HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Reference: Fair trading

MELBOURNE

Friday, 4 October 1996

OFFICIAL HANSARD REPORT

CANBERRA

HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Members:

Mr Richard Evans (Chair)

Mrs Bailey	Mr Jenkins
Mr Baldwin	Mr Allan Morris
Mr Beddall	Mr Nugent
Mr Broadbent	Mr O'Connor
Mr Martyn Evans	Mr Reid
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

CARUANA, Mrs Mary, 37 Glencairn Drive, Greenvale 177

CREWS, Mr Brian Dudley, 24 Torwood Avenue, Glen Waverley, Victoria 3150 168

FRILAY, Mr William John, Senior Business Analyst, BP Australia Ltd, 360 Elizabeth Street, Melbourne, Victoria 3000 126

GARRISSON, Mr Anthony Robert Wolseley, Business Law Committee, Law Institute of Victoria, 460 Bourke Street, Melbourne, Victoria 140

GILBERT, Mr Ian, Director—Legal, Australian Bankers Association, 42/55 Collins Street, Melbourne, Victoria 20

GILLMAN, Mr Christopher John, Marketing Development Manager, BP Australia Ltd, 360 Elizabeth Street, Melbourne, Victoria 3000 126

HOFMANN, Mr Toni Rolf, 14 Drysdale Road, Warrandyte, Victoria 3113 150

HOFMANN, Mrs Clare Lucille, 14 Drysdale Road, Warrandyte, Victoria 3113 150

HUBER, Mr Franz Nicholaus, 2 Helene Street, Bulleen, Victoria 3105 189

LINACRE, Mr Philip David, Business Law Committee, Law Institute of Victoria, 460 Bourke Street, Melbourne, Victoria 140

LUDGATER, Reverend James Keith, Part-time Chaplain, Box Hill Chaplaincy Inc., 67 Salisbury Street, Blackburn, Victoria 3131 189

McCANN, Mr Raymond Wayne, 42 Cavendish Avenue, Wantirna 177

MITCHELL, Mr Neil Robert, 4 Avondale Street, Hampton, Victoria 3188 112

MULDERRY, Ms Catrina, Legal Research Officer, Victorian Employers Chamber of Commerce and Industry, 50 Burwood Road, Hawthorn, Victoria 196

SAMMUT, Mrs Dawn, R. and D. Sammut Pty Ltd, Casey Gardens Caravan Park, PO Box 108, Narre Warren, Victoria 3805 150

SAMMUT, Mrs Dawn, R. and D. Sammut Pty Ltd, Casey Gardens, Caravan Park, PO Box 108, Narre Warren, Victoria 3805 177

SAMMUT, Mr Renato, R. and D. Sammut Pty Ltd, Casey Gardens Caravan Park, PO Box 108, Narre Warren, Victoria 3805 150

SIETZEMA-DICKSON, Ms Jean, 493 Elgar Road, Box Hill North, Victoria 3129 177

SLATTERY, Mr Neal Raymond, Managing Director, Amalgamated Roofing Tile Distributors Pty Ltd, 5-7 Yose Street, Ferntree Gully, Victoria 3056 168

WOJTKIW, Mr Steven, Manager, Economics and Research Services, Victorian Employers Chamber of Commerce and Industry, 50 Burwood Road, Hawthorn, Victoria 196

ZAMBUNI, Mr Shaun, Franchise Programs Manager, BP Australia Ltd, 360 Elizabeth Street, Melbourne, Victoria 3000 126

HOUSE OF REPRESENTATIVES

STANDING COMMITTEE ON INDUSTRY, SCIENCE AND TECHNOLOGY

Fair trading

MELBOURNE

Friday, 4 October 1996

Present

Mr Richard Evans (Chair)

Mrs Bailey	Mr O'Connor
Mr Beddall	Mr Zammit
Mr Jenkins	

The committee met at 9.28 a.m.

Mr Richard Evans took the chair.

MITCHELL, Mr Neil Robert, 4 Avondale Street, Hampton, Victoria 3188

CHAIR—I now declare open this public hearing of the inquiry into fair trading. To date the committee has received some 130 submissions on the issues raised by this inquiry, with the promise of more to come. Although this is not the first public hearing for this inquiry—the committee took evidence in Sydney from a number of organisations early in September—today marks the first occasion when individuals from the small business sector will put their concerns and accounts of experience to the committee. The committee will be hearing from a wide cross-section of the people and organisations that have provided submissions to this inquiry.

Firstly, in accordance with the program announced for today's hearings in Melbourne and in other cities between now and the end of the year, I welcome everyone here today. Committee 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.

Mr Mitchell, you will not be asked to take an oath or make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as contempt of parliament. The committee prefers that all evidence be given in public but should you at any stage wish to give evidence in private, you may ask to do so and the committee will give consideration to your request. The committee has received your written submission and authorised its publication. Would you like to make any additions or alterations?

Mr Mitchell—No.

CHAIR—Would you like to make an opening statement before we commence questioning?

Mr Mitchell—Yes, I would. Thanks for the opportunity to address your inquiry. In the period since I surrendered ownership of a BP franchise in early 1993, subsequent communications with BP Australia about alleged incompetent and unprofessional conduct by some of its personnel have indicated how the organisation approaches its franchising practices and responsibilities. I experienced three phases: how the organisation represents and promotes itself, how representations match actual performance and how the franchise organisation presently represented by BP Australia responds to questions about differences between representation and actual performance.

Since my first contact with BP Australia's franchise network, its representatives have forthrightly endorsed and promoted the integrity of the franchise system and organisation. In my experience these representations now appear to have been made with an apparent disregard for their accuracy and potential consequences, particularly impacting on franchisees' future viability and success. Unfortunately, persons who proceed into a BP Australia franchise become the losers when the rhetoric fails to match performance, particularly as this happens when they are most vulnerable and critically dependent on the integrity of the franchise organisation to deliver on its representations.

After I commenced business, the context of unrepresented and misrepresented pieces of the BP

Australia jigsaw began slowly to fall into place. The difficulties of commencing a business were unnecessarily complicated and frustrating. These are just some of the examples. It slowly unravelled that the training program was a farce. BP Australia alludes to the importance of training in their submission to this inquiry. This needs to be tested against the actual quality of their training program.

The fact that their training officer's only qualification appears to be that he may have been a grocery buyer showed contempt for franchisees. What is the justification for BP Australia charging an alleged $1,000 a day for the services of a grocery buyer who, in retrospect, displayed few if any training skills? I had a sense of isolation; support from my area manager failed to materialise, even though he was touted as a franchisee's most experienced area manager in Victoria. Despite repeated requests BP Australia will not indicate whether this person has any formal tertiary education or appropriate qualifications.

When in mid-1992 I suspected there was impropriety in the dealings of BP Australia, I kept a diary which indicates the area manager had a marked propensity to avoid responsibility or use any initiative to assist me in the frenetic and critical early days in the business. I was told by Rowan Shell of Food Plus on 20 May 1992 that the onus for Polygon's performance was mine—Polygon was at that stage the subsidiary of BP Australia which ran the franchise—and that I was responsible for overseeing the professional services they provided and that I could not expect the area manager to act unless under my instructions.

The disquieting consequences of realising the area manager's role had been redefined overnight made the organisation's rhetoric—that he would be 'providing guidance and supervision in the day to day running of each store'—just another hollow misrepresentation. For me, as a person with no real experience in small business, one of the major selling points when buying a franchise was acquiring the support package to minimise the possibility of business failure.

When it was discovered that the experienced outgoing owner had falsely represented the performance of the business, the organisation remained silent. Business figures at first seemed good, but they were actually misinterpretations; this was another of many vital topics ignored in the training program. The area manager sat on the figures for weeks while critical working capital was lost. When I questioned how the franchisor had come to approve the subsequent overstated business projection figures, I was cynically dismissed with the statement, 'They were figures supplied by you.' The figures came from their franchisee, operating under their franchise agreements, supervised by their area manager.

The prices which the figures were based on had been regularly checked for accuracy against a price schedule supplied to franchisees for this task. The prices were subsequently known to have been marked up. They were compiled, audited and printed by their accounting personnel, and made available to the organisation's franchise managers to make honest and accurate representations to potential franchisees. No such representations were made. BP will no doubt dispute this but that was the case.

The initial feelings of loss and failure rose as the misrepresented figures were adjusted and it was revealed that the business was at best marginal when following the franchise model. The franchisor later admitted the gross profit percentage he approved was a figure 'assignees are never advised to use'. BP Australia are not prepared to comment on the professional tertiary qualifications of this member of their staff.

I questioned why the franchisor would approve overstated figures and later found the owner and

franchisor had a difficult relationship and that the former owner had allegedly physically assaulted customers. I discovered the former owner had stripped the business of stock and assets during my training and the organisation told me nothing. I wondered why my first meeting with my area manager was only after signing the franchise documents. On day one, after an inordinately short handover period following training, I found there was no stationery, scant stock, no stock control books and temporary staff arrangements. It was a business in general disarray and the outgoing owner was free to remove even the teledex and all the business contact numbers. The area manager, whom I had first met an hour earlier, later said this was all to my advantage.

The area manager avoided responsibility. One of many examples was on day one when one customer complained about spoilt milk—just after I walked into the business. Over the following weeks there were other complaints by the public and I told the area manager three times about the problem. He later acknowledged he deliberately ignored me as he suspected I wanted the milk moved to a different cabinet. I called the dairy company and they said something was wrong with the storage but the area manager would not act. I called in the health inspector who discovered that the milk cabinet ran at seven degrees. A refrigeration mechanic implied later that the installation had been faulty and caused problems. There were uncorrected problems that had compounded over such a long time.

When this kind of situation regularly occurs with an organisation you wait to discover what the next detail is that they have ignored. All of these things occur at your expense. It even took BP Australia three months to get its own fuel card system into my store, all that time denying their own account customers access to their billing system. I dealt with the angry and frustrated BP fuel card holders, ironically trying to excuse BP's failure to perform in its own interests. When I first met other franchisees they had nothing positive to say about the franchise or the parent organisation.

The Victoria Police vice and gaming squad alleged I had been selling illegal pornography, following a public complaint. It was discovered that this happened long before I purchased the business. I subsequently began to question the franchisee's training program and how I was supervised into a store which was selling illegal pornography. The organisation's only response was denial of responsibility and yet they still requested me to alter my police statement to delete information about the vendor number they had given the magazine supplier, pointing out that I was in a cooperative business arrangement with them.

I found myself on my own—untrained, unsupported—in a business which could barely break even. In that moment when the pieces started to fall into place amongst the confusion and frustration, I suddenly realised my world and my hopes had been changed forever. I no longer had a career, and 20 years of savings and sacrifice had begun to slowly dissolve. It was then that my business partner began to practise the one art it is best at—the art of denial.

In communications with BP Australia I have indicated that the difficulties I encountered with their franchise organisation resulted from alleged incompetent and unprofessional conduct by some of their franchise personnel. More seriously though, beyond the issues of alleged incompetent and unprofessional conduct, the proposition can be put forward that the BP Australia franchise system may have been designed and strategically positioned from the outset to give the organisation an unfair advantage over its franchisees.

The organisational and resource base of BP Australia is formidable and offers them relative immunity from any inquiry into serious matters of propriety, truth in reporting, efficacy and good corporate citizenship. Importantly, it offers the opportunity for the organisation to control its franchisees and prosper, even if the franchisees do not. This perceived immunity sends a message to the organisation's franchise management and could help their propensity to misrepresent critical issues to prospective franchisees. They are able to make exaggerated claims about the integrity and performance of existing franchises and the franchise organisation in general—and be largely unaccountable.

The flexibility afforded BP Australia of selectively advising prospective franchisees about critical issues with relative impunity means that either a prospective franchisee does not proceed with the business purchase or, after becoming financially and contractually committed, a rapid redefining of that business relationship with BP Australia shifts the onus to perform away from the franchisor. Nowadays there is no real imperative to attract new franchisees as the organisation has a bank of existing franchisees securely locked into their system.

This brings us to the heart of the matter as I see it. Do BP Australia embrace the concept of franchising to pursue mutual success with franchisees in equitable business partnerships or does it see franchising as the opportunity to divest itself of risks, liabilities and responsibilities while maximising returns? In my experience, the latter appears to be closer to the truth.

If BP Australia's franchise organisation continues to thrive at the expense of the franchisees, this will reflect adversely on the broader franchise industry which has embraced the true spirit of franchising.

In early 1993, after leaving the business and asking questions of BP Australia about anomalies I experienced with their franchise system, they referred my questions to Polygon, its then franchise subsidiary. Polygon answered my questions freely and candidly, even making additional statements which were not asked for.

Since I reopened communication with the managing director of BP Australia this year, the organisation has taken a position in marked contrast to its former subsidiary. BP Australia is no longer willing to answer questions. In the only two statements that they have been prepared to make, BP Australia appear to have contradicted early positions taken by Polygon. Since I indicated these contradictions to the managing director, the organisation no longer answers or acknowledges my letters.

I was informed earlier this year by the managing director's representative that BP Australia will only answer my questions if I litigate. BP Australia, until this inquiry, has been able to hide behind the anonymity afforded by its organisational and resource base by retreating into the intimidatory and expensive processes of law. My lawyer told me not to take on BP Australia. His advice was they were just too big. Even if I could get the resources to take them to court, they would use every process of the law, quite legitimately, to delay and appeal until they brought me to my knees.

I would suggest BP Australia would be conscious of the symbolism of an aggrieved franchisee being left physically, emotionally and financially devastated by the processes of the law which their organisational and resource base could allocate for that specific purpose. How many others have received similar advice

from their lawyers?

Consequently, BP Australia is able to make any unqualified representation it chooses with relative impunity. It can fail to provide or withhold advice, support and services which were paid for with relative impunity. It can defame a person with relative impunity. It can even profit from pornography and do so with relative impunity.

The defining feature and spirit of franchising, as I see it, is that it ideologically brings together the best elements of big and small business to their mutual benefit and brings these benefits to the Australian economy and society which has and is still going through massive realignment. We are all aware of examples of best practice in franchising and attempts by organisations to ensure that franchising takes its intended position in this realignment by being defined as a true and equitable and cooperative partnership between big and small business.

Just to conclude, earlier in this statement I indicated that BP Australia had represented to me that their franchise organisation had been beyond reproach. The question is, was this in the context of equitable business partnership with franchisees, or exploitation of strategic positioning which is a consequence of the advantages offered by their size and resource base and the ultimate option of retreating to the law? BP's actions speak for themselves in this regard. I do not believe that I am the only person whose one mistake was believing what they were told by BP Australia. That is the end of my statement.

CHAIR—Thank you, Mr Mitchell. Before passing to my colleagues for questions, I have a couple of mechanical questions I would like to ask you, if you do not mind. Over what period was your buying process for the franchise?

Mr Mitchell—I have been in civil aviation for 20-odd years. I had looked at going into the system quite a number of years prior to when I actually did. I cannot give you the exact year, but I had looked at it previously and then what happened at work was that there was a rationalisation of air services. As a consequence, we were offered redundancy packages or the option of doing a conversion course on the radar. I worked in the air traffic system. I, like most people, thought that there was a future in taking an independent line with their life, and that is the line that I pursued at that stage. At that time, leading up to 1992, that was when I looked more closely at the franchise system. My look at the system a few years previously had not been that intense, but it certainly was a look at the system.

CHAIR—Was it advertised, or did you just approach the company, and they turned you aside or what?

Mr Mitchell—No. When I initially looked quite a few years ago, we had a Food Plus store around the corner from us. It looked to be a very attractive business. In general conversation with the owner he would say, 'It's great; it's great to be independent'—all the positives. When I eventually looked at their business, I cannot remember whether it was an ad in the paper or whatever—it may have been an ad; I may have contacted the organisation directly, I cannot remember which it was. When we were offered the redundancy option that is when I started to look at it seriously.

CHAIR—Were you offered a franchise agreement? How soon before you actually went to contract?

Mr Mitchell—The exact dates?

CHAIR—Just roughly.

Mr Mitchell—Just generally?

CHAIR—Yes.

Mr Mitchell—Generally, in the early days, it was really just a matter of being told all the positives by the representative. In my dealings with them, it was really with only one person. At least it was the same person who approved the business figures and all that.

CHAIR—This is from Polygon?

Mr Mitchell—Yes; this is back in Polygon, when they were representing the franchise. This person provided all the basic information about it. When he actually presented me with the franchise agreement, I cannot give you the exact date on that.

CHAIR—The next question I am asking is, did you have the franchise agreement considered by any of your agents?

Mr Mitchell—We looked at everything that was supplied to us. I had a look over absolutely every bit of information which they had given us. I can't give the exact date that they actually supplied each of those documents.

CHAIR—Let me just get a rough idea. Was it a week before, or a month before, or six months before?

