ideal but, to get there, we have got to be in the real world. The landlord has his funding. Let us get in the real world. He has obligations. He has an asset. The point is that ideally we have got to introduce it, and I have given the method of introducing it.

Mr ALLAN MORRIS—I am on to that. It may be that with hindsight, after today, you might give us some more comments about the actual process of it and not just the trigger. I want also to refer back to the earlier witnesses today. I am sure you were all in the audience when Dr Croft raised the question about a trading right as a kind of new instrument. Do you have any observations? He was suggesting almost off the top of his head the idea that, rather than having a tenancy lease in a shopping centre, you could have a right to trade, which would therefore be a different instrument from a normal lease and which may be able to be designed particularly.

ACTING CHAIR—You will have to be succinct, because we have only five minutes of tape left.

Mr ALLAN MORRIS—Yes. I am interested in some comments or reaction to that.

Mr Rogalsky—Again, we come back to dollars and cents. Let us look at the landlord—

Mr ALLAN MORRIS—No. This is strictly conceptual. Consider the concept that, rather than a shopping centre having a lease, they would have a contract which is a right to trade in the centre. That is a concept which would allow you to redefine what that actually consisted of, rather than picking up a lease.

Mrs Michael—There has to be a change. At the moment, the lease is written by the landlord, for the landlord.

Mr Rogalsky—That again comes back to the REMM in Brisbane. They had licences, with this percentage rent: instead of the word 'trading', they use the word 'licence'. I would say to that that the landlord owns the plant and the equipment and everything else. In the transcripts that I have read, the one thing that we are trying to hang on to is the nest eggs of superannuants. If they go in trade, what is really the future? Where is the goodwill for the trading person?

Mr ALLAN MORRIS—I raised the question—and perhaps you can respond subsequently—that the right to trade would be a tradeable commodity in itself, as the lease would be; but it would allow you to

design it so that it was actually written in a form which was not picking up all of the hundreds of years of lease law.

Short adjournment

ACTING CHAIR—We will resume now after that short break. I suppose the answer to this question is yes, but I would ask you to think about it first. Should the rent or total occupancy costs of any tennant in a shopping centre be on a public register? That is, should there be a register drawn up of what everybody pays and that everyone can access? Quite often the initial response to that is yes, but then people realise that everyone would know what their margins are, et cetera. What is your view on total disclosure?

Mr Rogalsky—I have put the statutory legal disclosure statement in the recommendations and I say outgoings have to be put on the public record. It is nice to know what people are taking but one of the concerns I have about outgoings is a new problem. It is the mixed use matter. We have got to have all that above board. We now have retail in a transit terminal, such as the REMM mix in Brisbane. You have your office and your residential. We are getting mixed use development.

We have to know what the outgoings are because it is such a mix. With mixed use there is a need to know what the outgoings are. If it was a simple 20-year structure, perhaps, but not with the modern practice of mixed use. There is also the entertainment component within an entity.

Mr ALLAN MORRIS—Concerning those questions I was asking before about a right to trade, I would be keen to get any comments later on, perhaps a note or something.

ACTING CHAIR—I want to ask about the concept of goodwill. We have had a lot of evidence before this committee about the concept of goodwill. A lot of people have put forward the proposition that because a lease is for five years, that goodwill exists only within that period. They say that at the end of five years, because the lease expires, goodwill is no longer existing. Therefore, any costs have to be amortised over the five years. Do you have a view on that?

Mr Rogalsky—Is it nearly back to a trading lease.

ACTING CHAIR—That is the reality now.

Mr Rogalsky—The reality is you have a trading lease.

Mr ALLAN MORRIS—The word ‘lease’ under law has a whole lot of case law and a whole lot of common law behind it. What has been suggested is a new instrument which does not have all that in which you could actually define precisely what you mean. You do not have this currently because of all the confusion as to what a lease actually is. The word ‘lease’ is normally used for a particular sized property—a particular amount of space in a fixed location which is surveyed and which is identifiable. A business in a shopping centre is not that but we call it a lease. In other words we are calling a thing a lease which is not a lease. It is actually a right to trade and all the baggage that goes with it. I think what was being raised by Dr Croft was the idea that it may be well worth thinking about defining a shopping centre lease as a new

instrument in which you have a clear-cut precise way of talking about what you actually own and what you have when you buy it. There would be no reason why it could not be traded as a lease can be traded depending upon how long it runs for. Whether it runs for three years or 25 years would be part of that particular contract.

Mr Rogalsky—With regard to that, my concern is in the interests of the community. The element of goodwill is very important to everyone. At the present time the five-year lease, as the Deputy Chair states, does not allow people—and I have read the transcripts—to get their money back. They do not have a nest egg; they are just goodbye Charlie, I am off. Who is next in the line—tick the box. We get into the question of the smokescreen. Take the person that for five years has made those beautiful pies. People have come from other areas to see the chap and his wife and got to know them. To my view that is goodwill. That is an element people have gone out of their way and strived to create. But after five years, you can wipe the slate. He has got no superannuation; he has got nothing from it.

It goes back again to the basic premise of the five-year lease. It has to be a ten-year lease. It has to be a five-year lease with an option to the tenant of five years—not to the landlord. Let us get the goodwill in and get him a chance to get his money back out.

Mr ALLAN MORRIS—That does not give him goodwill. What he needs is residual rights to renew.

Mr Rogalsky—No.

Mr ALLAN MORRIS—That is what it needs. Whether it is five years, seven years or ten years it does not matter because at some stage you have a year or two to go and if you haven't got it by then you are stuck. A residual right to renew is what would give goodwill.

Mr Rogalsky—If you read the recommendations as I said—perhaps I should not have shown you that brochure where it says that it is very hard to understand. I put in the recommendations a five-year lease with an option of five years to the tenant with a further option of five years to the landlord with a further five years. I trigger the landlord but I also say that the tenant has to have abided by the covenants in the lease. The covenants being mainly to pay your rent on time et cetera.

Mr JENKINS—I have got a feeling here—and this is a science graduate going through the maze of legalities—that this concept of goodwill is something different from what I thought at the start of the inquiry. My concept of goodwill you have nearly described. It is those customers that come to have Mum and Dad's pies but that is not something that is tradeable. What you are saying is that, by increasing the length of the rental periods from say five to ten years, a whole host of other matters that are involved with conducting the business can run across the ten years. If somebody wanted to sell their business on they would get, if it is after four years, six-tenths of something back but there does not seem to be an ability to sell the customers and things like that. Before this inquiry started, this was not something that I had actually realised, and that is what I thought goodwill was.