Mr Mitchell—It would have been probably a couple of months before, or probably even more than that—probably out to four months.

CHAIR—How much dialogue did you have with the operator that was in that franchise?

Mr Mitchell—I spoke to him quite a bit. He had an agent who represented him and we talked about all the figures. They provided figures as well. There were figures provided which reflected over their previous years' trading. I understand, although BP should be able to confirm this, he acquired the business after a former franchisee had fallen out of it. Consequent to that, he bought it off BP and quickly sold it after about a year's operation to me. But I had been looking at it for probably a four-month period and considered everything over that period.

CHAIR—This is prior to—

Mr Mitchell—Prior to my actually taking it over in March 1992, there was about a four-month lead-in period.

CHAIR—Was there a franchise association and, if there was not a franchise association, did operators meet and discuss mutual benefits and problems and operating difficulties?

Mr Mitchell—I was not aware of any of those. I spoke to a number of owners and they spoke positively about the organisation. That quickly changed once I got in.

CHAIR—Since you have sold the business, what did BP do with it? Did they resell it on?

Mr Mitchell—They bought it off me. I became so sick, I could barely stand up at times. I was put on some heavy medication and things and it was pretty horrific. They bought it off me. I paid $205,000 for it, plus stock on top of that. They bought it off me for $50,000 and then on-sold it again, I understand, to another franchisee. I assume they would have recouped the purchase price they got it off me for, which continues the process of someone failing, a franchisee being sold it, figures being worked on, being sold off to another franchisee—who in that case was me—who then falls out. It is then sold on to another franchisee. There appears to be some pattern in it.

CHAIR—So are you suggesting that the on sale was at the same price that you bought it for?

Mr Mitchell—Yes, as I understand it. BP would have to confirm that. I do not know.

Mr BEDDALL—The $205,000, was that a redundancy package plus borrowings?

Mr Mitchell—It was. I got a redundancy package and my superannuation package. I had not taken long service leave, so I had all my long service leave packaged. I had not worked for the previous year to acquire that year's leave. I got basically everything that I could, and then I borrowed a bit over 80 grand on top of that to buy stock, et cetera.

Mr BEDDALL—The figures were supplied to you, and I would imagine to the bank.

Mr Mitchell—Yes, we went through all that with the bank.

Mr BEDDALL—Have those figures been identified as incorrect?

Mr Mitchell—After I had written to Polygon, they wrote back and said that the figures I had submitted and which they had approved were figures that they did not necessarily feel comfortable with. They said that the gross profit figure that the whole thing should have been calculated on should have been closer to 28 per cent. The figures that I have been given and which Polygon approved were based on the performance of the business, which was at 30 per cent.

Mr BEDDALL—That is a gross profit margin?

Mr Mitchell—Yes.

Mr BEDDALL—I understand your reluctance to take on a large organisation legally. Have you had any discussions with the financial institution that forwarded you the money? Have you had any discussions with the bank—I assume it is a bank that lent you the money—about them taking action? Or have they recovered from you?

Mr Mitchell—They got paid out. When I came out of it, I basically lost everything. I was able to keep my house, but I lost everything else.

Mr BEDDALL—And you are now working where?

Mr Mitchell—I am back in what is now called AirServices. I work in the air traffic training annex. We do the radar simulation for air traffic controllers. I cannot resume my former occupation due to the rationalisation of the system and a loss of five years. Guys I used to work with are now pulling between $50,000 and $60,000 above what I can make.

Mrs BAILEY—Mr Mitchell, could I firstly just apologise to you for being so late and holding up proceedings, but I had to drive around flood waters to get here. In light of the experiences that you have had, what sorts of protective mechanisms would you like to see built into the system to prevent what has happened to you, for whatever reasons, happening to others?

Mr Mitchell—I have not had a lot of time to think about this, because I got notification only about a week ago to attend today. The only thing that really springs to mind is that there has to be accountability by the parent organisation. Franchising is a big industry now, and there has to be accountability from those people.

The problem that people like myself have is that we just cannot access the legal system. BP, in their submission to this inquiry, said that they have taken action more times than they have had action taken against them. I put it to you that the reason for that is that, when people like me come out of a business with nothing, we cannot even afford to shout a lawyer a cup of coffee.

My lawyer said that BP's tactics would be to go into the system, spend at least $30,000 to set up a case and probably use every legal process to delay appeal. If you even won at the County Court, they would then appeal and you would have to go to the next court. He said, 'That would cost you at least a $100,000 and they can just beat you.'

If they are so accountable and if their franchise systems are so wonderful and all encompassing, I cannot see why they would have any problems with putting in a fund of money which could be used by the aggrieved franchisees to take them to court. They would actually pay for their legal action while their franchisees have no access to defence or correction of injustices. They certainly would not have anything to hide, seeing they are so forthright in their representations.

I am sure the companies will argue against this. I am sure they would love to see a system where self-

regulation and industry consultation can be kept in-house without too much scrutiny. I do not think the public should pay for the wrongdoings of these organisations, as I see it. I would love to see them pay for the bills so that people can seek justice.

CHAIR—Mr Mitchell, whom did you consider to be the seller to you? Was it Polygon or the trader?

Mr Mitchell—The trader.

CHAIR—Therefore, have you investigated any action that you might have been able to take against the trader?

Mr Mitchell—No. When I came out of the business, I wrote to BP, but I could not keep it going because I was just so sick. I only re-opened communications with BP earlier this year. The whole process to me is really a massive public issue. I have not sought any compensation of any kind. I think it first has to be brought before the public's attention.

People like myself—with 20 years in aviation—are totally unsophisticated in business. That is why we go to franchising, because of what you are offered—the potential of a system that is totally integral and supported by large corporations. The attractions of that outweigh buying a corner milk bar or video outlet that you have to learn to run yourself.

CHAIR—You have put a lot of emphasis on the training aspect of it in your submission and also your statement today. Were you able to access any other support, training or knowledge outside of the BP organisation? Were you able to go anywhere in Victoria and tap into some sort of training?

Mr Mitchell—If I wanted to go and do private training, I could always have done that. But when you are paying these people to provide you with some and they have told you that they are going to give it to you—they have told you that they are a professional organisation and that everything they do is above board—you trust and rely on them.

We teach our people—people off the street—how to become air traffic controllers, and they do not go seeking education elsewhere. We tell them that we can do it and we have got properly qualified people. We have a lady with a PhD who oversees the training of the people who do the training. The reason you guys can fly around the country in safety is that our guys are trained to the nth degree.

If BP says that they are going to teach you how to run a business, you trust that they are being paid to do it and that they are actually going to do it. When people come to us for air traffic control training, they trust that we are going to be able to teach them absolutely everything about it. We do not get airline passengers to come along and teach them how to become air traffic controllers. Training is everything. Training is knowledge and training is your base that everything rests on. Training is only the start. You have to have the consolidation process taken from there. You have to be able to build on that consolidation with experience and, for that, you need support.

Again, one of the attractions of franchising was their support packages. These area managers who

were going to be behind you would be taking you by the hand—or it was alleged that they would. They would lead you through all the complexities of the business which you knew nothing about. When you go into business, you do not know how to read the documentation that they put out properly, because they drop that in training. The base that you enter the business at is just so poor. Over a period of time, you learn through hard experience. But every experience comes at a cost, and the cost is the cost to your health and your working capital.

Mr BEDDALL—Mr Mitchell, in your submission you indicated, I think, that you did not even get the manual.

Mr Mitchell—That is right.

Mr BEDDALL—So you could not even train yourself?

Mr Mitchell—No.

Mr BEDDALL—Was there any reason they gave for the manual never turning up?

Mr Mitchell—No.

Mr BEDDALL—Have you pursued it?

Mr Mitchell—It is my recollection that I asked Steven Shaw, the area manager, but he was not very active in performing his duties as a gentleman, unfortunately.

Mrs BAILEY—To your knowledge, is this a common practice that there is no manual available to outline the training that is supposed to be available?

Mr Mitchell—I assumed that everyone—

Mrs BAILEY—Have you talked to other franchisees about this?

Mr Mitchell—No, I have not touched on that subject. The subject was really kept between me and the franchisor. When you talk to other franchisees they say that once you get into the business you are basically on your own. You have to do it yourself and you should not expect support from the organisation.

Mrs BAILEY—Given the importance you attach to the training and your lack of previous business experience, was this an issue you kept raising? Did you keep trying to find out what sort of training was available, the extent of it and when it would be available?

Mr Mitchell—When I got in it was a 24-hour day seven-day a week business and I was flat out keeping up with it. I was trying to catch up with the lack of training and trying to keep up with the lack of support. By the time you start to get on top of things, months and months into the system, you have not had time even to take a real coffee break.

Mrs BAILEY—So there is no procedure before you actually take over the running of the business for any training or any induction period?

Mr Mitchell—There was a training program that ran for a week—it was formal training. Then you had a couple of weeks in another store where basically you went through some of the daily procedures and then you do a very quick handover from the former owner.

CHAIR—I am conscious of time and Mr Paul Zammit from the seat of Lowe in New South Wales would like to ask you two quick questions.

Mr ZAMMIT—I read your submission eight or 10 times. My heart goes out to you and your family. What you have been through is unacceptable in Australia. The push, as Australians, for small businessmen to play their role is very strong and will always be strong. What has happened to you is totally unacceptable.

I would like to ask a couple of questions. You did not include any of the correspondence from BP.

Mr Mitchell—I have brought it today.

Mr ZAMMIT—Is that available for us to have a look at?

Mr Mitchell—Yes, I have it photocopied.

Mr ZAMMIT—Secondly, you said you understand Polygon has since been absorbed. In other words, when you bought your business from Polygon they were not part of BP. Is that right?

Mr Mitchell—They were a wholly owned subsidiary.

Mr ZAMMIT—That is not what your letter says. You said:

I understand Polygon has since been absorbed by BP.

Mr Mitchell—Yes. Initially Polygon was a wholly owned subsidiary of BP. As I understand it, there has been some form of rationalisation.

Mr ZAMMIT—When you did your research you looked up Polygon and you found Polygon was part of BP and you assumed that BP had such a good name in Australia that it must be above board. That would have influenced your decision as to whether you would go ahead or not.

Mr Mitchell—To a large extent, BP has a very high corporate image and you think that if they are behind something there has to be absolute credibility to it. It lends enormous credibility to a system.

Mr ZAMMIT—Yes, of course, and you walked into it with that knowledge.

Mr Mitchell—Yes. I trusted that what they were representing was going to be true.

Mr ZAMMIT—Yes. We will have to ask some pertinent questions of BP in a few minutes.

Mr Mitchell—I would like to make a final summation. The whole motivation for going into franchising when you have come from an industry like I did—from aviation to commerce—is a massive shift in thinking and adjustment. The whole rationale behind going into franchising is to take advantage of all the systems, procedures and support that are offered to you for which you pay quite a premium. When you get in there and you find a lot of these do not actually eventuate in reality—I am sure BP will have certain things to represent about this—but where I was working was at the shop floor where it really does happen. It is very, very difficult.

CHAIR—Thank you for coming in today. Do you have some exhibits that you would like to table for us?

Mr Mitchell—Yes, I only have three copies of the lot.

CHAIR—Are they confidential or public?

Mr Mitchell—No, they can go public. There is nothing in amongst this. Do you want me to summarise it quickly?

CHAIR—I am conscious of time. If you have anything that you want to table, we can table it and move on.

Mr Mitchell—I would like to table the communications between myself and BP Australia. It is indicative of some of their attitudes and some of the ways they would like these things to actually head. There is a copy of this address and there is a copy of their training program. That is all you get on how to run a really intense training business. That is all you get. There is a copy of that. In regard to the syllabus, BP now say even in their submission to the inquiry that it is so important to do a training program, but if this is examined in the light of professional training, it will be shown to be an absolute farce. There is a copy of the pornography sheet there, the vendor number and BP's response to the whole situation. I have more of those.

CHAIR—It is proposed that the following documents by Neil Mitchell be taken as evidence and included in the committee's records as exhibits and called 'Communication documents between Mr Mitchell and BP Australia.' Do any members have any objections? If there is no objection, it is so ordered. Thank you for your time today, Mr Mitchell. We appreciate the opportunity of talking about this. I know it is difficult for you.

Mr Mitchell—It is hard, actually. It is hard when you are just an average person in the street.

CHAIR—We appreciate that and we can empathise with you, at least I can, anyway, having been in small business. Thank you for coming today.

[10.06 a.m.]

FRILAY, Mr William John, Senior Business Analyst, BP Australia Ltd, 360 Elizabeth Street, Melbourne, Victoria 3000

GILLMAN, Mr Christopher John, Marketing Development Manager, BP Australia Ltd, 360 Elizabeth Street, Melbourne, Victoria 3000

ZAMBUNI, Mr Shaun, Franchise Programs Manager, BP Australia Ltd, 360 Elizabeth Street, Melbourne, Victoria 3000

CHAIR—Welcome. Committee 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 make an affirmation. You are reminded however that false evidence given to a parliamentary committee may be regarded as contempt of parliament.

The committee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private you may ask to do so and the committee will give consideration to your request. The committee has received your written submission and authorised its publication. Would you like to make any additions or alterations to that submission?

Mr Gillman—No, we would not.

CHAIR—Would you like to make an opening statement before we commence our questioning?

Mr Gillman—Yes. I would first like to reiterate the key conclusions from our written submission. I would then like to add some further points and table in confidence some material relevant to this. I will then describe to you our initiatives on group franchising. I would also like to make a brief comment on the submission by Mr Mitchell as it obviously bears on BP.

Mr ZAMMIT—Is that a written submission you are going to have for the committee? If so, can we have a copy of that?

Mr Gillman—Yes, you can.

Mr ZAMMIT—Can we have that before you start reading so we can read it through with you? Mr Chairman, I would like to be able to read it, as he is reading it. Unless Mr Gillman is giving it off the cuff, are you?

Mr Gillman—Some I will, yes. It is notes, some scribbles and so forth.

Mr Frilay—I think we can give you most of it, if that helps. But we would have to run off a couple of copies.

CHAIR—Let us go ahead right now and we will try to get a copy to you.

Mr Gillman—The first point I would like to make to the committee is the importance BP places on franchisees and distributors in delivering products and services to Australian consumers. Our franchisees and distributors are the linchpin of our marketing effort and it is inconceivable that BP could operate successfully without sound relations with these individuals in business. BP invests considerable time and money to ensure that we develop and maintain these relations with the business people. It would be folly to believe we could operate successfully without achieving this simple but important objective.

The key points of our submission are: we seek to have fair dealings with all parties with which we trade; litigation based on legislative protection is costly and destructive of the commercial relationship; we support the use of agreed informal arrangements for dispute settlement; and we support Oilcode, the code developed as a consequence of cooperative efforts between oil industry bodies.

Oilcode sets out principles to avoid disputes and helps settle them if they do occur. It is our belief that the occurrence of litigation has been substantially reduced with the introduction of those codes. We believe Oilcode should be extended to apply across the whole of the downstream petroleum industry by strongly encouraging the independent sector to become parties to it.

The current industry specific acts have proved to be inflexible and arbitrary, hence our strong support for a process of self-regulation. They add significantly to the inflexibility of a mature industry.

We see the current provisions of the Trade Practices Act on unconscionable conduct, section 51AA, as unnecessary. We believe the act overall and common law provide sufficient protection for all on this particular matter. We strongly oppose new section 51AC mooted by the previous government. That kind of vague provision would create uncertainty.

We have separately submitted our response to the government on the Australian Competition and Consumer Commission's petrol price declaration report that the sites and franchise acts should be repealed. The current petroleum franchise act should be replaced by a general umbrella franchise act that would be supported by industry specific codes of practice.

Inevitably, there will be some problems with relationships. In our industry, the level of ongoing structural change exacerbates this. The BP system is a large one, with approximately 1,300 service stations and 33 distributors in rural areas.

Against this context, the level of litigation since 1994 has been five counterclaims upon BP's actions of debt recovery and only three actions where a franchisee brought action against BP. Under Oilcode, there have been only seven actions. If you consider this in the light of an industry of over 9,000 sites, of which it is estimated 3,000 are surplus to the industry, and the inflexibility caused by the industry specific legislation, we believe the record of disputation is very low.

I believe the committee indicated an interest in any cases involving BP in which an allegation of unconscionable conduct under the Trade Practices Act was raised. There has been only one, relating to a

Food Plus franchise in Victoria. The allegation was raised extremely late in proceedings, actually during the trial. BP won the case in the Supreme Court of Victoria.

BP's record as a franchisor was recently recognised by a personal business magazine that named BP as one of the top 10 franchisors. We were the only oil company to be included in that list. There is a copy of that article for members of the committee.

BP recently reviewed its documentation with a recognised franchise industry expert. He commended our use of plain English in our agreements and disclosure statements. I note that the plain English approach was recommended by the ACCC in its recent report on petroleum product declarations.

We submit a copy of our current franchise agreements and the disclosure statement to the committee for your confidential use. Please note that, while the document seems daunting, it is a structured agreement with only some parts applicable to particular franchises.

Both formally and informally, we do our best to maintain close liaison with our franchisees. Formally, as described in our submission, we do this through the Australian Franchisee Council, which represents franchisees at the national level, and the annual meeting open to all franchisees. Committee members would be welcome to attend these meetings if they wish to gain a first-hand feel for our franchise or franchisee relations.

We did not mention in our submission that we are cautiously moving to trial group franchising. What we have done to date is a program full of consultation with franchisees involving a workshop that was held on Hayman Island with our top franchisees—the top 100 of our franchisees are eligible for incentive trips, which are working trips that cover these sorts of issues—and a further workshop with 15 of our franchisees in Queensland, all of whom have more than one site under franchise but with separate group arrangements for each one of them.

We have identified up to four trials to be put in place before the end of this year. This would involve a group franchise of between four and 10 sites. Our franchisee council has been made aware of these trials. BP has not bought out any franchisees for these, with most sites being direct managed or already under a form of group franchise. I should also note that franchisees operating more than one site have been a common feature of the industry going back for more than 25 years.

We have examined the submission made to you by Mr Neil Mitchell and wish to make some comments. A key point that the committee has already noted is that Mr Mitchell did not purchase the franchise or the business from BP. He bought it from the existing franchisee, to whom he paid a substantial sum. He bought it on assignment.

It was the Food Plus franchise at Tally Ho, a convenience store and service station franchised by Polygon Retailing Ltd, which was then a subsidiary of BP. He left the business 12 months later. During this time, he suffered financial and health problems. We regret the financial and health problems incurred by Mr Mitchell, but believe that we were not responsible for these problems. Indeed, we did what we could to assist Mr Mitchell.

Mr Mitchell's case serves to highlight a particular problem with respect to franchising under the petroleum retail franchising act. I refer to the assignment provisions. The difficulty here is in the situation where we suspect that a vendor may be asking too high a price for the business. We have to try to be fair to both parties—very much in our own interests. The vendor would be angry if we prevented him from obtaining a high price.

The spirit of the relevant provision of the act is that the vendor should be free to assign his business without interference from the franchisor. Whether a vendor is asking too much is a matter of opinion to some degree, so BP is reluctant to become involved. However, bearing in mind defamation laws, we do try to ensure that the purchaser is aware of the relevant facts and that he takes appropriate accounting advice.

Our staff brought the relevant issues to Mr Mitchell's attention. When you have a vendor of a franchise on one side who has priced that and a purchaser and an assignee on the other side, a franchisor is somewhat between a rock and a hard place.

Essentially, our staff could only check and recheck with Mr Mitchell to ensure that he was satisfied that an adequate return could be gained for his investment, and this we did. Mr Mitchell chose to proceed. It was his decision and his alone. In effect, he paid a high goodwill figure. This was after a request from Polygon senior management that he seek a second opinion. The matter was perhaps further complicated by Mr Mitchell's choosing to use the same accountant as the assignor.

In respect of other matters that Mr Mitchell raises, so far as I am aware, Polygon staff have never considered Mr Mitchell to be party to pornographic activities nor have sought to infer it. Inquiries to the police at the time on his behalf resulted in the police advising that they were pursuing the vendor of the articles who was allegedly wrongly classifying the literature and that they considered Mr Mitchell to be an innocent party. This we passed on to Mr Mitchell.

In respect of training, I simply comment that I understand that two others were completing their training at a similar time, and they have proved to be amongst the best franchisees we have in the state of Victoria. I also comment that Tally Ho, the store in question, has been successfully operated by two franchisees since Mr Mitchell's time there.

In respect of gross margins and its impacts on returns and valuations, Mr Mitchell was questioned by staff a number of times about his assumption of 30 per cent when it was usual to use a gross profit calculation of 28 per cent. Ultimately, the pricing policy is a matter for the franchisee. Our staff were understandably very wary of giving advice which could be construed as resale price maintenance.

In January and February 1993, when Mr Mitchell's health problems were such that he wished to exit the business, Polygon purchased the remaining tenure of the site at a price that was substantially higher than the pro rata figure for which he would be eligible under the company's then policy. This was done to assist him, as was the provision in December 1992 and January 1993, at Polygon's cost, of a full-time experienced day person to take some of the pressure off Mr Mitchell at the time. Mr Mitchell then expressed appreciation for this assistance.

From our point of view, there is no bad feeling with Mr Mitchell. Our staff wished to assist him, but we do not accept that we were the cause of his difficulties. We believe that we have corresponded with Mr Mitchell on all the matters of substance that he has raised in the course of 1993. After a gap of some three years, he sought to re-open these issues.
He has chosen not to use the procedures available under Oilcode and it appears to us at this point in time to serve little purpose to continue such correspondence.

Mr Mitchell's time at Tally Ho was clearly not a happy one for him. For largely similar reasons, it was not a happy time for Polygon. We did not benefit from Mr Mitchell's problems. We sympathise with him but accept no responsibility for their cause. We continue to wish him well. I would be pleased to take any of your questions.

CHAIR—I am sure that issue of Mr Mitchell will be raised by some members of the committee. I have a couple of questions for you about other matters. You say in your submission that the Petroleum Retail Marketing Franchise Act 1980 is inflexible and arbitrary. How does the act cause problems in the oil industry?

Mr Gillman—It was put into place at a time in 1980 when the industry was very different from what it is today. It froze the sorts of relationships which were then in vogue as to which channels of trade were operating in the business. It freezes those sorts of things into a point in time. As the industry has moved on, we cannot flex, change relationships, develop new methods of doing business, or develop new relationships with our franchisees, to adapt to new times.

CHAIR—If the act were repealed, and I guess that oil companies would like to see that happen, would this promote multi-franchise sites and what would happen to the single operator?

Mr Gillman—I do not think it would necessarily promote multi-sites because, under the franchise act as it is, it is quite possible to have multi-sites. As I have already observed, they have been a feature of the industry, to my knowledge, for in excess of 25 years.

CHAIR—You suggest in your submission that you are about 30 per cent oversupplied at the moment in the marketplace generally, which means that, if it were to be repealed, there would be a rationalisation of sites, and I would suggest that single operators would probably disappear from the market. What is BP's plan to handle that in the event of its being repealed, and how would you go about easing these operators out? Would you be paying goodwill, and what sort of actions would you be taking?

Mr Gillman—The rationalisation is taking place anyway. The acts merely determine a timetable under which sites become available for rationalisation. So it is possible under the act, but it puts an impediment into that. We would follow the franchise code of practice—the Oilcode—which has termination provisions, counselling. Our practice often is to look at the end point of the site's useful life and, through rental relief and other things, to ease the burden of the party that is exiting it. If there is a good franchisee in a poor site, we try to promote those franchisees into better sites, and to move through the processes as smoothly as we can.

CHAIR—In relation to goodwill, I guess it is probably by negotiation, but you are not going to be objecting to going into that negotiation form? Is this what I am hearing from you?

Mr Gillman—We would not pay at the end of a lease for goodwill which does not exist, but we would go through a transition period where the assets and so forth were treated in a transition phase and where we would purchase those. I refer you to the Oilcode provisions which have those already in it. We practise that now.

CHAIR—Let me just ask you to qualify this one step further. If it were the decision of BP to cease operating in a site, you would not consider goodwill at that site an asset for the operator?

Mr Gillman—No, not at the end of a period of tenure.

CHAIR—Okay. You say that the promissory of the contract should continue, which means, I guess, that you just rely on common law in that regard and that you would not like to see any change at all to the Trade Practices Act, but why would you think that legislative protection for parties—from the Trade Practices Act—when it comes to contract would be at risk?

Mr Gillman—I think it is because with the mooted trade practices amendments we have not seen a proposal that would not be vague and create uncertainty.

CHAIR—That is the point I am getting to: why do you assume that any legislative process would in fact create uncertainty?

Mr Gillman—Only the changes that we have seen to date tend to do that.

Mr BEDDALL—Uncertainty for yourself and patently more certainty for the people who now feel that they cannot take litigation. One of the problems we have had with the oil industry is that all the players in the oil industry say, 'We've got 3,000 too many sites,' and all the players continue to open new sites. I want to get to the point where you have an operator who comes to the end of the term in a successful site and that is the end of the contract of obligation. What is the percentage take-up of offering that back to the current licensee?

Mr Gillman—I do not have that figure, but I would be prepared to have a look at that and give you an answer.

Mr BEDDALL—One of the complaints—not just about BP—is that quite often people feel aggrieved because they are not offered a continuing right. Contractually you have met an obligation, but people think there is another obligation that should continue. I would like to get that figure if I can.

Mr Gillman—Okay, we will be able to do that.

Mrs BAILEY—I want to flesh out your attitude toward section 51AA of the Trade Practices Act. You would be aware that recently the case on Hamilton Island has opened up a window of opportunity for

small business. Given that what you tell us is the sort of attitude that BP has towards its franchisees and the sorts of programs that you put into place, why is it that you have this concern about section 51AA?

Mr Gillman—I think it is just because when there is a resort to legislation—as opposed to codes of practice that have been devised by all parties in the industry that know the issues in the industry—it seems to be a much better way forward than to have that kind of combative provision rather than trying to work through the issues as is happening now with Oilcode.

Mrs BAILEY—I want to pursue this a little further. If everything is as rosy in the garden with your franchisees as you are telling me and suggesting here today, why is it that, if there is a legislative process there, if you like, to allow small business the opportunity for a fair hearing, you are so concerned about that legislative process? It is one thing to talk about a code of conduct, but if your code of conduct is so good and everything is so rosy, why do you have this fear of 51AA?

Mr Gillman—We just see it as unnecessary in our experience today as people do not rely on it. There are other processes.

Mrs BAILEY—It could not be that big business is just slightly concerned that small business is getting an opportunity?

Mr Gillman—No, I do not think so.

Mr Frilay—I think it is more the fact that we would all like to have certainty—big business and small business. Once that certainty thing becomes unravelled and perhaps even the contract becomes open to question and the sanctity of the contract may be put at risk, I think we have a problem. It is just the issue of certainty.

Mrs BAILEY—So are you saying to me that a legislative process is not providing certainty and that a code of conduct is going to provide a greater degree of certainty both for big business and small business?

Mr Frilay—I am not an expert on this; I am not a lawyer. Our advice is that the proposal would have reduced greater uncertainty than at present.

Mrs BAILEY—What you are saying to me is that a legislative process is not going to provide the certainty that a code of conduct would.

Mr Gillman—When the legislation is mooted we hear terms such as, 'We want to have a provision that has versatility.' We think that that is tantamount to vagueness.

Mr Frilay—If you really got to the bottom line, it is the issue of certainty.

Mrs BAILEY—I suppose it depends on what our definition of 'certainty' is—whether we are big business or small business.

Mr Frilay—Certainty for both sides, too.

Mr BEDDALL—One of the problems that we continually find with franchising, in particular, is that because there is no definition of franchising, there is uncertainty. Perhaps if there were a legislative definition there would be more certainty.

Mr Gillman—As we move to a franchise code of practice with perhaps a legislative umbrella to bind that in, that may well be our way forward.

CHAIR—Before moving to Mr Zammit, let me just ask you: on the expiry of a franchise contract—you have already said that goodwill is not considered as an asset by BP—does the franchisee have an automatic right to renewal?

Mr Gillman—Under the current legislation, it is a nine-year arrangement—three by three by three. At the end of that nine years there is no automatic right of renewal. When we went through that transition, as we did first of all in 1989, there were certainly arrangements from those franchisees in sites where that transition occurred where they were franchised again into those sites at amounts a lot less than an assignment market rate.

CHAIR—So if there is no automatic renewal, that would give you the opportunity of rationalising a site and closing a site, I guess, but, on the other hand, if there is no automatic renewal, you could change operators if you wanted to.

Mr Gillman—Correct.

CHAIR—So, therefore, the so-called non-asset of a goodwill is not then considered by you either if you were moving a franchisee out?

Mr Gillman—No. One has to look at what makes up the goodwill in that site. Is it the location, the brand, the facilities or the systems that we provide or is it the individual operator?

CHAIR—What percentage of franchise agreements are renewed?

Mr Gillman—I would have to take that on notice and provide it.

CHAIR—If you could provide an answer for us, that would be good.

Mrs BAILEY—Mr Chairman, could I just follow up with a question on that. With the answers that you have just given us, does that qualify with your definition of providing certainty?

Mr Gillman—In relation to the tenure that we agree with a party as they go into an operation, yes. They know the amount of time that they have a guarantee of being in that site. We know that, so that is certain.

Mr ZAMMIT—On the second page of Mr Mitchell's submission, in regards to his follow-up with you, he says:

BP Australia have stated they will not answer questions and that if I wanted answers I would have to litigate.

In your opening remarks you then made the statement that litigation based on legislative protection is costly and destructive of the commercial relationship. You said that you support the use of agreed informal arrangements for dispute settlement. You cannot have it both ways.

Mr Gillman—I would suggest that the dialogue took place and came to an end some three years ago. The point that I believe the company was making just recently to Mr Mitchell was that we did not see a point in restarting that after a three-year gap.

Mr ZAMMIT—I would say that you are absolutely wrong not taking into account the man's distress, having lost his life savings, and the concern that his family has for him personally, physically and mentally. Because someone has let a matter go for a couple of years, trying to restart his life and trying to attend to his health problems, for you to then say, 'Just because he has left it for a little while means that we are not going to talk to you any more', I think is grossly unjust. Are the witnesses under oath, incidentally, Mr Chairman?

CHAIR—No.

Mr ZAMMIT—Why not?

CHAIR—Because of procedure.

Mr ZAMMIT—Could you answer that.

Mr Gillman—Sorry, I didn't quite get the question.

Mr ZAMMIT—The point I am making is that there seems to be a very strong degree of insensitivity on BP's part just because a person has left it for a couple of years to try to restart his life and get himself together after this terrific strain on his life and his family's life. You then say, 'No, we are not prepared to talk because you left it for so long', and then you come in here and say, 'We believe litigation is costly and destructive. We support the use of agreed and formal arrangements for dispute settlement.' Then you go on to say that you believe there should continue to be self-regulation. Self-regulation just does not work. It never has worked and never will work. You cannot answer that, can you?

Mr Gillman—First of all, I am afraid that I did not follow the question, again, because there was a series of statements in there.

Mr ZAMMIT—They are your statements, not mine.

Mr Gillman—What I would like to say, first of all, is that with the exception of the correspondence and the restart of that this year, Mr Mitchell has not availed himself of those informal procedures. On behalf

of the company, I would say that if he does want to go through those processes, we would reconsider that. We do not see the point in merely entering into written correspondence upon matters where there is quite a difference in view as to facts. We would be prepared to go into a discussion with him on a productive basis that we could bring some of these matters to rest.

Mr ZAMMIT—Can I go on to what he says here, which concerns me. He says:

Formal training by Polygon occurred over a five day period.

Mr Mitchell asks you to state what qualifications the training officer, if any, may have had for these training seminars.

Mr Gillman—I believe we have answered all those questions.

Mr ZAMMIT—I am asking you what professional qualifications these people have to conduct these seminars.

Mr Gillman—I am not aware of the particular person that was conducting the seminar that occurred in 1992. In fact, after I finish here I am going down to close one of our franchisee's development programs, which is a two week in- classroom training session here in Port Melbourne with between two and four weeks on-site training for all our people before they go into sites. We have a series of qualified people. I would be quite happy to give you a list. They range from qualified accounting people to very much hands-on folk who know how to operate a convenience store and a petrol selling business. They are all qualified. Some do not have tertiary qualifications, but they certainly have a lot of experience in the business. As I said before, two other people went through the same sort of program, and many others, and we do not have this sort of issue.

Mr BEDDALL—I want to go back to the person who actually sold the franchise. Does that person currently operate a BP franchise?

Mr Gillman—Not to my knowledge.

Mr BEDDALL—Could you check for us?

Mr Gillman—I will.

Mrs BAILEY—I would like to follow up on the training. Mr Zambuni, I think this is your area of responsibility. Do you produce a training manual? Is this given to franchisees prior to their taking over the business? What sort of follow-up is there once they have undergone the initial training program?

Mr Zambuni—There are very detailed manuals provided to franchisees. In fact, you will see in the schedules of the agreement we have given you that the core list of the manuals and the contents of those range from advice on how to be an effective manager right down to the day-to-day operating procedures of various activities of the site. Those manuals are specifically designed for the different types of products that exist on the premises. So if there were a Food Plus today and express on the site, there are specific

procedures and guidelines in terms of the day-to-day activities that we would believe would be the appropriate way to run the business, and that is all part of the manual process, as you pointed out. It is our view of how best to do it; it is not something they are forced to do, but we would strongly recommend that they do it within the context of the day-to-day procedures.