ACTING CHAIR—You can sell that as long as someone is prepared to pay the money. Goodwill only exists if someone is prepared to buy it. But what that person needs to buy is more than thin air and

unless there is a continuity of lease arrangement then the people may pay goodwill but they will in the end only have two years to amortise all their expenditure. That is where you are coming into a real danger situation because goodwill is exactly what you say and what Mr Rogalsky says. That is, Mum and Dad have built up a business. They sell that goodwill; people pay for it but unless they have security of tenure of premise, then it is gone. Some businesses you can move but not in an enclosed shopping centre.

Mr Rogalsky—There is one element that I did not mention and that will probably ease your mind a lot. At the end of the first five-year lease, the option is to the tenant to extend but the tenant has to give an option to the landlord to take it back with its inherent goodwill in it. If someone comes to the tenant in say three or four years and says, 'I would like to buy your business,' and there is a year or two to go, if he has got another five-year extension perhaps the landlord would like to take it back. In some leases, the tenant must offer to the landlord a right to buy the business back at the price that someone has offered him.

Mr JENKINS—I want to just change the questions a little. I want to give Mrs Michael a chance to give her association a plug. How many numbers have you got at the moment? How many shopping centres across Melbourne and Victoria are represented in that membership? I think that as part of the maintenance of the rage and anger you should be pushing the association.

Mrs Michael—We have members in all shopping centres. We have got a very dedicated committee. We are different from the Retail Traders Association in the fact that we are run by small businesses for small businesses. We have the passion and the understanding to know what they are going through. Our membership is increasing. We have a subcommittee of solicitors who can help and advise tenants. This week we have received some tremendous contacts from Perth, Adelaide and Sydney suggesting that we do go national and we are considering that. We feel as though United Retailers is the first and only association representing small businesses run by small businesses.

As I said before, we are represented in every single shopping centre in Melbourne. Each one of our committee members is a small business person within that shopping centre. We get weekly or fortnightly reports of what is going on in that shopping centre and once we have a member we also inform them. It is sort of like being a survivor of a plane crash—it is the only way I can describe it—because by speaking and being together we can discuss similar problems. The small business person is not feeling left out there in the cold.

Mr JENKINS—Do you have members that are from strip shopping centres?

Mrs Michael—No.

Mr JENKINS—Are the problems different depending on the size of the shopping centre or is it across the board?

Mrs Michael—No. I do not think any shopping centre is isolated. The problems remain the same within all shopping centres. It is just basically the greed of the landlord.

Mr JENKINS—My final question is about the ability of traders to act collectively. Often we have

had people come before the inquiry who were the chairperson or the secretary of the centre's traders association. They have gained the impression that they have been victimised because they have taken on those positions. That seems a real difficulty because it would seem, as you have experienced, that by bringing people together, and you talk of even legal class actions, there is a great deal of strength from that coming together. But it is also a pity, I believe, in terms of the proper conduct of the shopping centres for the landlord and the management not to be able to have a point of reference of people who can speak on behalf of the tenants.

Mrs Michael—What are you actually asking me?

Mr JENKINS—I am wondering whether, within the shopping centres, you try to assist people to come together as centre committees?

Mrs Michael—Yes, we most definitely encourage it. I will not mention the shopping centres, but I have what I call my hit list. I get my hit list out every Monday morning and do a whip around and speak to each shopping centre. In other words, I have someone in each shopping centre that I can talk to at any given time. If they have a problem, I have a phone number at which I am available 24 hours a day. The reason we are different from any association is that, having been a retailer of 20 years, I have done the full circle. I have been successful, I have litigated, I have won, and now I am trying to pass on my information to fellow retailers.

ACTING CHAIR—So you have the passion, which a lot of them do not.

Mrs Michael—Yes, I have a genuine passion.

ACTING CHAIR—I think one of the great successes you will have is that you are made up of small businesses. Retail traders associations tend to be dominated by the people who pay the wages of the people who work for the retail traders.

Mrs Michael—I might add that everyone is doing this voluntarily; no-one is getting a salary. We have huge expenses—photocopying, obviously, and all sorts of expenses, including the documentation to you.

Mr Russo—I would like to make one point to follow on from what Lisa has said. It is all very well to have a representative organisation, as we do have, and we are quite solid across the board of the shopping centres. But the simple fact of the matter is that shopping centre owners and managers do not like to speak to a representative purporting to represent the members within a shopping centre. They try to split one off against the other. That is very important to note. They will not talk to a representative organisation speaking on behalf of the shopping centre tenants collectively.

Mr ALLAN MORRIS—Could we go back to the question on goodwill and leases—and, again, you might want to think about this. The English system has a right to renewal with the tenant. Unless there is a reasonable expectation that you can actually renew a lease—for example, if it was accepted that a person who was trading properly, paying all their bills and so on, would be able to expect to renew—it seems to me that goodwill becomes a shrinking commodity, whether it be two years to go, a year to go or four years to go.

Can you think about that and drop us a note. I am not sure if you can answer it now, but you can see what I am trying to get towards, that without that you have no goodwill.

Mrs Michael—I would like to define goodwill, because that was in a press release we sent off this morning and it is interesting that you should bring up the subject. This is the way we define goodwill, which only involves three words: retailing is largely dependent upon the goodwill, hard work and commitment of small traders. That is what goodwill is.

Mr ALLAN MORRIS—Yes—but can you sell it?

Mrs Michael—I do not think there is any goodwill these days. It would be very hard to sell hard to sell a business for goodwill.

Mr Rogalsky—It says in the leases that we have got goodwill.

Mrs Michael—Yes—you used to be able to get goodwill.

ACTING CHAIR—I am about to draw this to a conclusion, but in case we have not covered any issues you wanted to raise I will give you the opportunity to raise them now.

Mr Rogalsky—One of the issues that is very burning and that is coming to light more is in the Alan Millington report. You gentlemen heard Alan Millington and you can judge what you thought of the man, but his report to the Retail Traders Association in January last year was a very intelligent and very positive approach. As I observe the man, although Alan Millington understands the problems of tenants he is an economics driven person, concerned with evaluation. He has stated in his book that landlords are going to have a problem very shortly. The prime tenants are disappearing and there is going to be a change in the value of their assets.