Mrs BAILEY—Is the document I am holding up the sort of thing you mean by a manual?

Mr Zambuni—No, not at all.

Mrs BAILEY—It is not. What follow-up procedures are there to the initial training?

Mr Zambuni—The initial training is, as Mr Mitchell pointed out, not just the five-day course; it is also a period at another site which is generally run by BP or one of our more experienced franchisees who volunteer to be part of that process. There are also regular courses on a whole range of topics which BP run on a schedule basis. But we also have a hotline where franchisees can ring in and say, 'I would like this course to be run for my site, or for my staff,' and, as soon as we have sufficient numbers, we will run the course for that particular purpose.

Mrs BAILEY—Did that hotline exist during the time of Mr Mitchell's franchise?

Mr Zambuni—I do not know.

Mr Gillman—No, it did not. We ran the organisation in a different fashion in those days. Indeed, Polygon retailing at that time was the subsidiary that focused on some company operated outlets and our then branded Food Plus convenience store network. There was the training run out of that subsidiary. The initial set up in the early 1980s was as a result of a know-how deal that we did with Conna Corporation of Louisville, Kentucky, who are very experienced franchise operators and operators of convenience stores.

The original of the operations manual, which is something like that thick, and the training manual and other materials was there. We translated them into the Australian situation. During the course of the 1980s we developed them a lot further. It is a very robust package and a very extensive system. We would be quite happy to provide copies of documents outlining what we do and operating manuals outlining the things we do for our franchisees by way of training. We would ask that they be dealt with in confidence because a lot of hard work and cost has gone into producing those.

CHAIR—We would appreciate that.

Mr ZAMMIT—I have three very quick questions. Firstly, you implied—even though you did not say it—that Mr Mitchell paid too much for the business. Secondly, you implied that if others have succeeded, then there must be something wrong with Mr Mitchell. Mr Mitchell said in his submission:

At the critical time when I made initial enquiries into the business Polygon, being represented by the same person who later approved the business transfer. . .

In other words, BP through Polygon—Polygon through BP—were present during the initial inquiries, during the discussions he had with regard to the purchase of the business, and actually approved the business transfer. If Polygon and BP knew that what Mr Mitchell was doing was not in his best interests or in the company's best interests and you were present throughout, why did you not say anything?

Mr Gillman—We did.

Mr ZAMMIT—You did?

Mr Gillman—Absolutely.

Mr ZAMMIT—Against all of that, Mr Mitchell said, 'I don't believe you and I am going to go and take it anyway.'?

Mr Gillman—He went ahead with it.

Mr ZAMMIT—I might say that he is not nodding in agreement.

Mr Gillman—I can understand that. I have reviewed the file over the last week since I knew Mr Mitchell was going to raise this matter here. There is quite a difference between Mr Mitchell's viewpoint on the facts and the issues and the company's viewpoint on the facts and issues.

Mr ZAMMIT—Are you prepared to sit down with Mr Mitchell, in the spirit of goodwill and cooperation, to try to resolve the concerns that he has that he may have been—putting it bluntly—ripped off?

Mr Gillman—Yes, we are.

CHAIR—In attachment 2 in your submission you referred to the low level of disputes which go to litigation, yet it has been reported to the committee that a particular franchisee was advised not to go to litigation because big companies like BP can use the legal processes to delay proceedings and increase costs to the point where small operators would be unable to finance any further action against a major company like BP. If that is the case, the list of disputes which you have submitted—which I think number 16—have gone to litigation may not be a true indication of the level of disputation within the industry. Do you have a comment on that?

Mr Gillman—Yes. Firstly, through the various service station associations and so forth, if there is a case that is significant, there is a mechanism through which the franchisees within the industry can seek support and therefore funding. Also, in this day and age, there are certainly lawyers who will take on those sorts of cases without high up-front costs to the person involved, provided that there is a legal case to be made.

Mr Frilay—While we are arguing for informal regulation procedures, we are not saying 'Get rid of the legal framework.' We would go through the informal procedures and then, as a last resort, there is the legal framework.

CHAIR—Thank you. It is proposed that the following documents presented by BP Australia Limited be taken as evidence and included in the committee's confidential exhibits: BP Enterprise Franchise Agreement Disclosure Statement and the BP Enterprise Franchise Agreement. Is it the wish of the committee that those documents be included in the committee's confidential exhibits? There being no objection, it is so ordered.

I would like to thank you for your attendance today. It has been worthwhile. I think Mr Mitchell is sitting at the back; if you want to go and have a chat with him, that is fine.

Mr Gillman—I have not met Mr Mitchell before.

CHAIR—I am sure he is prepared to talk to you. Thank you again for coming along today. We appreciate your time.

[10.48 a.m.]

GARRISSON, Mr Anthony Robert Wolseley, Business Law Committee, Law Institute of Victoria, 460 Bourke Street, Melbourne, Victoria

LINACRE, Mr Philip David, Business Law Committee, Law Institute of Victoria, 460 Bourke Street, Melbourne, Victoria

CHAIR—Committee proceedings are recognised as proceedings of the parliament and warrant the same respect as proceedings of the House of Representatives. 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 make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as contempt of parliament. The committee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private you may ask to do so and the committee will give consideration to your request. The committee has received your written submission.

Resolved (on motion by Mr Beddall):

That the committee receives as evidence and authorises for publication the submission from Mr Garrisson made to the House of Representatives Standing Committee on Industry, Science and Technology.

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

Mr Garrisson—Yes. We represent the Business Law Committee of the Law Institute of Victoria. We are both accredited specialists in business law with substantial practices in franchising, intellectual property, licensing and trade practices. On a daily basis we see a variety of problems in franchising. It is our considered view that there are serious problems afflicting the industry and that these problems are causing franchising to have a bad name. We often hear comments that franchising is growing at rates of 14 per cent per annum, and that by owning a franchise you have a 2¼ times greater chance of survival than if a person were to operate a business not under a franchise.

We have only recently seen some indications that this is not necessarily the case. It is our view that what seems to be happening in the industry is that it may appear that unproven franchise systems have been established which inherently do not have a fundamentally profitable or core business. These businesses run for a period of two, three or perhaps even four years until a point of time when, due to lack of management systems and infrastructure, they collapse. New or similar systems then fill the void.

The predominance of information which we are aware of concentrates on the opening and not the closure of old systems. It is our view that, because of the lack of control in the marketplace in how franchises are established, the average person who may receive a redundancy payment or other package is easily persuaded into a false sense of security in thinking that buying a franchise will enable a person to acquire a safe and stable job. It is our view that, when a franchise system does perform poorly, the effects are compounded substantially because of the additional charges that the franchisee must incur through ongoing royalty fees, high prices for product, et cetera.

It is our view that there are two fundamental areas in the franchising sector that require remedying: misrepresentation caused prior to buying a franchise, and unfair conduct carried on in the course of a relationship between the franchisor, its related service providers and the franchisee. The overriding reason that we are here today and offering support to Mr Gardini's recommendations is that franchisees are usually in an economic position which is substantially inferior to that of their franchisors.

It is often the case that franchisees have exhausted all of their resources to buy into a franchise and have it set up. Franchisors have intimate knowledge of their franchisees' economic positions. This knowledge is gained at the time of the initial application and the performance of the franchise is monitored from then on. Accordingly, some franchisors have no incentive to cooperate with the current mediation and other dispute resolution procedures. It is argued that the great number of disgruntled franchisees that are unable to afford litigation are driven out of the system at a substantial financial loss.

As set out in our submission, by forcing all franchisors to provide effective disclosure, and by establishing a regulatory environment that enables the Australian Competition and Consumer Commission and the Franchise Code Administration Council to regulate unfair conduct, many of the problems occurring in this sector will be solved. These two recommendations will result in substantial economic gain for the franchise sector by reducing franchise system failures, improving the process of negotiation and resolution of disputes, and providing an economic benefit to franchising by ensuring that only proper franchise systems are established with effective processes and systems. Thank you.

CHAIR—Thank you. I have a couple questions before going to questions from my colleagues. You said in your submission that conduct carried on during the course of the relationship with the franchisor and franchisee was of concern to you and you also talked about serious concerns with the franchise system. You have given some overview of that in relation to exiting the franchisor system. Have you any case studies or anecdotal examples of where these things might be a problem?

Mr Garrisson—In exiting the systems?

CHAIR—Yes.

Mr Garrisson—I think it happens in a lot of commercial relationships. An important point that has been raised today is that people do not really look at the question of what they are actually buying or the return on investment which they are getting out of a business. For instance, most shopping centres have a requirement that tenants will only get a five-year lease. The problem that occurs with normal proprietors is that, at the end of that term, they should not necessarily think they have a right to stay there for the rest of their lives. The same applies in relation to franchises. Because of the very nature of franchising there are so many different types of industries in it. Each of them faces the same sort of problem.

At the end of the term of their contract they should not have an expectation that they should be able to get an additional profit or bonus for being in the business, because what they have done is achieved and obtained a business which has been imparted to them from the franchisor. A lot of the problem comes from a lack of understanding, at the beginning, of what they are getting into and what sort of return they are expecting. You can see examples in retailing, in mobile franchises—all sorts of different types of businesses.

But it happens often.

CHAIR—You might have heard BP talking about goodwill and that they do not consider goodwill as an asset. Do you see a need to recognise goodwill as an asset for an operator?

Mr Garrisson—During the course of their contract, I think they have a goodwill within their own business. But once that contract finishes, I do not think they should have a right to an additional premium. The problem with many franchisees has been that they do not work out the proper price of their business when they buy it. The pay an artificially high price and they do not look at exactly how they are going to get a return on their investment. Most of them only have five or 10 years. The problem occurs when they finally find out at the end of the contract that they have not made a profit, and it is because they have not negotiated the best deal in the first place.

Mr BEDDALL—Mr Garrisson, would you find that a large number of your clients do not understand the basic premise that they are actually buying the right to run someone else's business? You hear a lot of people talk about franchising as running their own business. In fact, what they are doing is running someone else's business.

Mr Garrisson—They do have their own business in their own way. But what they are doing is that they have to pay someone for that information and right. The biggest problem is that unfortunately, in a lot of the cases that you hear about with disputes, the original business just is not a good business to be franchised.

Mr Linacre—If I might contribute to that question, Mr Beddall, I think it is not a natural concept in a business operator's life hiring a trademark. But that is what they are doing in a franchise—it is as if they are hiring a truck. They often do not understand that difference.

Mr BEDDALL—Is that part of the process you take them through when you are explaining contracts?

Mr Linacre—Yes.

Mr Garrisson—Very much so.

Mr Linacre—And they always have great difficulty comprehending it.

Mr Garrisson—I was quite interested, actually, just to hear the comment with BP that they were present at the meeting with the purchaser of that particular business. Unfortunately, what happens with a lot of people when they go to buy a business is that they fall in love with the idea of the business and, no matter how many times we tell them, 'Don't buy it,' they will still buy it because they think it is a good idea. Let us not lose sight of this. Franchising is risky. It is like anything else. It is buying a business opportunity. There is no guarantee of success. What you are trying to do is reduce the risk of failure.

Mrs BAILEY—I just wanted to ask you for perhaps some suggestions on trying to improve the transparency of disclosure before purchase because, as we have heard already and as you have stated, a lot of

the problem is that misrepresentation prior to someone purchasing. What means would you suggest to improve the transparency of disclosure?

Mr Garrisson—I think it could quite easily be done, actually. We have the Corporations Law, as you know. Franchising at law is a prescribed interest and, through regulations of the Corporations Law, franchising has been exempt from the requirement to lodge a prospectus. The cost of preparation of a prospectus is well over $150,000, generally, in the marketplace. If someone wants to offer a franchise, a franchise is just simply another way of trying to raise capital—the capital of the franchisee. If you have a system that sets up 100 stores and it cost $250,000 on average to set them up, that is a lot of money that is going out there in the marketplace and being offered by people.

My view, and I have had this consistently for some time, is to give people who want to set up franchises an alternative: register a prospectus or join the voluntary code. A lot of the problems you are finding are with people who are not registered with the voluntary code. What that means is that you are putting an economic incentive on people to go down the disclosure requirements under the voluntary code.

My view is that the voluntary code also needs tightening up in its disclosure requirements because there are many important representations and statements that need to be looked at in setting up franchises. That is a very effective way to solve one half of the problems which I see. What happens is that when they go and buy the business, they are under unrealistic expectations. They have paid too much for the business, there has been key material not disclosed and what happens is that it sits and festers.

It is like a marriage. You go through the honeymoon phase, then you get a bit familiar, then you find out that things are not so rosy, and then you decide, 'Gee, I am not really making much money here,' and then you get into problems. It may come sooner or it may come later. It is how you handle those sorts of problems. But where there are fundamental problems in the system, that is when all the problems occur. That would fix the first half.

The second half of the problem really revolves around the conduct. Franchising involves control. Because the franchisor has given away his secrets, he has to protect those secrets. He also has the ability to control the profit that a franchisee can make. The good franchise systems these days are very good communicators but you do, unfortunately, get certain problems. My view in relation to handling those problems is to be able to handle the conduct of that commercial relationship. If you control that relationship you will solve the other limb with the problems in franchising.

Mr JENKINS—I was interested in the comment about the relative risk between a franchisee and a franchisor. You said that it can be a very risky proposition for the franchisee. If the franchisor has the control as you have described, how can they minimise the risk on their behalf?

Mr Garrisson—By having proper management systems, to be properly capitalised, to make sure that the royalties and fees they charge are adequate to meet their infrastructure to support their franchisees.

Mr JENKINS—What about the notion that there is nothing in it for a franchisor until a certain period of time into the agreement?

Mr Garrisson—It can depend on the size of the system. Australian operations are traditionally a lot smaller than American systems. What they have done is import American royalty structures into Australian franchise systems and they just generally are not economic until they are a substantial size. Where a franchisor supplies product, it is a different story. You will generally find that in Australia a lot of the franchise systems supply a product or related service, which is where they make their real profit. They certainly would not make money on offering franchises, or they should not. Those who do try to make profit out of them generally fail pretty quickly.

Mr ZAMMIT—Mr Garrisson, you raised the matter of the BP submission and I will pick you up on that. You have assumed that what BP said was right and what Mr Mitchell said was wrong by your assertion that some people say, 'Oh yes, I've heard all the arguments but I still think it is a good idea; I am still going for it.' That is not what Mr Mitchell said. You have assumed that, have you not?

Mr Garrisson—No. What I said was that often what happens in franchising and in any other small business is that irrespective of the financial position, the person falls in love with the business and it may not be for financial reasons that the person actually wants to buy the business. That was all I was saying. I am not supporting either party's views, I just wanted to make a comment on what happens in small business generally.

Mr ZAMMIT—Say the person representing the company, BP, was present in the discussions between the seller of the business and the potential new buyer of the business. The assertion made by BP is that that person said nothing in regard to what was being said as to the profitability of the business by the seller. Can one not lie through an act of commission as much as through an action of omission?

Mr Garrisson—I am not going to get involved in BP's—

Mr ZAMMIT—Let us leave BP out of it. Let us assume there are two people in the room and the franchisor is present, as he was in this case. Would you not expect the franchisor to say something in regard to what is being stated by the person who is selling the business?

Mr Garrisson—If you are looking at a hypothetical situation, you have got a situation of a buyer and seller. That is the two franchisees there. You have got a related party, the franchisor, who has an interest in it because what is happening is that the buyer is buying the rights to the franchise. What the franchisor has is a contractual right to vet and approve the person who is going to buy the business. The difficult point is where the franchisor then has to make a commercial decision as to whether in fact he should make a comment about the business. The franchisor, probably in a contract in most cases, has no right to actually say what price you can sell your business for.

Mr ZAMMIT—I am not suggesting that. All I am saying is that the person may be saying to someone else, 'You buy my business and I have a mark-up of 30 per cent', and the franchisor may be there and say nothing with regard to what the profit mark-up allowed, which may or may not be 30 per cent—in this case they claim it is only 28 per cent. You keep saying in your submission, and you have repeated, that you believe in self-regulation. I am saying to you that self-regulation does not work.

Mr Garrisson—No, I am not suggesting self-regulation.

Mr ZAMMIT—Your final words in the submission are:

We concur with the proposals by the Franchising Code Council Limited's for effective self regulation.

That is what you said.

Mr Garrisson—That is right.

Mr ZAMMIT—I do not believe that that works.