Not only that, we got the transcript yesterday of another case of this from a report on the *PM* program on the wireless that Gareth Griffiths, President of the Institute of Business Brokers—I do not know if you have heard him?

ACTING CHAIR—Yes.

Mr Rogalsky—If you refer to what he says, with all these expansions we are creating a problem for everyone—mortgagees, landlords, financiers, the stock market, superannuants. With all of this money you are getting in from your poor little person with his superannuation, where do we put it? Shopping centres. They are saying, 'Look, they are the 10 wealthiest people. Let's get the shovel out and throw the money over there. Let's keep going into it.' But that is going to crash the country.

Every other element has had its drop and I get concerned for landlords the way they are going with it. The tenants are running out. We have destitute tenants already and we are now creating more, so we attract other people—they will find someone to go in—and we are creating this economic problem. Those two elements are a problem that you in government have to look at. It is a very important element.

ACTING CHAIR—Mr Zammit is in government, the rest of us here are not.

Mr Rogalsky—In opposition or in government.

Mrs Michael—To sum up, I would like to thank the fair trading inquiry for this opportunity for United Retailers to speak for the majority of small businesses. I have a question I would like to ask the Acting Chair, because I am the new girl on the block.

Mr ZAMMIT—Is this a dorothy dix question?

ACTING CHAIR—No.

Mrs Michael—I would like to know where this is heading. I think you mentioned before that you did something similar to this 10 years ago, yet nothing has changed. What is the next step? When should small businesses have an answer? When should we hear the outcome from this?

ACTING CHAIR—We would hope to have the report tabled mid-year. Then the government has to respond. The frustrating thing about the last report was that I was the chairman of this committee, then I became the minister and for three years I fought all the state governments to try and get uniform legislation—and we are back here nine years later.

Mrs Michael—This is very disheartening.

ACTING CHAIR—At least we know that it did not happen.

Mrs Michael—I hope you and I are not back again nine years later addressing the same situation.

ACTING CHAIR—No, I do not think so.

Mrs Michael—I am here to say that I do not think many small businesses can survive.

Mr ALLAN MORRIS—That is why he asked you to maintain your anger.

Mrs Michael—I will maintain my anger—but nine years is a bit too long to maintain it.

ACTING CHAIR—I know. Thank you all for attending, because this has been most important for us. On Monday, 24 February, the Property Council of Australia is appearing before the committee, so we were very keen to hear your point of view. Susan clearly indicated to the committee how impressed she was with the submission you made, so we are very glad that you took the time to come and see us today. We am glad the other people came, we hope you all found it interesting, and we hope that you will also find the report so.

Mr Russo—I would just like to correct a misapprehension that you may have unwittingly conveyed when you said that I did not understand the lease.

ACTING CHAIR—No, I said that you found it difficult to understand.

Mr Russo—No. Indeed, I understood the lease, but what I did not understand was the level of duplicity that preceded it by way of inducement. That was what I intended to get across.

ACTING CHAIR—Okay. Thank you very much.

[4.04 p.m.]

GARRAWAY, Mr Grant, General Manager—Franchising, Kleins Franchising Pty Ltd, 1 Abbotts Road, Dandenong, Victoria 3175

ACTING CHAIR—Welcome. The committee proceedings are recognised as proceedings of the parliament and warrant the same respect that the proceedings in the House of Representatives itself demand. Witnesses are protected by parliamentary privilege in respect of the evidence they give before the committee. You will not be asked to take an oath or an affirmation. You are reminded however, that false evidence given to the parliamentary committee may be regarded as a contempt of the 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 do so and the committee will give consideration to your request.

Mr Garraway, the committee has received your written submission and authorised its publication. Would you like to make any additions or alterations before going to an opening statement?

Mr Garraway—There are no changes to the submission.

ACTING CHAIR—Would you like to make an opening statement?

Mr Garraway—Yes. I am in my 12th year in the franchising industry. I am a qualified accountant by profession. I work for Kleins Franchising, which was formed as a company in 1983. It is a fashion jewellery and accessory business running small stores in most of the regional shopping centres in this country. We commenced franchising in 1990. We currently have 145 franchise owners and run about 50 company stores. We operate in Australia, New Zealand and South Africa as an Australian owned and operated company.

In general, clients have 100 per cent support for the franchising code of conduct and were bitterly disappointed by recent developments in terms of the Franchising Code Council. We strongly submit that there should be an independent body to administer the code, genuinely representative of the franchising industry.

We take what we think is a slightly unusual position in our industry, in the sense that we believe that the model generally used by the stock exchange in this country can be useful as an example for what can happen in franchising. It would not be necessary for the parliament to pass individual, chapter and verse legislation but rather to pass authority to that body to make rules which would be subsequently enforceable by law. In the light of recent developments we just come more and more firmly to that view.

We think the body should be funded largely by industry, perhaps with a modest contribution by government in the early years in the public interest to get the thing under way. They are the main points that we wanted to make today.

ACTING CHAIR—I thank you very much, as someone who has a long interest in the franchising code. When the announcement was made about its going into liquidation, was that something that the industry expected or did that come as a major surprise?

Mr Garraway—I do not believe the industry still understands 100 per cent why it has gone into liquidation. One presumes that, because of our friends the lawyers, everyone is being a little cautious about what they say on the public record. There were rumours of some difficulties, rumours of disputes over funding between the government and the council, but as to the actual end I think it was either Christmas Eve or New Years Eve—

ACTING CHAIR—It was 31 December.

Mr Garraway—That we got the fax and the information of what was happening. There was no explanation and, to be perfectly frank, none since that makes any sense. We had a couple of matters running under the code at the time and you are still left wondering whether you should or should not be following the code of practice. We have followed the minister's invitation to continue to use it, and do so, and we have now made it part of our franchise agreement. We are hanging out there waiting for the minister to make clear what he intends and how it is going to be working.

ACTING CHAIR—When the franchising code was first introduced—I speak with some authority on it—it was a trial period to see if a voluntary code would work. There has been a lot of evidence to this committee that a voluntary code that is not underpinned by legislation does not work. There has been a suggestion by some people that a good example of how to underpin the code with legislation is, I think, section 7 of the New South Wales Fair Trading Act. It basically means that it is a voluntary code until there is a dispute, and then the regulations carry the force of law. That is how I understand it. Do you think that sort of thing would give it more credibility?

Mr Garraway—I would leave it to others better qualified in the law to establish how the force of law comes about, but I think the reality is that, with some industries having relatively low entry costs as a franchisor, unless you have some force of law, some sanction against those who want to behave in a poor fashion, then we are not going to get the results we all want out of the industry.

The industry, in many respects, has been spectacularly successful. It is very easy to focus on the negatives. There are 30,000-plus successful franchises in this country. There are some hundreds, maybe small numbers of thousands, who are unsuccessful. But compared with the ordinary small business success rate that is a spectacular success; let us not lose track of that at all. Let us give a method of dealing with the unfortunate problems and, hopefully, weed out the bad operators that way. But how it is to be done I would have to leave to those who are better versed. I am an accountant, not a solicitor.

ACTING CHAIR—One of the things that probably convince me that it is now time to underpin is the fact that we have received a lot of evidence—from the Franchising Code Council itself and from others—that, whilst they had a fairly high penetration rate into franchising, once people had problems in the code they dropped out of the code until they fixed them, and then came back. So while people were adherent to the code had a low level of disputation, the actual level of disputation was much higher. If you had an underpinning, perhaps it would not be so easy for some people to do that.

Mr Garraway—I think that is a fair call. Within the industry I am not aware, as I go to seminars and expos and various things and talk to the other major franchise operators, of any of the really major players

playing opt in, opt out. To be perfectly frank, it is publicly unacceptable. It was the accepted method of doing the business and we all modified to a greater or lesser extent what we were doing, to comply with the code, and pushed on. I am not aware of people opting in and out—that detail was not provided to the industry—but certainly among the senior players in the industry I saw no sign of it.

ACTING CHAIR—Apart from legal underpinning of the code, done by whatever method, do you see any areas where the code needed to be strengthened or to be changed?

Mr Garraway—It was still relatively early days. I think one of the faults was that it was not only franchisors who had some options under the code. We had examples, certainly, where franchise owners were advised, in some cases by quasi-legal advisers, to not take the mediation and conciliation processes under the code but to go straight to legal proceedings. If a franchisor had done that, he could look forward to seeing himself featuring early on a Sunday morning on the television.

I think that is a little one-sided. Whilst not all franchisors may behave correctly, it is a fairly naive view to think all franchisees will behave correctly as well. I am not trying to cast any doubts on anyone; I am simply saying that what applies to one should apply to the other. Both should be treated equally under the law.

ACTING CHAIR—Do you think there is a realisation broadly amongst franchisees that what they are doing is buying the right to operate your business name, and that there is an obligation for them to conduct the business as prescribed by the franchisor? Do you think there is still some dispute about that? It seems to me that there are some franchisees who want the benefit but not the rigour that goes with that benefit.

Mr Garraway—I think it depends on how structured the particular system is. There are some businesses which actively encourage a great deal of entrepreneurialism from their franchise owners and others that do not as much.

I know that in our business we stress a great deal the disciplines and the controls that are required to operate inside a franchise system. Our evaluation processes specifically look at the issue of the likelihood of the applicant being comfortable operating in a relatively structured environment, and some people clearly will not be. By nature they are simply not suited to that.

That is fine for them, but it does not mean that they will be happy and successful in our system if they are very much the outgoing, push the edges of the envelope type of entrepreneur. But somebody who wants to buy some support systems in a cost-effective package to help run their business, must not ever lose sight that it is their business that they are operating. They have to take responsibility for their business, as we have to take responsibility for operating ours.

Mr ALLAN MORRIS—Mr Garraway, what would be your average franchise? I think you said that you have got between 145 and 150, so the average franchisee has three outlets. Is that the right interpretation?

Mr Garraway—No. We have 145 franchised stores and we have 50-odd company run outlets, 195

stores in total. Most of our franchise owners are single store operators.

Mr ALLAN MORRIS—What would be the normal selling price or buying price of a franchise?

Mr Garraway—The range is huge.

Mr ALLAN MORRIS—Would it be about $90,000?

Mr Garraway—No. We would have stores under that price and stores change hands for several hundred thousand dollars.

Mr ALLAN MORRIS—Your franchise fees would be what, 20 per cent?

Mr Garraway—Our royalties?

Mr ALLAN MORRIS—The franchise fees.

Mr Garraway—Ongoing royalties or upfront fees?

Mr ALLAN MORRIS—No, ongoing.

Mr Garraway—Our ongoing royalty is 15 per cent.

Mr ALLAN MORRIS—Advertising?

Mr Garraway—Five.

Mr ALLAN MORRIS—In your situation, you supply the stock, do you not?

Mr Garraway—That is correct.

Mr ALLAN MORRIS—What, 40 per cent?

Mr Garraway—The margin varies by product.

Mr ALLAN MORRIS—About 40 per cent of the sale price?

Mr Garraway—I would be happy to answer that question in camera, Mr Chairman. It is commercially sensitive information, Mr Morris, with respect.

Mr ALLAN MORRIS—That is okay, I am getting to a point eventually. You also negotiate the rent?

Mr Garraway—Yes, that is correct.

Mr ALLAN MORRIS—What is the average rent to turnover in shopping centres for your tenants?

Mr Garraway—Again, the range is from in the order of seven per cent to in the order of 21 or 22 per cent. It does cover that full spectrum.

Mr ALLAN MORRIS—If someone was paying 21 per cent, you are probably talking about 80 per cent of turnover going on fixed charges—franchise, rent and cost of goods.

Mr Garraway—It is fair to assume someone paying over 20 per cent has difficulty with their bottom line. I do not think that is an unreasonable statement.

Mr ALLAN MORRIS—But if you negotiate the rent, not them?

Mr Garraway—Sir, with respect, the difference between the dollar figure of the rent and the rent percentage is the sales figure, and the sales figure is a function of how well the business is run.

Mr ALLAN MORRIS—We have been involved with this rent question with shopping centres which is really complicated—we heard this today. When you go in to negotiate with a shopping centre you do it by yourself, not with a tenant, not with your franchisee.

Mr Garraway—No, that is not fully correct, either. We have a site evaluation process where we get feedback from our franchise owner. In our case we employ external consultants who are expert in this matter. We use our internal people as well. And we negotiate individually each case as we think it is the best way to get the best result.

Mr ALLAN MORRIS—For whom?

Mr Garraway—For the franchise owner, they pay the rent. It makes no difference to our income whatsoever.