Mr Garrisson—Mr Gardini's recommendations were pinned on a couple of different things. The first thing which was required and what he recommended was having legislative underpinning for his code. The second thing was a recommendation that there needs to be legislation underpinning unfair conduct. I am not suggesting that a voluntary code by itself is a solution—far from it. I think that there needs to be some form of legislative change to deal with unfair conduct. That is my point. If you do not have that—

Mr ZAMMIT—At least we are agreed on that. It is just that your final paragraph states quite categorically: 'effective self regulation'.

Mr Garrisson—That is right.

Mr ZAMMIT—That has never worked.

Mr Linacre—If I might interpose, it says it is limited in its effectiveness because a lot of people are not in the code. So we are saying that everybody ought to be in it.

Mr Garrisson—Perhaps I could also point to some additional things. Some comments have been made about section 51AA and particularly the Hamilton Island case. I do not know whether the committee members are aware, but my understanding of the decisions was that they were private and negotiated decisions reached with the ACCC. The current problem with section 51AA is the fact that what it deals with is pre-contractual conduct. The ACCC has stated, from my understanding, that they are trying to test the bounds within which that section applies in post-contractual situations.

Our biggest problem in franchising, apart from the misinformation that occurs prior, is the conduct that occurs during the course of the contract. Unfortunately, I believe that the draft bill that was presented by the former government is not the right solution in that it was a fairly complex piece of legislation; it was a little bit of a nightmare to even try to work out.

I still believe that there needs to be some form of legislation that deals with unfair conduct and how, when there is a commercial relationship, that economic power is properly dealt with. The problem with small business people is that they cannot afford lawyers generally, and when they have gone into a bad business they cannot afford the complexities of employing people like us. I am trying to put myself out of a job here. But my view is that I think that if the ACCC, coupled with a franchise code council, is given the legislative underpinning to deal with the sort of conduct and to be able to enforce proper disclosure then you will find a

much more effective and vibrant franchise sector. That is my view.

CHAIR—You talked generally then, but have you any opinion what specific changes you would like to see to the act?

Mr Garrisson—I know the ACCC in their submission talked a little bit about economic duress. We have a common law principle of economic duress which is fairly irregularly used. I think that it would require some degree of attention but it is where there is that commercial relationship between the parties and they unfairly exploit that that we need to look at the type of conduct and some form of underpinning. It is a question of really then working out the bounds and the exact parameters of how that would work. But I would strongly suggest that there be some clear consultation with the institute bodies so that they can help in the formulation of such drafted legislation, if you take that course.

CHAIR—Do you have a view on the constitutionality of the act?

Mr Garrisson—Under the constitution for the trade practices amendment?

CHAIR—Yes.

Mr Garrisson—No, not at this point.

Mr BEDDALL—In evidence from the Franchise Association they pointed out, and I think correctly, that if you do legislate you have to be extraordinarily careful, as is the case in the United States now where legislation is so complex that disclosure prior to entering into an agreement for a franchise basically means you watch a video and nobody tells you anything because the fear of litigation is there. Do you think we can strike a balance between—

Mr Garrisson—I think you can. I think market forces will sort through a lot of the problems within it. I should point out that what we are talking about is a minority position of problems and unfortunately that seems to be the public perception. Most franchisors are honest, ethical people and do the best thing by their franchisees, but in order for the industry to grow properly, because I think that is where the future is, we need to fix this framework up quickly if it is going to survive.

CHAIR—You spoke before about the difficulty for small business operators in tapping into some legal advice and you suggested that we should have effective disclosure procedures. But have you got any idea in your own mind how we can set up—if that is possible, if that is the right terminology—some sort of access to some sort of legal aid for small business operators?

Mr Garrisson—You currently have a small business unit of the ACCC. You also have a voluntary code. If you give legislative underpinning and protection to the code of practice and the council, then you have got more than enough access to material. And I should say that the ACCC should be monitored in its use of its small business unit and used effectively.

I think legislation is a last resort. I do not think that access to legal aid in small business is going to

be the solution to the problem. If you give the legislative underpinning and the power of the code to the ACCC to deal with complaints, you are going to improve the disputes because what will happen is that you will get an equalling of the negotiation position so that matters will be resolved commercially. I do not think that legal aid is going to be the solution.

CHAIR—I would like to thank you both for coming in, unless you have any summary you would like to cover that we have not covered?

Mr Linacre—I will just tell one short thing, if I may. I think we are really suggesting that there should be some protection for purchasers of franchises because frequently—and I think, Mr Beddall, you raised this in your report into small business—they have come from other sectors of the economy. Sometimes for generations they have not been involved in small business. It is a harder world.

CHAIR—Does that then suggest that there should be some sort of access or education? It seems to me that the basic principles of business planning and a lot of other things should be available to people before they go into business, instead of, as Mr Garrisson said before, talking to the next door neighbour and getting very excited about it, and then refusing or ignoring good advice. Is such an education system around at the moment?

Mr Linacre—I do not think it is enough. I think in Canada they do advertise and warn people about the dangers in small business. I think it would be of benefit if they did get some more help but we really are satisfied with the operation of the code, when it comes down to it.

Mr BEDDALL—We were looking at some years ago when there were a number of people taking redundancy packages. That has escalated somewhat and looks likely to escalate further.

Mr Linacre—There is nowhere else for people to get work.

Mr BEDDALL—People are now buying a job in desperation. I think it is one of the problems we will get when we talk to retailers. People sign leases in shopping centres because they always fear someone else will if they do not.

Mr Linacre—That is right.

Mr Garrisson—If they look—I keep coming back to this—at the return on the investment for them and work out the price they are prepared to pay, and they understand what they are getting into, then they have to take the commercial judgment whether to get involved in a particular business.

Mrs BAILEY—I say this half seriously, I should stipulate. Most large companies today in appointing staff require the applicants to undergo psychological testing. Do you think this is perhaps an extra avenue that could be used?

Mr Linacre—How seriously?

Mr Garrisson—Ask the lawyers.

Mr Linacre—They do, but I have never seen the actual psychological test and I would not be very confident about its outcome. Even those that do have failed franchisees.

Mr Garrisson—Many franchise systems do have varied selection processes which do include psychological appraisals and all other sorts of things.

Mr Linacre—They are written in the United States and at times may not suit us.

CHAIR—I again thank you for your appearance this morning and thanks a lot for your evidence.

[11.18 a.m.]

HOFMANN, Mrs Clare Lucille, 14 Drysdale Road, Warrandyte, Victoria 3113

HOFMANN, Mr Toni Rolf, 14 Drysdale Road, Warrandyte, Victoria 3113

SAMMUT, Mrs Dawn, R. and D. Sammut Pty Ltd, Casey Gardens Caravan Park, PO Box 108, Narre Warren, Victoria 3805

SAMMUT, Mr Renato, R. and D. Sammut Pty Ltd, Casey Gardens Caravan Park, PO Box 108, Narre Warren, Victoria 3805

CHAIR—Committee proceedings are recognised as proceedings of the parliament and warrant the same respect as the sittings 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 make an affirmation. You are reminded, however, that false evidence given to the 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 consider your request. Could you please state in what capacity you are appearing before the committee today?

Mr Hofmann—I am the husband of Clare Hofmann. We are here as witness to maybe strengthen or verify the matters we talk about here. We have been called as witnesses by Mr and Mrs Sammut.

Mrs Hofmann—I was a tenant in Box Hill Central and we are here to assist Mr and Mrs Sammut's case.

CHAIR—Mr and Mrs Sammut, the committee has received your written submission and authorised its publication. Would you like to make any additions or alterations to your submission?

Mrs Sammut—No.

CHAIR—Would you like to make an opening statement before we commence our questioning?

Mrs Sammut—Yes, I think that would be advisable. I will bring you up to date. Approximately 12 months ago, a group of us attended a meeting with Mr Parsons at his office. It was organised by Tony Christakakis. We went there, in particular, to ask for compensation for what had happened to all of us.

CHAIR—Who is Mr Parsons?

Mrs Sammut—Mr Parsons is the general manager of Lustig and Moar, the owners of Box Hill Central. He flatly refused, after much discussion, to give anybody compensation. Our case was particularly bad. He turned to us at the end and said, 'You can do your damnedest. You can do whatever you like. It will get you nowhere because we are able to have the best solicitors and barristers. You would only be wasting

your time.' So that is how we were left at that stage. That just brings you up to date. Our first letter about this business went to Professor Fels on 13 February 1995.

CHAIR—Mr and Mrs Hofmann, do you want to make an opening statement as well?

Mrs Hofmann—May we reiterate our case.

CHAIR—Yes.

Mrs Hofmann—We have not had any comment from you, so I do not know whether you are aware of it. Our case is very much like Mr and Mrs Sammut's case. They were refused the right to sell. We believe we also were refused the right to sell.

We obtained a purchaser, we had a signed contract, we had a deposit and we had allowance in that contract for an increased rental of 10 per cent. This was two years ago and, at the time, inflation was very low. It was not even two per cent; it was about 0.2 per cent at the time. We made allowance for a 10 per cent increase. We thought that was a fair way of passing on the lease. We did have only six months of our lease to run. The new purchaser seemed perfectly happy with that situation. They put in an application to the landlords to take over the lease. For six weeks we heard nothing until the landlords finally decided that they would not renew our lease.

We went back to them and they said, 'Well, we don't want everybody to think that they can automatically get a new lease.' We asked for some kind of negotiation. The response was, 'Yes, if you pay us another 120 per cent.' That was what it worked out to. They asked for $32,000, which equated to a 120 per cent increase.

We, in consultation with our purchaser, researched what market values were on rentals at that stage. We made a counter-offer of $18,000, which we thought was fairly reasonable. Our purchaser had many branches around Melbourne, so he knew what the going rental was and I had spoken to different real estate agents, so we thought it was a fair market rental. We believed we had done everything correctly.

However, the landlords, in rejecting our right to sell, delayed so long that we could do nothing about it. They then opted to go to our purchaser, who they eventually put into another shop around the corner. When we continued our submissions for releasing they said, 'No, we will not have two of the same people in the centre.'

We believe, on looking back at all this, that it is just a set-up so that they can refuse the right to sell. They did this with so many people in Box Hill. They refused everybody the right to sell, and tenants who are still in there are being refused in one form or another. I believe there should be some cheap form of redress. We should be able to go to an arbitration court so that we can express our case.

None of us has the funds to take it to court. I think one of our members did go to court. He went until the money ran out, and that was it. They had two barristers and two solicitors. There was no way he could

compete with that, so it really did boil down to how much you have as to how good your case is. In a situation where shopping centres are filled with small business people, it is their only livelihood. It is their life savings in many cases. These landlords just flip a coin and either you get it or you do not get it.

CHAIR—I am keen to go to questions, but I think Mrs Sammut was keen to say something else.

Mrs Sammut—No, Mrs Hofmann has covered just about everything. On this point of not being able to sell, we had some very good buyers, as is stated in our submission. One in particular they sent off to their solicitors. He was so keen on buying at the price we asked for that he brought his solicitor in for three months. It took so long to get an answer from the manageress. In the end they wrote a letter to him after three months, saying that he was not successful.

That man was involved in one of the most famous restaurants in Melbourne. He did not speak very good English. He spoke in broken English, and his wife had perfect English. His son of 25 years was born here. They were all going to be involved in the cafe. Still, the manageress's excuse was, 'Oh, he does not speak very good English, and we can't have any more like that in the centre.' Referring to the Asian trend in the centre, she said, 'Our customers are getting too upset.' So that was the excuse for that man. That was the trend.

CHAIR—I want to move to asking some formal questions. I want to get an overview from both of you as to what your current circumstances are. Have you sold the business? Has the business closed down?

Mrs Sammut—The only reason I was allowed to sell was that I went to Mr Robert Clark, in desperation.

CHAIR—Who is Robert Clark?

Mrs Sammut—He is our local MP. He knew my shop because his secretary shopped there every day. He knew that I was a good operator. I have references here, going back years, on our operation and on our character. He was very much on my side and he knew. I took the lease to him. He read it and everything like that. He said 'You definitely have got a case here.' That was not only his opinion. The whole thing was that he intervened and told Mr Parsons—after Mr Parsons had abused me on the phone for going to Robert Clark and using all the bad words, and I think you have got it there; I do not have to repeat it—that if he did not let us out there would be real trouble on his part.

CHAIR—Are you now in business?

Mrs Sammut—We have a weekend contract with the Victorian Canine Association. We operate at both the Royal Melbourne Showgrounds and the KCC Park at Cranbourne.

CHAIR—Mr and Mrs Hofmann, have you sold the business or are you out of the business?

Mr Hofmann—I would like to clarify a few things. When we entered the shopping centre, we were wooed on a nice honeymoon. We paid our previous owner goodwill of $230,000, for which we took out a

mortgage and a loan through the bank. Of course, we were new tenants in the shopping centre. These people wanted to go out. There was nothing wrong. We were told we would be given a new lease when the time comes up. As my wife explained, they decided that for them it was financially advantageous to offer it to our prospective purchaser.

I must point out that there was a shop, also in a prime position, but it was vacant, so they could put someone in there who never had to pay any goodwill. Therefore, they could ask for the sort of lease they wanted or were hoping to get. For the purchaser it was still a viable proposition. If he had to pay the lease money they asked for, nobody would go in. That is why the shop was empty. Now someone who just paid the lease had the opportunity. We then had to simply walk out. We lost the purchase, as I said. We had a signed sales contract. We lost our $230,000. We lost the sale. Instead of transferring the lease and the goodwill and receiving the agreed and signed money, we walked out.

CHAIR—Are you in business now?

Mr Hofmann—No.

Mrs Hofmann—Our circumstances now are that we lost that business, we lost that money. I am doing temporary work. My husband is manufacturing environmental control equipment. Every dollar that we can spare, every dollar that we make, goes down to the bank. Our two options were: sell the house, or retain the house—and we have a 30-year mortgage over the house. That means that we will be 80 or whatever when it is finished, so the bank get it either way. Basically, it was gone.

CHAIR—I am sure that my colleagues would like to ask you a few questions, but let me ask you both: what sort of access to leases and what sort of opinions did you get on the leases prior to going into the lease? And did they include the fit-out arrangements in the lease as well?

Mrs Sammut—Yes. We paid—

Mr Sammut—They said that they were going to modify the shopping centre a few months ahead—

CHAIR—This is prior to your going into the lease?

Mr Sammut—Yes, but still nothing happened after three years. There has been no renovation at all. We had high hopes when we went in because of the promises that they had made. Two weeks after we started the business, four shops closed down in our vicinity.

Mrs Sammut—And we mortgaged our house to go into the shop. All of our life savings are gone. Our home is gone. We have lived in a caravan for the last two years because of this, and it is through no fault of our own.

CHAIR—What prior advice did you get before going into the lease?

Mrs Sammut—When we went into it, we were not fools. We tried to do as much homework—weeks

of homework—before we went in, because it was the very first shopping centre that we had been in. But there is homework that you cannot do. There are things hidden that you cannot find out until you get into the thing, such as that these people were going through hell. You have got a representative at the back here from Box Hill of people that were all going through hell, but nobody spoke up. We did not know anybody anyway, and you cannot just go and say, 'Hey, Clare, what is going on here?' They just would not tell you anyway, because everybody has the hopes of trying to sell their business. They are not going to put it around that this is a lemon. So you do what you can.

My husband and I took the agent with us to ask Anda, the manageress, to give us an insight into the shopping centre. She said, 'Look, we haven't got anything written down as to how the shopping centre is going or anything like that. I can't tell you anything.' So I said, 'We're very interested in buying this business, but the rent is way too high,' which it was—$3,000 a week on that business. After she had seen our references, which I have got here for you if you care to look at them, she accepted us without any conditions. She said, 'Get in and operate for six months, and we will reduce the rent.' We had no reason to doubt her for the simple reason that we had our agent there, we had dealt 20-odd years with landlords and had nothing but respect for everybody—respect for each other. We had left everything really clean and they were all rooting for us.

The whole thing was that we had no reason to expect this woman to turn around and then call us up after two months and say, 'Congratulations on your operation. It is fantastic, but now we would like you to spend $100,000 on upgrading it.' We had just spent $200,000 getting in there. Two months later, she wants us to spend another $100,000 to upgrade it. We did not go in there blind. We asked her about whether there was going to be an upgrading of the centre or anything else. 'No,' she said, 'not for at least 12 months,' and then produced a drawing of what was going to happen. That was three years ago, in 1994, and it still has not happened. She said, 'No, you will not be asked to upgrade your business,' and yet eight weeks after we get in she wants a $100,000 upgrade on the shop.

CHAIR—I would like to qualify one thing—and this is probably the hub of the inquiry. I do not particularly want to move into the specifics of this, although we will. Prior to going into the business, did you have the lease analysed by anyone other than your own agent?

Mrs Sammut—Yes, we had our solicitor analyse it.