ACTING CHAIR—Could I follow on from a question of Mr Morris. When you negotiate the rent, I think you said it could be as high as 21 per cent of turnover, but that is dependent on the turnover.

Mr Garraway—Correct.

ACTING CHAIR—So if someone makes a very big success of the business then the rent percentage will drop. You do not have, I imagine, any of your tenants on a percentage lease.

Mr Garraway—No.

ACTING CHAIR—It is on a fixed lease and it varies depending how turnover goes?

Mr Garraway—That is correct. I could show you many examples where turnover varies dramatically on changeover of franchise owner, both good and bad. It is wrong to see any franchise system, in my view,

as monolithic, so that you can come along and Mr Morris would be as good as Mr Jenkins. I am quite certain they would get different results. I do not know which of you gentlemen might be best but one of you would be better than the other one—that much is inevitable. I have got 149 franchise owners and they rank one to 149, and the 149th is not terribly good.

Mr ALLAN MORRIS—The other ingredient, of course, is fitouts, which you again control—

Mr Garraway—That is correct.

Mr ALLAN MORRIS—And you actually do them.

Mr Garraway—We do not physically do them, no. We tender for the business—

Mr ALLAN MORRIS—So as a franchisor, you have got the 20 per cent—15 per cent plus 5 per cent—for the franchise; you have got the cost of the product, 40 per cent; and then you have to do the fitout which your franchisee cannot go to tender for. So there is no—

Mr Garraway—No, that is not correct. We have been asked on a handful of occasions by franchise owners if they could do their own. One of the people watching at the back was one of our franchise owners from a store here in Melbourne who did that just late last year. The simple reality is that, if we have a relatively standard design which we reproduce—in our case so far, 195 times—there are certain economies of scale by going back to the same people delivering them volume work and getting some discount from that. We are not in the business of making anything out of a shop fit, it is incidental. If we took our costs of setting up the store, negotiating the lease, all that time on that basis we would actually lose money on that part of it.

Mr ALLAN MORRIS—I have had some concerns in my own area with a franchisor, where the tenant told me that he talked to the franchisor and said that the rent was too high. He talked to the franchisor who was supposedly negotiating with the landlord to get the rent down. I spoke to the landlord and asked what is going on with this guy because he is going broke, and they said, 'We don't know anything about it.' It was obvious that the franchisor was not negotiating at all.

In a sense, what the landlord was saying was, 'Look, we've got these guys all over Australia. We get on very well with them. These guys are in our centres everywhere and we are the best of buddies. Why would we tell lies?' In a way, the odd one out is the franchisee who is a single. There is a real suspicion among franchisees that the franchisor and the landlord both do best if they cooperate, and if the franchisee suffers, well, tough titty, they were not very good at their business. It was their own fault. I have heard that on probably dozens of occasions to date.

Mr Garraway—I can only counter with two points. We try to actively involve our franchise owners in the process. There are some franchise owners who are eminently well qualified to do that. They are experienced small business people and they have been in the centre for some time. They keep their ear to the ground; they hear what other prices are being paid, et cetera. One of the biggest traps in this business is to talk of rental as being on a square metreage or square footage basis. It will come as no shock to anybody that

Coles Myer, taking 40,000 or 50,000 square metres for a Target store, pay less per square metre than we do for 25 square metres. We are almost the smallest store in every shopping centre we are in. Physically we take a very small store and we pay a higher per square metreage charge accordingly. If you talk to almost any other tenant, they will have a less per square metre basis but for more square metres.

Shopping centre people have been known to be not necessarily fully frank with their comments one way or the other. I have just finished a matter where what the shopping centre manager was telling our franchise owner and what we were doing were diametrically opposite. I do not know how common that is, I just know it happens on occasions. On that particular matter—and this is where the expertise issue comes in—the franchise owner wanted us to settle to avoid missing out on a relocation to a new shopping centre. We have held out, we have hassled, and the rent is $7,000 lower per annum than she wanted us to settle for.

We take every lease as a head lease. If there is no franchise owner, we have to operate a store in that environment ourselves. Our directors put their personal guarantees on every one of those leases. We do not do it lightly.

Mr ALLAN MORRIS—If you have an existing franchisee in the centre and there is a thing going on with the landlord, why cannot either the franchisee or their representative sit in on the discussions? What is the problem with that? It is their house on the line rather than yours.

Mr Garraway—Sure. The reality is that at law in the process at the moment, they are not a party to the discussion.

Mr ALLAN MORRIS—But you could allow them to be.

Mr Garraway—We could certainly allow them.

Mr ALLAN MORRIS—If you chose to, but you choose not to.

Mr Garraway—These processes, in some cases, take many months. It is rare that the actual decision is made by the shopping centre on the ground where they are. I will not give an example as I will try not to offend anybody here, but in any suburb in Melbourne the vast majority of landlords are resident in Sydney or Brisbane. There are actually very few national landlords in Melbourne. So if you are a Perth franchise owner, how many times do you want to fly to Lend Lease's head office in Sydney, at the prices Qantas and Ansett charge for a Sydney flight at short notice when you cannot book a seven-day advance purchase fare?

Mr ALLAN MORRIS—But you just made the point a moment ago that the centre manager and yourself were diametrically opposed, so the poor old franchisee is caught between you guys having some kind of interesting exercise. If they were part of the process, that could not happen. If you and the franchisee were operating jointly—

Mr Garraway—That is a fair call, but I put it to you that there is generally not the expertise to do it, and they generally do not have the time. We do not have staff in our stores much of the time. They are owner operated businesses. How do they go from—

Mr ALLAN MORRIS—They have an agent, a representative.

Mr Garraway—Then there is more cost. That is what they are paying us for. That is what they paying the royalty for us to do.

Mr ALLAN MORRIS—So why are some of them paying 20 per cent?

ACTING CHAIR—Is it a fair comment to say that, for example, with Westfield or Lend Lease, that because you are representing a large number of these stores you have more negotiating power than an individual tenant?

Mr Garraway—I believe that to be so in many cases. I still think it is frequently an uneven contest. I only came in on the tail end of some of the issues in the previous presentations, but I heard enough to indicate that I would have no difficulty with some of the views they were expressing.

It is probably different in other cases where the square footage taken is larger. To be blunt about it in physical terms, to the shopping centre managers we are pretty small fish. But we complement the mix in that shopping centre. We do seven million transactions a year in our stores. We are responsible for some of the shopping centre mix. We have, we believe, the expertise to do a good job. There is no incentive for us not to do a good job. If the franchisee goes broke, we have to operate that store at that same rent. So all our incentive is to make sure that the franchise owner can pay their bills on time and regularly.

Mr JENKINS—Can we go to that point about how, if the franchisee goes under, you have to take it up. On the relationship between the extent of the agreement that you have over a franchise, as against the rental that you might have on the site, do they match up or is there going to be overlap? How do we get that relationship squared up?

Mr Garraway—We grant a 10-year franchise with a 10-year option. Like everybody else, we get the longest lease we can commercially get at the time. That ranges from centre to centre. We have a handful of four years, the vast majority would be five. We have a handful of six, seven, eight type category. But I am unaware of any small stores of our size getting a 10-plus lease. You could get them 15 years ago, but you cannot get them today.

Mr JENKINS—So for a new franchise, straight up it is going to be the dislocation between the length of the thing. The other thing that comes to my mind is that if there is some doubt about how you are performing on behalf of the franchisee, it would be an indication that there might be other things that might be adrift in the business relationship. That is what franchisors really have to develop with their franchisees across a whole host of matters.

Mr Garraway—I think it is fair to say that if a franchise owner felt that we were not doing the rental job properly on their behalf, we have not got the relationship with that franchise owner that we would want and we may well be potentially having some other dispute with them over a range of issues. Our job is to do the best job that we possibly can for them. There is every incentive for us to do so.

ACTING CHAIR—You have given an indication of how many stores you have now, which is 195.

How many did you have 12 months ago? Are you still on that expansion phase—

Mr Garraway—No, the numbers would be relatively static. We have opened a number of new stores and closed a number of smaller stores.

Mr ALLAN MORRIS—How many closed last year?

Mr Garraway—Five or six, I think. I am not attempting to mislead, but I do not know the number—it is of that order. They were very small stores, almost exclusively company run.

Mr ALLAN MORRIS—When you say there is no incentive, if a franchisee went bankrupt and closed down, could you not sell that franchise again?

Mr Garraway—There is a commercial reality that if it is an unprofitable store, sufficiently so that the person went bankrupt, I think the commercial answer to your question is no.

Mr ALLAN MORRIS—Has that ever happened?

Mr Garraway—I am not aware in certainly my time at Kleins of a franchise owner going bankrupt, no.

Mr ALLAN MORRIS—Have you sold a franchise again when someone has walked?

Mr Garraway—Some time later, yes. Usually quite some considerable time later after we have rebuilt the business.

Mr ALLAN MORRIS—Could you check your records and tell us. This is what we have been told by people in all kinds of franchises. That is why some people say to us that a franchise code does not work anyhow because the franchisee is the one who has so little power.

ACTING CHAIR—Just for the record, this is a genuine franchise question.

Mr ALLAN MORRIS—Yes. When you get a live one here you have to talk to them.

ACTING CHAIR—Mr Garraway is one of the few franchise owners to appear.

Mr ALLAN MORRIS—I am just the messenger. What is being put to us is that that happens, but what happens then is that you and the landlord agree that the rent is too high and the new entry is actually then paying less rent.

Mr Garraway—We would use every possible piece of information available at any given moment to lower the rent so that, if there was a commercial reality that someone had gone broke, we would make it abundantly clear to the landlord that we felt that he had played a role, if his rent was the problem. There are occasions when franchise owners have made modest or very small profits and, in my view, the rent has not

been the problem at all. We don't go to fight every rent increase from every landlord. We think many of our rents are, commercially, the correct price to pay for that particular site in that particular shopping centre.

Mr ALLAN MORRIS—At 21 per cent?

Mr Garraway—At 21 per cent, no. I said many, not all.

Mr ALLAN MORRIS—We are being told that what is going on in businesses is a shift of margins away from the profit of the owner towards rents and franchise fees. Perhaps people are paranoid but they really do suspect a collusion between the franchisors and the landlord because they talk to each other, and because they both operate in Sydney or somewhere. So when you say your rent turnover can vary from seven per cent to 21 per cent, that doesn't sound like a very good franchisor to me. That sounds like one whose got a wide range—with some of your people doing very well and some doing very badly.

Mr Garraway—And that makes us a poor franchisor? I don't see the connection.

Mr ALLAN MORRIS—If you negotiated all the rents and you know the businesses and—

ACTING CHAIR—Can we get Mr Garraway to reiterate: he was talking about a product of turnover. If you are only turning over $50,000, and you have a $10,000 rent then it is 20 per cent. If you increase your turnover to $100,000, it is 10 per cent.

Mr Garraway—Let me give Mr Morris an example of where you are passing on information that would shoot the blame home entirely to us. There is a shopping centre here in Melbourne—in confidence, I would be happy to provide you with the figures to prove what I am saying—that changed hands around this time last year. The new franchise owners have, off the top of my head, nearly doubled the turnover in their first 12 months. That halves the rent percentage.

We had some doubts and we have chastised ourselves about this. We had some concerns over that shopping centre, whether the centre was performing properly. We went through that self-doubt and self-analysis. We looked at the centre, and spent a lot of money checking out whether the centre was performing in preparation for a fairly serious argument with the landlord. The reality was that we had a seriously underperforming franchise owner and, often, that is every bit to blame. While small business is a wonderful thing in this country—it is built on small business—it doesn't mean that every person who goes into it is necessarily good at it.

Mr ALLAN MORRIS—I think we accept that. We all have our varying degrees of fallibility. The chair made the point earlier about small business being consumers and being protected who they consume from. So the franchisee is a consumer of tenancy and a consumer of a franchise and appears to have very little protection from either. In fact, you seem to have all the power in terms of negotiating the rent and the product. They appear to have very little choice as to who does the fit-out. You set the price and they seem to have very little say.

Let me go further. It has been put to us, and I also raise the question about landlords, that there

should be an independent arbitrator, an independent evaluation. If you feel that a person is bad trader, they think you are a bad franchisor. Do you ever call in an independent third party to try to help resolve that?

Mr Garraway—We have used the mediation processes under the code. The vast majority of such scenarios, as you have outlined, we are able to negotiate. We sit down with people, talk about where they are and find an appropriate exit for them. It is important that people understand that there is a heck of a lot more mediation—if you like—going on in the franchising industry than what is officially done in an official dispute type capacity.