Mr BEDDALL—The difficulty we have had in a number of inquiries with retail tenancy is that it has, historically, a state jurisdiction. It does not necessarily mean that the federal government cannot intervene if it decides. Is there any sort of appeal mechanism in Victoria where tenants can go if there is a disagreement between the landlord and the tenant?

Mrs Sammut—If there was, it was not made known to us. We did everything we could. We went everywhere we could without money. There was no money available from any of us. We did everything we could separately and as a group.

Mr BEDDALL—This is a centre which is owned by—

Mrs Sammut—Lustig and Moar.

Mr BEDDALL—Is that a family owned company? It is not one of the major—

Mrs Sammut—It is not small.

Mrs Hofmann—They own the Hyatt.

Mr BEDDALL—I am a Queenslander, so you have to excuse me.

CHAIR—Please explain for the record.

Mrs Sammut—They own the Hyatt, Highpoint West.

Mrs Hofmann—They own several centres.

Mr Sammut—They are big operators.

Mrs Hofmann—The people at the back know what they own.

CHAIR—Could you just give us a bit of an overview of what the Box Hill shopping centre was like? How many tenancies were there? Who were the major retailers there?

Mrs Hofmann—The Box Hill shopping centre is the only transport centre in Victoria at present. It has the railway going through underneath; it has a bus station on top. Inside there are about 120 tenancies. They did have a couple of majors such as Safeways, Target and McEwens. I know McEwens has gone now; I think Safeways is still there. I do not know about Target. They had Brashs, but that has gone. A lot of the tenants who were there have now left because the centre has been run down by the landlords, we believe, with poor advertising and poor promotion. Most things were pretty poor—the management was pretty poor as well. They are owned by a major developer in Victoria, who, I think, owns the Hyatt. They are not small players by any means, although there are much larger. I think the family also owns the Plaza in Box Hill, which is the adjoining centre.

Mr BEDDALL—How do they tend to run the other centres?

Mrs Sammut—The same.

Mrs Hofmann—And they also put in a tender for the Malvern market. You may recall that there was a big commotion about their purchasing the Prahran market, which they were defeated on.

CHAIR—Did they run that through an agency or do they run their own managers?

Mrs Hofmann—They run their own managers.

Mr ZAMMIT—I cannot speak for my colleagues but only for myself in this regard. During the past four, five or six years, I have been dragged in more and more, very reluctantly, by people with retail tenancies asking me to intervene on their behalf, not with the management, but with the owners directly on a personal level because of the way they are being treated. I think that is a disgrace. What Mr Beddall said, of course, is right—the Retail Tenancies Act applies in the state jurisdictions, but I do not think it is working.

I can honestly say to you that with one particular shopping centre, I am on the phone to the owner of the shopping centre in Singapore every week or every 10 days because people have come to me crying their heart out about the way they are being treated by the management of these centres. I want to ask you a couple of questions about goodwill so that I can understand how it works. You pay goodwill to buy a business and that goodwill is between you and the person selling the business.

Mrs Hofmann—Yes.

Mr ZAMMIT—What gain is there for the management of the shopping centre to try to squeeze or force you out? If the goodwill goes directly to the person that is buying or selling the business, they have nothing to gain by that.

Mrs Sammut—Oh, yes, they have.

Mr ZAMMIT—Could you explain for the record, please?

Mrs Sammut—We paid, with legals and everything, close to $200,000; there was not anything left. The goodwill on that place was enormous. To outfit it again, it would have cost $300,000. But, at the same time, what they gain out of it is the equipment. Parsons said to us, 'It would be better for our management if you went broke.'

Mr ZAMMIT—Yes, I read that, but why?

Mrs Sammut—Because they can then put somebody in and ask for key money, or they could then. I do not know whether it happens now. But it has happened and that is what happens. He asked me, in a meeting that I especially set up with them, to ask them to reduce the rent so we could operate. By the way, we never owed them a penny of rent; they did not have anything against us at all.

Mr ZAMMIT—So what you are really saying is that there is a rort there because you pay to outfit the shop—you pay $150,000. If you go broke, if you are out of it, the new person comes along and they say, 'Look, there it is, it is all set up for you.'

Mrs Sammut—Fifty thousand or whatever they ask.

Mrs BAILEY—It was my understanding that goodwill was actually the business itself—equipment does not come into goodwill.

Mrs Sammut—It does, a part of it. You do not walk out of a shop and not charge the next person

something for the equipment.

CHAIR—That is a separate issue, I think. I think it is assets plus goodwill.

Mrs BAILEY—Yes, I would have thought that. I just wanted to clarify that.

Mr Hofmann—I think our case answers your question exactly in a very practical term. What has not been said yet is that what shopping centre people tend to do is woo people into empty shops. The goodwill is paid from one owner to the previous owner to take over the business. You mentioned the last five years, and that is exactly where we have been. When we entered into our contract five years ago, everybody seemed to be happy. It was accepted that you paid your previous owner goodwill to take over his business and you negotiated the lease with the landlord.

This seems to have changed. The landlords, it appears, have become greedy. In our case, our prospective purchaser had an empty shop around the corner, for which we now know the shopping centre wanted $40,000. It was not a viable proposition if they had to pay the goodwill to the previous owner and $40,000. It would not have made commercial sense. But to be able to just walk in this shop and only pay $40,000, he is still only paying $200,000 in five years. He walked in there without paying any money.

Mr ZAMMIT—This is a very important point. I am hearing from a lot of retail tenants that this rort is being pulled more and more—

Mr Sammut—Yes.

Mr ZAMMIT—I have not told you what the rort is yet. In the clause, in signing a contract, they are placing a relocation clause in it. That is a very dangerous thing for a lot of retail tenants. That means that if you say 'No relocation clause,' they say, 'Well, we don't want you because we might have to change the shopping centre around and, therefore, you are going to stop us from doing what we want to do.' That sounds plausible. So they sign the contract and very soon after that they tell the new tenant, 'We are going to have to do some reorganising here. We are going to relocate you. You did not disagree with the relocation clause, so we are going to send you from here to there.' The tenant says, 'I can't. You will send me bankrupt because the cost of outfitting is going to knock me out.' They say, 'Sorry, that is how it is.' I am getting a lot of cases like that, people coming to see me and saying that they have not foreseen that when they signed the contract with this relocation clause. Did you have to sign a relocation clause?

Mrs Sammut—No. We had a clause put in that they would not be able to relocate.

Mr ZAMMIT—So no relocation.

Mrs Sammut—No. We had a clause put in that they would not be able to relocate, and they accepted that. But I would like to go back to your comment about your dealings with owners and not management. We tried very hard to deal with Mr Max Moar, but Mr Moar was just not available—ever. When the group got together and asked, through Tony Christakakis, if Max Moar would meet us—

CHAIR—Tony Christakakis is who?

Mrs Hofmann—He was the President of the Combined Retailers Association in Victoria.

Mrs Sammut—He tried to get Mr Moar to have a meeting with us and Mr Moar just passed it back on to Mr Parsons.

Mrs Hofmann—The general manager.

Mrs Sammut—The general manager. None of us could get to Max Moar, none of us.

CHAIR—And Max Moar is the owner?

Mrs Sammut—The owner with Lustig and Moar.

Mr JENKINS—Could we just go to the nature of the leasing agreements. You have just explained that you had written into it a clause for no relocation. Did the leasing arrangement go to future fit-outs?

Mrs Sammut—No.

Mr JENKINS—It was silent on that matter.

Mrs Sammut—It was silent. That is why we made investigations before we committed ourselves as to when that would happen, because we knew we were on the last of our money getting in there and we did not want to get caught halfway through with them saying, 'Right, now you have got to fit it out.' We knew it was going to cost a lot of money to upgrade it, and we were assured that it would not happen.

Mr JENKINS—Were other tenants asked to—

Mrs Sammut—Yes. As we sent the buyers in there—eight in all, that we can recall—they were asked whether they were prepared to pay $150,000 on fitting out as well as the price, and that turned a lot of them away.

Mr JENKINS—You mentioned an amount for promotion. Was that a specific part of that leasing agreement?

Mr Sammut—Yes. Every tenant had to pay for promotion. In our case it was $307 a month. It was no promotion at all.

Mr JENKINS—At the time of signing of the lease was there any explanation of what you would be getting for that $307?

Mrs Sammut—No. I cannot remember that.

Mr Sammut—No, not that I know.

Mr JENKINS—In the leasing agreement, does it have a clause about the managers of the centre having veto over any future sale of your business?

Mrs Sammut—No. I cannot remember it word for word. There is a clause in the lease that says that we are able to sell our business.

Mr Sammut—Subject to approval.

Mrs Sammut—Subject to approval. That is where they have got you.

Mr JENKINS—Out of your experience, what is it that you think should happen, should change, to give greater protection to people who find themselves in your position? For instance, there have been a lot of things that have been said to you that, down the track, did not come around. There appears to be no certainty about the future of the centre—that is, the nature of the centre. There were businesses that were about to leave. You had no idea of what the mix of businesses was to be. Do you think that at the time of you entering into an agreement there should be something that the managers of the centre have to provide you with in writing to say, 'This is what we believe'—

Mrs Sammut—Yes, they should provide something in writing, definitely. They should be made to give everyone a progress report on the centre. It should be there. There is no excuse.

Mr JENKINS—There was nothing in your agreement about any form of arbitration.

Mrs Sammut—No.

Mr JENKINS—If there were disputes.

Mrs Sammut—No.

Mr BEDDALL—Do you think that, as part of the solution, there should be a mandatory independent arbitrator and that all parties must therefore take the umpire's verdict?

Mr Sammut—Yes.

Mrs Sammut—Definitely, yes.

CHAIR—Who should operate that?

Mrs Sammut—I do not know, that is out of my field.

CHAIR—The industry, the Building Owners and Managers Association or the Real Estate Institute?

Mrs Hofmann—The problem is that there is already the building owners association and I think it is probably biased towards the larger developers—Myer and so forth. It would be a waste of time. It needs to be for the tenants or the small business operators. At present there is no representation for small business operators or tenants, and the landlords intimidate you. If you do try to get together, if you want to form an association, you are told you are not allowed to have meetings. They stopped us from having meetings in the centre so we were intimidated every way we turned. You are not allowed to get together.

CHAIR—So an association was not a part of the leasing arrangement and there was nothing?

Mrs Hofmann—No, there was nothing there. There was not allowed to be anything there.

Mr ZAMMIT—Did you try to form the Box Hill Chamber of Commerce or something like that?

Mrs Hofmann—Not the chamber of commerce but we did form a group called the Box Hill Combined Retailers, which was a part of the combined retailers association. The problem is that tenants, after they have been working all day, 12 hours and sometimes 14 hours and 16 hours a day, have no time left to go to a meeting. They are too tired to do anything after that so it is a matter of relying on somebody else to do it. How can they put all they have into an association?

Mrs Sammut—Our relationship with management went sour when we were called up, congratulated on our operation and asked for $100,000 to improve it. When they realised we were out of cash—turnover had dropped after that Christmas by 15 to 20 per cent and things were really bad and there was no money to do anything—that is when the whole thing went sour. They wanted somebody in there who would upgrade the shop and not wait.

Mr Sammut—It was not necessary to upgrade it.

Mrs Sammut—It was not necessary to upgrade it. We had cleaned it up.

CHAIR—Were you here when the previous witness was giving evidence?

Mrs Sammut—Yes.

CHAIR—The solicitor, Mr Garrisson, was suggesting that what retailers have to understand is that what their business is is a five-year lease or a 10-year lease or whatever it might be. The business is only the lease period, and that is the business, the lease.

Mrs Sammut—Yes, and we had a 12-year lease.

CHAIR—BP spoke about not recognising goodwill and by implication the previous witness indicated that goodwill is a matter between you and the incoming buyer and that what you are selling is not the business or the goodwill but the lease. Have you got a comment on that?

Mrs Sammut—We had a 12-year lease and that was unheard of in the shopping centres. We took

over from the original operator who was a friend of Mr Moar. The story went that he tried to sell it a few years before he sold it to us but he could not sell it because they would not accept the amount of time on the lease. Therefore, he said, 'I'll fix it.' He went off and got a 12-year lease from Mr Moar. That is how we got the lease for that length of time, because it was unheard of until then.

CHAIR—If an owner says at the expiry of the lease, which I think is what happened to you, 'I'd like this extended', what should happen? I just want to get some feedback from you? Do they have that right to say that to you at the end of lease?

Mrs Hofmann—If they do it that way then where does all this goodwill that has been paid for go to? Obviously it goes out of our pocket. Somewhere you draw the line. There is a whole stream of people who are going to fall into bankruptcy because there is no goodwill any more. There is only a five-year lease. When we went into ours, we inquired about an additional option for the lease—ours was only five years—and they said 'Yes, of course, we will give you another lease. We need tenants. If you are good operators there won't be any problem about another lease.' So we went on on that premise.

CHAIR—So there was no option in your lease?

Mrs Hofmann—No, there was no option.

Mr ZAMMIT—Why did you not ask for an option at that time?

Mrs Hofmann—When we first went in, we did. They said it was an assignment of a lease and they said, 'It won't be a problem. If you are good tenants, there won't be a problem getting another lease.'

Mr ZAMMIT—So why did you not put it in the contract—five and five or three and three?

Mrs Hofmann—Our solicitor did not suggest that to us. He had been through the lease, and there had been no comment along those lines.

CHAIR—Was your solicitor conversant with these situations; was he a specialist in lease negotiation?

Mrs Sammut—No, mine was not anyway.

Mrs Hofmann—I do not think so. Looking back, I very much doubt it.

Mr ZAMMIT—That is a basic requirement. In any business you go into, you ask for a lease plus an option, to exercise that option. I do not understand solicitors not advising you.

Mr BEDDALL—The lease has already gone to option, has it not? You had taken over a lease which could have already exercised an option.

Mrs Hofmann—No, they had a new lease; we were six months into the lease when we took it over.

Mrs VALE—Had any of you been involved in small business previously?

Mrs Sammut—Yes, that is why I was going to give you these references. We have been in business around 25 years. We had come from the Northern Territory. We were up there on contract to the university before we came down here and took this position. We catered for all the parliamentarians, all the dignitaries, everyone else who came there—that is the standard of our work—as well as the students and anybody that was anybody and everybody.

Mrs VALE—So you felt that you had a good working knowledge of what it takes to run a small business.

Mrs Sammut—Yes.

Mr Hofmann—Our problem was not that it was misrepresented or anything. The business we bought was exactly what we thought it was going to be. We were successful. As I said before, five years ago it seemed to be different. It was accepted fact that you paid goodwill, and now this seems to have gone out the window. Our problem simply came only out of the fact that the landlord refused to let us sell and recoup our original goodwill money.

Mrs Hofmann—There could not have been a problem with it, because they accepted the tenant anyway. They wanted the tenant. They wanted the fit-out. They wanted everything. They simply separated the two. I believe that waiting until tenants go broke allows them to get a bigger fit-out from their incoming tenant and higher rents, and, therefore, it increases the asset value of the shopping centre in general, which is their asset value, their goodwill.

Mr JENKINS—Have any of you had experience with single landlords?

Mrs Hofmann—Individual landlords?

Mrs Sammut—Yes.

Mrs Hofmann—We know of one over the road who did the same thing. He suddenly demanded a 200 per cent increase in the rent.

Mr JENKINS—Is there greater redress for tenants in that situation? This is the nature of tenancy law, is it?

Mrs Sammut—We have never had any problems with our landlords over all of the years that we have been operating. That is why we had no reason to doubt this woman. We have left everywhere with very high praise. That is a long history of landlords. We have never owed anyone one cent of rent or anything else—even this lot.

Mr JENKINS—When Mr Clark intervened on your behalf, you seemed to suggest that he looked at the lease and thought that it was okay.

Mrs Sammut—He looked at the lease, and his first comment was, 'How on earth did the solicitor let you sign this lease?' He said, 'You definitely have a case here.' I said, 'How can I do anything about it? I've got no money.' Then I just proceeded to tell him that we were in a group and we were trying to do the best we could through the group to get better conditions and some sort of compensation, even if we just got our money back, which would enable us to live in a house again.

Mr JENKINS—Did he think that perhaps there was not a tribunal that you could go to? Did he see that as being a problem?

Mrs Sammut—No, he did not suggest anything like that. He had been out of the legal field for a while. He informed me that he was a barrister but that he had been out for a few years. He did not go right into it, but he did what he thought he could do and I did not ask any more of the man, because it was good to be able to go to him and talk to him.

CHAIR—You say you have some references to submit. Do you want them to remain confidential?

Mrs Sammut—No; this is just a character reference.

CHAIR—We are happy to accept that. Do you have a copy of the lease arrangement?

Mrs Sammut—Yes.