Franchisors are talking to franchise owners every day of the week, all over this country. They are sorting out minor problems, major problems and in between problems. That happens all the time. I would like to correct two things because I can't allow the record to stand. We do allow our franchise owners to look for other quotes, if that is what they wish, on fit-outs. In terms of stock, we supply the stock to our franchise owners but, in my time at Kleins, I have not had a single request from a franchise owner to buy a product outside the range we supply, not one.

ACTING CHAIR—There are a couple of questions we need to get on the record about the franchising code. I think we sent you a copy of the interview with the Minister.

Mr Garraway—Yes.

ACTING CHAIR—We now have to make some recommendations about what we feel, as a committee, should be the next step in the franchising code. Do you wish to suggest any amendments or enhancements to the proposal that has been put forward by the Minister that the committee may wish to recommend in its report?

Mr Garraway—I think the Minister has only been speaking generally about what he has in mind. At the end of the particular transcript you sent me it says that it should be independently chaired and be representative of the entire industry. I have absolutely no problem with those principles at all. I said earlier, and I restate it, that it is important that franchisees and franchisors are treated equally under the code and encouraged to use it. In fact, its use must be mandatory, if it is to be as successful as it can be. I have no doubt the code can be incredibly successful for our industry.

ACTING CHAIR—Do you agree with the scepticism that I do, the offer of the franchisors association to run it on behalf of the government?

Mr Garraway—We stand by our submission that it should be an independent body, independently chaired.

Mr ALLAN MORRIS—We were told of a case, but not the name, where a person was selling their business and introduced their perspective purchaser to the organisation. There was then a transaction between the supplier and the purchaser, direct, which bypassed the person who was trying to sell. In other words, they went behind that person's back and did a deal.

Mr Garraway—I am not sure how you could because the franchisor does not have anything to sell.

Mr ALLAN MORRIS—A franchise.

Mr Garraway—He does not, because he has granted the franchise to his existing franchisee. He has nothing to sell in that territory.

Mr ALLAN MORRIS—You said before that people sell their businesses.

Mr Garraway—If I have granted a franchise to person A in territory A, I cannot do a deal in territory A—end of story.

Mr ALLAN MORRIS—Yes. But let us say a person in territory A is dying, or going broke, or their marriage is breaking down and they have property settlements and so on. Say that person tries to sell, and introduces the franchisor to a possible purchaser. In one sense, you could say to that purchaser, 'If you wait six months, you can buy it off us for less than that.'

Mr Garraway—Technically, under the scenario you described, yes, you could.

Mr ALLAN MORRIS—Would that not be a breach of the code?

Mr Garraway—Again, I am not a lawyer.

Mr ALLAN MORRIS—A breach of your franchise code?

Mr Garraway—I would have assumed so but, again, I am not a lawyer. I would find that unacceptable conduct.

ACTING CHAIR—The case that Allan is referring to was not a franchise it was an assignment of a lease on a business.

Mr Garraway—The simple reality is that if you have a person in the circumstances that Mr Morris outlined—that is, for some physical health, emotional or financial reason the person needs to leave—a good franchisor will actively encourage and help the person. It is part of our role. I interview people regularly to approve them for a franchise-to-franchise assignment. We did a relatively large number in the second half of last year as interest rates came down and interest in the businesses went up.

ACTING CHAIR—I would like to rephrase Mr Morris's question because he raises a much broader question about the on-sale of franchising. Quite often people decide, for all sorts of reasons to leave a particular business. In your case, they have a ten-year franchise agreement. Let us say that after seven years, and three years into their next tenancy in a shopping centre, they say, 'I want to sell. I have made enough money. I am off to the Bahamas or whatever.' They then find someone to buy the business. What is the procedure you go through? I would imagine that you have a right of refusal.

Mr Garraway—Yes. And I think any reputable franchisor has to retain that right to protect the rest of the franchise group. I think it is fair to say that if you are exiting the system your loyalty to that system is at a lower point than it has been over the time you have been in the system. All you want to do is move on. So, at that point, we take responsibility. We grant the incoming franchise owner a new franchise term for lease so that they are not buying a partially expired term. That is the first point.

The second point is we train them fully ourselves. We do not require the franchise owner to do that. There is a fee involved in that process but it is to cover our cost of turning over the franchise to the new people, and we vet them exactly the same way as if we were selling them a franchise ourselves. The process is identical. We go through an approval that, in our case, involves a number of face-to-face interviews, telephone conversations and forms to be filled out. There is a precise evaluation process. I have knocked back a couple in recent times because they were substantially inadequate candidates.

ACTING CHAIR—There is now an aggrieved franchisee whose only interest is leaving. You have knocked back the potential replacement. What is the position for resolving that?

Mr Garraway—I work even harder to try to help the person find the right candidate so they can go. They would be less than human if they were not aggrieved by that if they had found a candidate.

Mr ALLAN MORRIS—How do you work out the value of what is left of the franchise?

Mr Garraway—The franchise owner is selling that, not me. He charges a price. It is what anything is worth in this world—what you will part with it for and what I will buy it for. It is as simple as that. That is what value is all about. It is no different to the share market.

ACTING CHAIR—If you reject a particular person because you feel that they would not be a good franchisee, does the person still have the right to then ask for the same amount of money from another potential purchaser?

Mr Garraway—That is correct. The price was not the question in any of the cases I have rejected, it was the quality of the individual. When there is another franchisee in a neighbouring shopping centre, five minutes drive down the road, and that is the reality in Australia today, that person is entitled to know that the person I grant the franchise to in the exiting case is of at least an equal standard to the rest of the network.

Mr JENKINS—Could you clarify for me the up-front fee in that case? You are going to give the purchaser the full 10 years, but it may have had, say, five years to go. They only pay the extra five years because you would assume that in the purchase price that the existing person has got that that has been covered.

Mr Garraway—Our cost is not related to time at all, it is a fixed fee. It is covering our costs of the interview process, the approval process, our management costs, internal costs of changing over, training, and that sort of thing. It is a transfer fee payable by the exiting franchise owner. The incoming franchise owner pays nothing at all to us in terms of a fee.

Mr ALLAN MORRIS—But if the exiting owner left without a new entrant, you could then sell the franchise.

Mr Garraway—If that ever occurred, yes, but it has not ever occurred.

Mr ALLAN MORRIS—So you are giving away a capital value.

Mr Garraway—There is an element of that. Franchisors are not always the nasty, horrible people we are occasionally accused of being.