CHAIR—If you are happy to do that, I would like to take that as a confidential exhibit, because I think we should show due respect for the owners of the property.

Mrs Sammut—Yes; you can do what you like with it. It does not worry us. It is all above board and honest and there are no lies.

CHAIR—In respect of their own organisation, I think we should treat it as confidential. It is proposed that the documents presented by Mr and Mrs Sammut be taken as evidence and included in these records as exhibits. These are references, which will not be treated as confidential, and a copy of the lease arrangement—which, in fact, will be treated as confidential. There being no objection, it is so ordered. I would like to thank you for coming along today. As a final statement, is there anything you would like to say to the committee?

Mr Sammut—The fact that they gave the new operator a 40 to 50 per cent reduction in rent and they would not allow us any reduction at all, after having promised that, speaks for itself.

CHAIR—Did they put the promise in writing?

Mr Sammut—No; but there was a witness.

Mrs Sammut—Our agent was his agent, so we got it through the agent; plus the fact that this man only had to put out about $10,000, which anybody could have done.

CHAIR—I have one final question. I know you are going to give us the lease, but is there an arbitration clause in your lease?

Mrs Sammut—I cannot remember.

Mrs Hofmann—No, there is no arbitration clause in the lease.

CHAIR—Mr Hofmann, would you like to make a final statement?

Mr Hofmann—In what has been finally said, I think the main problem is that the only recourse retailers have is through solicitors and barristers. There is no other way. If they want to really take some action, they have neither the means nor the money. You spoke of small shop owners: in our case, these people have so much money. In one case they came with two solicitors, a barrister and a QC, so what hope have you got? Money speaks, and that is the first thing that needs to be addressed. There needs to be an arbitration system where not the money speaks but the case does.

Mr ZAMMIT—In New South Wales, there is a rental tenancies tribunal, and I wonder if we might get some more information on that to see if it could be extended to include retail tenancies.

Mrs Hofmann—Yes; the rental tenancies is fine, but it does not cover the retail tenancies. One thing this lease does cover, though, is a sharing of the outgoing expenses in a shopping centre. The lease covers sharing of those outgoings. They group all the outgoings together and then they divide it amongst the tenants. As I said before, the centre is a MET transport centre. They send a statement to the MET, asking for their contribution to all the outgoings, and they send a different statement to the tenants, which is for the total outgoings and we pay the total outgoings. As well as that, they receive the contribution from the MET towards those outgoings. So they are double-dipping. They do not seem to be bound by the lease that we have all signed.

Mrs Sammut—We had a meeting on this.

CHAIR—Are you prepared to table those statements?

Mrs Hofmann—Yes.

Mrs Sammut—Tell them how Parsons explained that as ‘oranges and apples’ and as rent that was not rent.

Mrs Hofmann—We did approach the landlord and, when we asked him about this, he said, ‘It is not outgoings, it is rent.’ But if it is not outgoings and it is rent, then where is the rent? He is just changing things around, however he thinks.

Mr Hofmann—He ultimately said, ‘I do not know. You tell me what these figures are.’ And that is from the general manager of the centre. They are two audited statements. One simply has a column left out: the money they received from the MET.

CHAIR—We would be very keen to get that information. I ask you to formalise a submission to us. Write to us, explain those little examples you have just mentioned and include in that the information you have spoken about. We would be keen to have a look at that and we will take it as consideration then.

Mr Hofmann—Should we send it to you?

CHAIR—Yes, please do that, and we will advise you of the best way to do that. I thank you for coming in today and explaining your case. We have a number of other people in Box Hill this afternoon who are talking to us. Thank you for your evidence.

[12.01 p.m.]

CREWS, Mr Brian Dudley, 24 Torwood Avenue, Glen Waverley, Victoria 3150

SLATTERY, Mr Neal Raymond, Managing Director, Amalgamated Roofing Tile Distributors Pty Ltd, 5-7 Yose Street, Ferntree Gully, Victoria 3056

CHAIR—Welcome. Committee 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 make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as 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. Mr Crews, in what capacity are you appearing before the committee?

Mr Crews—I am appearing as a private citizen.

CHAIR—Mr Crews, the committee has received your written submission and authorised its publication. Would you like to make any additions or alternations?

Mr Crews—No.

CHAIR—Mr Slattery is providing a submission now.

Resolved (on motion by Mr Beddall):

That the committee receives as evidence the submission from Mr Slattery, dated 4 October 1996, made to the House of Representatives Standing Committee on Industry, Science and Technology.

Resolved (on motion by Mrs Bailey):

That Mr Slattery's submission be treated as a confidential exhibit.

CHAIR—Would you like to make an opening statement before we commence our questioning, Mr Crews?

Mr Crews—Yes, I would, Mr Chairman.

CHAIR—Please go ahead.

Mr Crews—Thank you. I would firstly like to summarise what my submission was to you in terms of some facts, some reasons behind what happened and some comments. I operated a roofing tile distribution and contract fixing business from 1988 till July 1994 in the metropolitan area. I employed at the closure of

the business about 20 employees. We distributed and fixed roofing tiles supplied by Monier, Boral and Nubrik. The manufacturers also fixed roofing tiles but were in a different part of the market—the volume builders and the national builders. We looked after the smaller builders and owner builders. We very rarely clashed. That was initially.

From about 1992 onwards, we found ourselves under increasing and aggressive pressure from the manufacturers, who were chasing my customers. The consequence of that was that, in order to keep our customers, we reduced our prices. Consequent to that, of course, there was a great decrease in profitability of my business.

I have no objections to competition, but most of the competition was grossly unfair and unjust because it involved what I believe to be improper transfer pricing by the manufacturers of their roofing tiles to their fixing divisions. I strongly protested to the manufacturers and their management at that stage and constantly referred to the fact that they could be in contravention of the Trade Practices Act.

In July 1994, as one, the three manufacturers withdrew their supply of tiles to me as I was unable to bring my trading terms back to 30 days on notice. Consequently, I called in a company administrator. The company administrator endeavoured to make a scheme of arrangement with the creditors, the three main manufacturers. He was unable to do so and, consequently, my business is in the process of being liquidated.

The company administrator attempted to dispose of the business to other parties in the industry, but the manufacturers on one occasion threatened one of the other distributors that, if they bought any part of my business, their supply of tiles would be withdrawn immediately. The administrator was also told that in no way, shape or form would Brian Crews be allowed to continue in the industry.

The result was that within two weeks of trading my company went into liquidation. I lost my business. I lost my financial assets. I lost my house. I lost the esteem of my family as a financial supporter. An illness that my wife now has was probably contributed to by the stress at that stage.

I will go into the reasons behind what happened. In 1993 the manufacturers, led by CSR, wanted to restructure the marketplace with the aim of removing from the marketplace all of the large, stand-alone, independent distributors—such as me. I was probably the seventh or eighth largest in the metropolitan area.

I refer you to an article which was published in the *Financial Review* by Chanticleer in about mid-1993. In hindsight, it appears that the plan of the three manufacturers working together was to reduce the financial strength of the distributors by aggressive and unfair competition using transfer pricing. If you want to know how transfer pricing worked in the roof tiling industry, I refer you to the Royal Commission into Building Productivity in New South Wales, pages 147 to 151.

Having financially emasculated their distributors, the manufacturers were then in a position to deal with their distributors however they wished. I put my head up and challenged them on trade practices matters. My head was summarily chopped off. I was disposed of, and I was made an example of to others.

My comments and reflections in hindsight after two years are these. I do not dispute the right of any

manufacturer in any industry to decide on or change the channels of distribution within their industry. That is their right. However, I do challenge and dispute the way, in this case, in which they went about it. Their actions were harsh, oppressive, unjust, merciless and many more adjectives like that. They never gave us any opportunity to restructure. They never asked us to sit around the table. They never gave us the option of merging and, by acquisition, reducing the number of outlets in the industry.

When challenged, they told us that they needed us, that they loved us and that they would look after us for ever and a day. All the larger distributors had invested heavily in their distributorships on the implicit instructions or requests of the manufacturers by way of competent staff, displays, repair tilers and equipment. In other words, we were told to run a professional show or get out. They then went about the process of discarding us. Another distributor wanted to appear with me today to support my contentions. However, that distributor is still within the industry and did not want to come for fear of retribution by the terrible triplets of the Australian building industry.

However, Mr Neal Slattery has come along. He is currently still in the industry. I applaud his courage in coming, because he has to deal with the manufacturers next Monday. The manufacturers' tactics never made good business sense. Why would a good manager encourage confrontation which has been endemic in the industry over the past few years? I submit to the committee that their actions have been unethical, amoral and certainly against the spirit of the Trade Practices Act—and, at worst, in contravention of the laws, and certainly downright deceitful. I ask the rhetorical question of the committee: is this the type of behaviour we want from our top corporate citizens?

Finally, I want to thank the committee for the opportunity to present my story. You can see from the submission that I have tried many avenues—the Australian Securities Commission, the TPC, members of parliament, the Commonwealth Ombudsman, et cetera. You are, in fact, the first to listen in any formal sense and I thank you for that. In view of the fact that my business affairs are not yet finalised, I can assure you that I have not spoken out without some sense of trepidation today. Thank you very much. I will be glad to answer any questions.

CHAIR—Thank you for that candid statement. Speaking on behalf of my colleagues, we respect you for coming along and talking in those terms. Mr Slattery, do you have an opening statement you wish to make?

Mr Slattery—No. In view of the confidentiality of what I have submitted I am happy to answer questions on issues related here, but I prefer not to make an opening statement.

CHAIR—Mr Crews, you say you approached everyone, including the ACCC. What advice did they give you on how you might redress your situation? Was action through the courts the only option available to you?

Mr Crews—The results of talking to the TPC and subsequently the ACCC were that they said they well understood the patterns of behaviour which they had observed within the industry. However, they were not in a position to take any action because there was insufficient evidence. On asking them what sort of evidence they really wanted, needed or required, they said that it would have to be either a previous dissatisfied senior employee or, in fact, a letter or document from within the company's files. As I had access

to neither of the two, and could not point them in the right direction where they could obtain that, we went no further. They took a very legalistic approach in that they would only run with something if it would stand up in court against what would have to be a very considerable opposition.

Mr BEDDALL—Mr Crews, your case is a clear example of what this committee, under my chairmanship, identified in the report that we did on small business—that is, abuse of market power. I am concerned that you got that report from the ACCC because one of the recommendations we made, which was adopted by the previous government, was that the Trade Practices Commission, as it was then—now the ACCC—was empowered to take action on your behalf. You say they just went down a purely legalistic—

Mr Crews—Yes.

Mr BEDDALL—It does not sound like Fels—he usually chases every hare he can find. I am just surprised that this is the outcome.

Mr Crews—I have those answers in writing. In fact, in the last submission I put on top of the letter, 'For the direct attention of the Chairman, Mr Fels' because I felt that it was not getting through. The answer came back that Mr Fels had directed whoever was replying to answer, and that this was the answer: 'We want the evidence. You have not got it. We cannot help you.'

Mr BEDDALL—Would you be amenable to the committee taking this up with Mr Fels?

Mr Crews—Yes, I would indeed.

CHAIR—How long had you been operating the tile distribution before you began to encounter problems? What was the relationship that you had with the manufacturers in that period, and did you have any written agreement or contract with them?

Mr Crews—I entered the industry in 1988. For the first few years we had very good relationships with the manufacturers. They kept to their side of the fence; we kept to our side of the fence. When I say 'ours' I am referring to the distributors. There were no written distribution arrangements. I was well aware of that. There had never been anything written in the industry. It had grown up over a period of years. But until 1992, I guess, we had fairly amicable relationships with them. Then it all changed.

CHAIR—Prior to it changing, they did not have any retail outlets themselves but had all their retail through distributors. Is that right?

Mr Crews—No, they also did fixing of roofing tiles themselves, but they would concentrate on the larger volume builders and the national accounts—for instance, Jennings, who operated across states. They left the smaller builders to us. Many of the smaller builders, and also the owner builders, wanted to deal with small business. They wanted to see the whites of the eyes of the person to whom they were paying the money.

CHAIR—Mr Crews, did you take over an ongoing business or establish one yourself?

Mr Crews—No, I purchased one.

Mr ZAMMIT—Mr Crews, my heart goes out to you. But I have run businesses for 20 years prior to entering parliament. I have appointed agents; with others, manufacturers have appointed me as an agent. I would never ever take on a distribution unless I had a contract, no matter whether it be wallpapers or fabrics or anything. You just do not do it. If you go and offer a distribution to a company and they do not say, 'What about a contract?' you do not say anything, because it is in your interest not to say anything.

But how could you go into business and put your house on the line on the whim of a manufacturer who could close down their business if they wished, or take it from you, just like that—with a phone call? As I said, my heart bleeds for you, but business sense—I think you mentioned business sense, they were your words—dictates that you just do not do it. No matter what business you are in, you just do not do it. I suspect that is probably why the ACCC have refused to do anything about it, because it is just not business sense.

Mr Crews—I understand what you are saying, and I certainly would not do that again if I had the funds to do it. However, they were, shall I say, 'heady days' in 1988. They were heady days in the business sense after the October 1987 crash, and a lot of commonsense was thrown to the winds, as you are well aware, in the banking fraternity. I in fact had a joint venture partner. I had a financial partner who was a venture capital company. The venture capital company took one-third of the shareholding and financed the acquisition. The venture capital company was a partly-owned subsidiary of the Westpac Bank.

Mr ZAMMIT—All on a handshake. Was that all—just on a handshake?

Mr Crews—Sorry, the business was acquired from the previous vendor together with guarantees. Needless to say, verbal guarantees—sorry, written guarantees from Monier and Nubrik that they would continue to supply the tiles. That was a one-line letter, 'We will continue to supply the tiles.' That was part of my purchase contract that the vendor provided or made sure that the three suppliers gave that assurance in writing. But that is all it was. It was a letter, but that was subsequently torn up.

Mr ZAMMIT—It is useless.

Mr Crews—But, as Mr Slattery might tell you, subsequently other arrangements were entered into, and I suspect that they were torn up also.

CHAIR—Do you want to expand on that, Mr Slattery? Are there, in fact, distribution agreements now about the place?

Mr Slattery—As part of my submission, all three manufacturers felt that it was intolerable that, on the basis of a handshake, we could purchase material from all available manufacturers and thus play one against the other to obtain the best possible price for our customers, and sought to formalise our arrangements. But, as part of that formalisation, they rejected the right of the distributors to purchase tiles independently from all manufacturers in future. In other words, if you want a contract, you must become exclusive.

Mrs BAILEY—Mr Slattery, as you are still involved in the business, can you give us any indication whether small builders are able to purchase their tiles and ultimately the price that the consumer pays? Are they able to purchase at a better price than previously when there were more of the independent operators in the system?

Mr Slattery—I think that by sheer volume of trade in the marketplace—a reduced volume of trade—there is no doubt that builders are currently purchasing the best that they have ever purchased. I do not think this is a reflection on the business community, because this is historically low—the number of building permits being issued. Our concern is that if the independents like ourselves do not survive, they will have very little choice but to pay what the three manufacturers require for their product and only have three similar outlets to purchase them from, as is the case in other states in Australia. In Queensland, for instance, there is not an independent roof tile distributor; you buy directly from Pioneer, CSR or Boral and they will install their product for you. The builder has nowhere else to go and the pricing of the product is marginally different. That is our fear for Victoria if the independents are squeezed out.

CHAIR—If I read your confidential submission correctly, and in broad terms, once you had a handshake agreement you formalised it with one person. And because you formalised it with one manufacturer, the other two said, 'We don't want to deal with you any more.' Once you had formalised it with that particular manufacturer, after six months of trading under their terms, they started changing the terms too?

Mr Slattery—I think they started changing the terms on the first day. We spent quite a number of months negotiating this in the company of my accountant. We had many meetings with them. We documented concisely our questions and their answers, and we followed that through with heads of agreement and so forth to come to an agreement with them. At the end of the day they got very cold feet about the extensiveness of our agreement and offered to replace it with a more simplistic agreement that would encompass all previous discussions.

My understanding of that period was that all discussions that we had formed part of that agreement. That agreement was drawn up under the key distributor program and it was entitled, 'Active growth and business partnership agreement between Amalgamated Roofing and CSR Building Materials.' They purported to enable my business to survive and prosper.

As you will see from my submission, they identified four or five distributors that they felt had the intellectual capacity, the management resources and financial resources to expand the businesses in a difficult climate, and they saw these outlets as natural supply centres for significant products. Effectively from day one, though, we were clashing head on for the same customers. Any attempts that were made to allow us to represent their interests in certain markets were ignored. I had dozens of meetings with them to highlight the fact that it was not working: the excuse was always, 'These are early days, we will rectify the problem.' After six months we did not have a business that was viable in their interests any more, and they ceased supplying to our business.