Mr ALLAN MORRIS—Mr Garraway, I do not think you were here when I made that announcement earlier, as we always do, that if people wish to make comments they can drop us a note. They are welcome to do that. You just mentioned that some of your franchisees are here, so we are very likely to get some letters from your franchisees. If there is any conflict between you and them, will you solve it rather than us?

Mr Garraway—I am not aware of—

Mr ALLAN MORRIS—Before you came I issued a call to people to drop us a note because we had only the organisations and audiences are often a bit frozen, they cannot talk. I am expecting that we will get letters from people here today. If any of them are your people, do we first pass them back to you? What do we do with them?

Mr Garraway—I am always happy to hear from my franchise owners, Mr Morris.

Mr JENKINS—You have mentioned that you have used the code. In fact, I thought you said that you had a couple of cases before the code on New Year's Eve and you were unsure—

Mr Garraway—We had two matters that were in the very early stages. We had not gotten to the first mediation meeting, we were in the process of arranging it. I am not sure whether the lawyers might care to comment. The minister can say the code still stands. I suspect he is wrong.

ACTING CHAIR—The council—

Mr Garraway—The council is to administer the code but there is no council. We are trying to act as if it is but the sooner the minister makes it clear what is happening, the happier the industry will be.

Mr JENKINS—Since we cannot talk about the future because we do not know what is actually going on until we give some suggestions, can we talk about the past and the type of things that Kleins have found themselves—within the code—before the council?

Mr Garraway—It is important to understand that we can—as you put it—find ourselves before the council. You do not find yourselves before the council, you find yourself before a mediator. All the council ever did was this. You wrote to them and said, 'I've tried discussing this with the franchise owner. They tell me they are unhappy with my answer and at the moment I am not prepared to change my answer. Therefore,

in my view, under the definition of a dispute in the code, that is a dispute'. I then notify the council of the dispute. I ask them to appoint a mediator. On the one occasion that we got to mediation, we solved the dispute. We reach an agreement in front of the mediator and we move on.

ACTING CHAIR—Without giving away too much confidentiality, what would be the most common dispute that Kleins would have with its franchisees? Or is there such a thing as a common dispute?

Mr Garraway—No, I really do not think there is. They are very different businesses, with very different people running them. I do not think there is a common pattern. I really would struggle to put my finger on one. There are lots: almost every range of commercial issue that can come up does come up, from time to time. Let us say that the vast majority are solved by simple one-on-one discussions with the franchise owner. That is what the field support staff and my operations manager and all those other people are there to do: to help them in a positive way as often as they can.

Sometimes, tempers get a tad frayed during that process. If you are trying to tell a struggling franchise owner that taking Friday afternoons off, for example, in a retail business is not necessarily the best way to build that business, some people do not take kindly to that. Sometimes the tensions are there but, for the vast majority of times, you are able to solve them. You could not sell 150 franchises, in our case, or 30,000 franchises in the industry's case, if the fundamental premise that two people can sit down at the table and resolve most disputes did not hold.

Mr ALLAN MORRIS—It does not necessarily follow. Pyramid selling did very well for a very long time.

Mr Garraway—But each one fell over, inevitably.

Mr ALLAN MORRIS—Eventually. It was a question of time. Ask the same question in 10 years time and then you might be able to say. Mr Garraway, we have been trying to canvass the question about average rent to turnover. In the terms it has been put to us by a number of witnesses, that would seem to be a fairer system for shopping centres, because it is really quite difficult. We are picking up figures from different areas about what average rent to turnover is. Given that you have got such a spread across the country—and I do not want to breach your provisions, so even if the information were made confidential, it would be very helpful to us—would it be possible for you to perhaps do a strand for, say, Lend Lease, AMP and Westfield, or for states or for both?

Mr Garraway—If I may seek clarification from the Acting Chairman, I think that, if you officially ask me, I can officially provide you with the entire property list.

Mr ALLAN MORRIS—You said it ranges from seven to 21 per cent, which is a very wide range. I was trying to get at whether the average rent to turnover is different—in, say, Lend Lease—from that in Westfield or AMP, for example? Is it different from state to state, for example?

Mr Garraway—We do not analyse them in those terms.

Mr ALLAN MORRIS—No, but I am asking if it possible.

Mr Garraway—Certainly. It varies from state to state. Land is more expensive in Sydney than it is in Perth, so the costs of building a shopping centre are different, and therefore the rent is different. There is no argument about that. But I am unaware of a pattern by a landlord.

Mr ALLAN MORRIS—Would it be possible for you to look at that and provide us with that?

Mr Garraway—Yes, it is certainly possible.

ACTING CHAIR—Is there a medium at which you think that, in ideal circumstances, a business that is trading well should be, in terms of rent? What proportion should that be of turnover?

Mr Garraway—As absolutely low as possible.

ACTING CHAIR—So it is seven percent.

Mr Garraway—That is the objective. I think seven is too high. I would be happy to go in and argue for lower. On a more serious note, there is; but, with respect, I suspect that the landlords are going to be looking at the transcripts of these inquiries, and I am a little less than excited about telling them what I am prepared to pay.

ACTING CHAIR—We will leave it on the record that you think seven is too high, so that the landlords can bring it down!

Mr Garraway—Yes.

Mr ALLAN MORRIS—If Mr Garraway will provide us with that—
Mr Garraway—I am happy to provide you with a full copy of that printout.

Mr ALLAN MORRIS—It will give us an insight, because it is really difficult to get hard evidence. We did talk to business brokers who had the hard data on some issues, but if we can pick that up, it would be very helpful to us.

Mr Garraway—If it can be provided in confidence, Mr Acting Chairman, I am happy to provide it.

ACTING CHAIR—Yes, it can be.

Mr ALLAN MORRIS—You can give me a call after all the letters flood in!

ACTING CHAIR—I will bring the proceedings to a close and thank Mr Garraway for appearing. He is one of the few brave franchisors prepared to appear before the committee—although the Franchisors Association did appear right at the start of the hearings. We thank you very much, and we thank *Hansard* and everyone else for what has been a productive day. Is there anything you wish to add?

Mr Garraway—No, there is nothing I wish to add; but is it possible to get a copy of the *Hansard*?

ACTING CHAIR—Yes, automatically. And you will get a copy of the report.

Mr Garraway—Thank you very much.

Resolved (on motion by Mr Jenkins):

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

Committee adjourned at 4.50 p.m.