CHAIR—And their competitors don't supply you now?

Mr Slattery—No.

CHAIR—So what is the outlook for your company?

Mr Slattery—Currently it is very bleak, as you will see from my submission. We were in the top five distributors when we were selected to join that program. We had close to 40 employees working for us at the time. Currently I have two employees. I have closed the offices, closed my business, and I am operating out there installing the roof tiles myself for a small band of loyal builders that I have retained. We had 300 builders when we joined this program; we now have close to 30 of those builders left. The outlook for our business is very bleak. We have suffered an enormous financial loss in disposing of our acquired assets in this period of time. We are under severe pressure from our banks to repay large amounts of debt and, without access to product at competitive pricing in the marketplace, our future is very grim.

Mr BEDDALL—Mr Slattery, I will put the question I asked Mr Crews. Have you talked to the Trade Practices Commission, because it appears to me that you may have what Mr Crews did not have, and that is a contract that is in breach—an abuse of market power by the supplier?

Mr Slattery—We have not talked to them as yet. But we have certainly briefed a barrister to test our case. He believes we have a very strong case and he believes that we have got a very good chance of success. But he obviously wants a substantial amount of money up-front to run this case, and there are no guarantees in return. Obviously, one of the options available to us under his advice is that we could submit the case to the ACCC—in other words, we could start the case and we could seek additional funding from the ACCC should CSR tend to overpower us with legal representation. We are actually in the process of finalising that brief and forwarding it to the ACCC.

Now, as this inquiry has come forward, I have come through that to make people aware of the pressures that we are under just to retain our businesses.

Mr ZAMMIT—Just for my own interest, what is the import duty on building materials?

Mr Slattery—I do not think it is relevant as such, but I believe that it is only four per cent. I think the barrier to entry for building materials is purely and simply the cartage cost.

Mr ZAMMIT—The weight factor.

Mr Slattery—We looked at getting roofing materials from China 18 months or two years ago, but the cartage cost is just prohibitive.

CHAIR—Are there any further questions? I appreciate you coming in and opening it up. It is interesting that Mr Beddall took that line on the ACCC and it is probably something we will be following closely. I certainly would be taking it up with Mr Fels, particularly in your case, Mr Crews. But I would like to thank you both for coming in today. Is there anything finally you would like to say to us, given that we are the only ones listening at the moment, Mr Crews?

Mr Crews—I would just like to say that, on reading the article that you have in front of you, an interview from Mr Kells, I did not sit back and just get alarmed about it; I actually wrote to Mr Kells. I got an answer from Mr Kells, who is now the chief executive officer. The answer is in front of me. This was in 1993. If I could just read the last paragraph:

I can assure you that we do not intend to upset any of our customers or established distribution arrangements, particularly in the roof tile industry.
Newspapers are notoriously inaccurate in most items of importance.

I am sure the *Financial Review* would be interested to know what Mr Kells thinks of their reports. I would be prepared to table that if it is of any interest to the committee.

CHAIR—I would just like to state for the benefit of *Hansard* that that is an exhibit that Mr Crews has just referred to. Thanks for coming in today. I do not know whether or not this committee will be helpful in your cause. Certainly you have both got some challenges ahead of you and we wish you well on that basis. In the meantime, it is proposed that the following document presented by Mr Crews be taken as evidence and included in the committee's records as an exhibit—that is, a letter from CSR to Mr Crews. There being no objection, it is so ordered. I want to thank you both for coming in.

Luncheon adjournment

Evidence was then taken in camera, but later resumed in public—

[2.36 p.m.]

CARUANA, Mrs Mary, 37 Glencairn Drive, Greenvale

McCANN, Mr Raymond Wayne, 42 Cavendish Avenue, Wantirna

SIETZEMA-DICKSON, Ms Jean, 493 Elgar Road, Box Hill North, Victoria 3129

SAMMUT, Mrs Dawn, R. and D. Sammut Pty Ltd, Casey Gardens, Caravan Park, PO Box 108, Narre Warren, Victoria 3805

CHAIR—Welcome. This hearing is back into a public hearing. Committee proceedings are recognised as proceedings of 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 make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as 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.

In what capacity are you appearing before the committee today?

Ms Sietzema-Dickson—As a private citizen.

Mrs Caruana—As a private citizen.

Mr McCann—As a private citizen.

CHAIR—The committee has received your written submission and authorised its publication. Would you like to make any alterations or adjustments to your submission?

Ms Sietzema-Dickson—No, I think that can stand.

CHAIR—Would you like to make an opening statement before we commence our questioning?

Ms Sietzema-Dickson—Thank you, yes. I actually would like each of you people to have one of my business cards. I am a poet. I am not much published yet, but I believe that I can be counted as a poet. Maybe you would like to take those up and give them one each, because I would like you to take this home and read it afterwards. The reason that I am a publisher is because I want to get poetry out. I have got involved in this because I have lived in Box Hill for 30 years and I have been concerned by what I have seen happening in Box Hill Central. I got to know my friend Mary Caruana and I found that she was struggling. I am here today to speak up for the small traders because I feel they need a voice. Some of the even smaller traders just have not got the wherewithal to speak for themselves.

I was reading *Wild Swans* recently, which gives a picture of China under communist rule and the fear

that was engendered there. I thought, 'This doesn't happen in Australia,' but there are moments when I think it does and it frightens me. So my concern is to see justice done. My personal experience is largely limited to one shopping area—Box Hill—but it is obvious that that is widespread. It is clear that the landlords are acting rather like feudal landlords in centuries past with this total power. It is clear that the present Trade Practices Act is inadequate to protect these small traders. I am glad to see Kim Beazley's private member's bill being raised, but I do not know that even that goes far enough.

The deficiencies have only come to light with the development of the large, undercover—you can take that word in two ways—shopping areas. They have not been helped by a downturn in the economy after the boom of the 1980s. It has been helped even less by the fact that our government is guided by economic rationalism which takes no account of the value of service industries in its assessment of work done.

I have talked to many traders and ex-traders in Box Hill and I would like to—I do not have them now—present further submissions later from some of those other traders or get them to send them to you. One ex-trader talked to me about how she had suffered in her attempt to run a business to provide work for herself and her son and to set him up in business later. Her early enthusiasm was replaced by a growing despair as she realised that the whole system was stacked against her. Figures of income expected and traffic flow had been misrepresented. The lawyer, who was supposed to make sure that the contract was workable, did not do his job.

Within weeks of starting, she knew that she could not make the shop pay and told the management. When she complained again, they told her to look for a buyer, but, as you have heard already, it was the same story: they refused to see the buyer. In the end, she was forced to leave owing rent and a massive debt to the bank. When she talked to other traders she found that they were all in despair but were scared to do anything about getting together because of the intimidating tactics of management. Today, two years after leaving her shop, she sees no way out of the continual drain of debt that she carries.

I believe that a big part of the problem in our area is due to careless landlords and incompetent and uncaring management. I have more detail, but I do not want to talk for too long now. It is not only incompetency. You have heard about the fraud that we suspect, and I have a piece of documentation about that.

One small fashion retailer at the Box Hill Central shopping centre has now brought legal action through the arbitration court against the landlord, Lustig and Moar. The tenant alleges that Lustig and Moar has obtained a financial advantage that runs into millions of dollars since the opening of the centre by charging the small tenants too much in outgoing expenses. These are costs incurred by the landlord to operate the centre—such as electricity, maintenance, escalator operation, security, cleaning, et cetera.

Box Hill is in a different situation from that of other centres because of the transport centre. Some of those costs are meant to be borne by the Met, but they are apparently charging both ways, and we have figures through the freedom of information about that. That is probably enough. I had written down some ideas that I thought might be helpful.

ACTING CHAIR (Mr Beddall)—We will come to that. Does anyone else wish to add to the opening

statement?

Mrs Caruana—I would like to say thank you to Jean Sietzema-Dickson. I have always said she was the angel for me because she walked through the door of my restaurant. I had been praying to God for someone to walk in and help me. I went into the centre to get this business to set up my son and that person she was reading about was me. If it had not been for her, for her husband and family, I do not know how I and my family could get through this for me to be sitting here today. She gave me the strength and the courage when I was scared to walk out of my shop just to get some pamphlets to some of the tenants such as Dawn and Clare, George and Ray, to get together to get meetings going. We were all scared to even talk to each or even have a cup of coffee because the impact, the severity, of the way they did their proceedings scared us stiff. Actually, I did it once and I got caught by security and the manager, Anda Anderson, rang me and abused me to the extreme where if it had not been for Jean, I wish I would have had a gun and shot myself, because it was very severe. I had never ever had a shop before. It was my first experience.

But I had had a small business which I set up myself. I was very proud because I have three sons. They all wanted to be chefs and today they are. One is 27, one is 24 and the other one is 22. The dream my husband and I had was to work very hard and accumulate as much money as we could, which we did. We had a lovely home which we borrowed on and bought the shop for my eldest who had gone through MCG and got medals in his cooking. He really strived. I had been looking for 3½ years for this shop. I did not just buy this shop. I went through all the agents and solicitors and accountants and tried to do the right thing. We were happy and we got into this shop, but within eight weeks I knew I had bought a nightmare, to the extreme where my eldest son no longer wants to cook any more. He works in a factory with his dad.

My second son is a chef, but he only works casual. He wants to go into business and that is all he talks about. He says, 'What am I going to do, mum?' I said, 'Wait. We have to wait until it changes.' So I would like you to not just look at how you can change the situation—I know that is what we are here for—but think about what it does to the families, to the marriages, to the kids, to the people who are not so educated who depend on solicitors and accountants to get them into these businesses; so we can just pull our heads above water. That is all I have to say about that.

ACTING CHAIR—We have heard a large number of people who have vacated the shopping centre or have had their leases terminated. How many traders are still there?

Mrs Caruana—Very few. I have 45 names on the petitions here. Most of them have gone.

Ms Sietzema-Dickson—There has been a 10 per cent empty shop rate for the last couple of years. They keep putting them in and they keep going out. I cannot tell you the exact numbers. I could find that out possibly, but I do not have that at hand.

Mr McCann—I think at one stage last year in the shopping centre something like 15 to 20 shops were vacant. Some of those shops had been vacant for two to three years. When you approached the manager responsible for leasing, his reply to me was, 'You find somebody to go into a delicatessen after the smallgoods scare last year or the year before.' It was not up to me to go out and find somebody, but that is their approach. This particular delicatessen has been closed now for two to three years. In a shopping centre

where you have only got about 120 shops and you have got 20 vacant, that is 20 per cent or so. That is a large percentage and there must be something wrong, particularly when the shops are vacant for a number of months. I go into other shopping centres and walk around and you see vacant shops, but those shops are not vacant for too long. They might be vacant for a week or two weeks but then at Box Hill Central, you will see a shop vacant for months at a time, even years.

Mr JENKINS—I want to ask a question about the Box Hill area. I was going to preface it by saying this was for my interstate colleagues on the committee but it is really for me, being from the northern suburbs. I do not really know the answer. What was the effect of the opening of the Box Hill Central shopping centre on the strip shops along Whitehorse Road and around the corner?

Ms Sietzema-Dickson—It has gradually deteriorated. The strip shops along Whitehorse Road I think it has turned into a business area—other sorts of business rather than shopping now. There is very little shopping along Whitehorse Road.

Mrs Sammut—There is a big Asian influence there.

Mr JENKINS—And there is a shopping centre further up?

Mr McCann—Next door.

Mr JENKINS—The Plaza, right.

Ms Sietzema-Dickson—The Plaza was there before the Central opened.

Mr JENKINS—So the management—at the time when you entered into leases—would talk optimistically about how things were going to happen at the centre. They would have given you some sort of thought not only that everything was rosy, but that it would get better? Would that be the case?

Mrs Sammut—Yes, exactly the case; with me anyway.

Mrs Caruana—They were always saying about the traffic flow that we had there. There are some figures here that I would like to show you where they are saying that in 1993, 25,000 people were going through there. And then in 1994 there were 180,000—this was advertised in the *Retailers' Digest* there. That was because people were going from the trains and going up the escalator, on to the bus and going home. But there was little advertising. We were paying them extra money on top of our rents to advertise and promote. It was just not happening. When I went in, it took me about 15 minutes to get into the centre. I had an interview with David Parsons because Anda was away on holidays at the time. He said, 'Yes, this is what we want. You have got young sons; they will get into the business. This is the kind of people we need for our centre.' That was the only interview I had with them, and I was 'in', and that was it.

Yet with Dawn, she brought eight people and was refused all the time. But when I came to sell, and I knew that I was in trouble, David Parsons said, 'Sell.' I said, 'All right, tell me the lease and the rent, and I will give it to an agent.' He would not tell me what the lease or the rent was. He wanted Asian people in my

restaurant. Asians do not go up to shopping centre management. You have got to have it there—to tell them about it. Agents would not touch my shop. I had to do all that myself. I put it in the *Age*. I had an Asian man who put it in the Asian paper for me and I did attract a lot of Asian people, but they would not go to the centre management, and they needed a new place.

I found an Italian man who wanted the shop, and the run-around they gave him! There was a deposit put down for sale agreement of $70,000. I approached David Parsons in 1993. I walked straight up to him and he said, 'All right, sell, fine.' He just gave them all the run-around. And at the end the man collected his deposit and disappeared.

Mr JENKINS—Mary, in a letter that is part of a submission you wrote to Vin Heffernan, who was then the state minister for small business, one of the items you referred to in an attached sheet was: 'Matters needing immediate action: legislation to change leases looked into, one law for all.' What were you actually getting at?

Mrs Caruana—The law is not for all of us. There is a law for them, but there are no laws for us. We need a law that is for everyone. Small business is the backbone of business. These people—the big ones—have to know that we are the backbone. What is the point of building all these big shopping centres and then not having little people to go into them? None. It has got to be one law for all of us. I have not got the money that Lustig and Moar have got. I am at court at the moment: they took me to court because I could not pay the rent. They drained every penny, and I told David that. In February 1993 I said, 'My money will run out in November' and it did: I started owing them money.

It so happened that I did not give them a personal guarantee; I did not even know that. They took me to court for this money, and I won the case because they could not come up with a personal guarantee. But now I have got to go to arbitration on 21 October, with them again, because they are saying that they assumed that I was going to give them one.

Mr JENKINS—'Arbitration' as in 'legal arbitration'?

Mrs Caruana—Yes. They went to court and the judge said, 'You have to appoint an arbitrator', and that is what we have all done.

CHAIR—Where is the arbitrator coming from?

Mrs Caruana—They sued me the second time, because they assumed I was going to give them a personal guarantee.

CHAIR—So it is a court appointed arbitrator?

Mrs Caruana—Yes. When we go to arbitration, if that is not resolved, then we go to court again.

Mr JENKINS—But, at a different level, what is missing is a tenancy arbitrator that you could have gone to in the first place. That would, I would hope, be less costly.

Mrs Caruana—I have had four solicitors in two years; I still owe about $10,000. I owe another $6,000 to my accountant. I am paying one solicitor $100 a month. I have worked in freezing conditions just to make money. On the money that we borrowed against our home, we are paying—interest bearing only—$1,800 per month. My husband only earns $400 a week: it is not enough.

Mr JENKINS—Did that collective of tenants that you finally got together—

Mrs Caruana—There was one stage where Anda herself went to one of the tenants and asked him to get some of the tenants together to see how they could get it all. I know so much about the tenants because a lot of the tenants came to my cafeteria. They came for a cup of coffee and a tear in the corner of my shop as a getaway. Many a time I would say to my son from the kitchen window, 'Look, there is another one.' Slowly, slowly, we all opened up to each other, and they would come and we would talk. Anda said, 'All right, get together; get a meeting going and tell us what you want to do.'

We did that. One night, we said that we would shut our shops. We always used to have to hurry and shut our shops, then run home to have some kind of personal life going with our husbands and children. But, that night, we said we were going to sit in the food court and try and talk. Anda found out, and she went into a rage. She got all the security guards to shut the doors and turn out the lights, and customers were still in the shopping centre. I do not know if Dawn and the rest remember.

Mrs Sammut—Yes, that is right.

Mrs Caruana—The only door on our side was my door, because I was on the outside. The customers of that shopping centre went through my door to get out. It was at night, in winter, and people were literally locked into the centre because she would not allow us to meet. She rang and abused me. She was ringing around everywhere, abusing other tenants. We were doing what she had asked. All we wanted to do was to sit down to see who could afford to put some money in together, to be able to offer an idea to management about advertising to bring more customers into our centre: that is all we wanted to do.

Mrs Sammut—And, remember, we are all paid promotional fees anyway.

Mr O'CONNOR—I am interested in the type of intimidation that was brought to bear on tenants. You mentioned this before.

Mrs Sammut—Yes, it is terrible.

Mr O'CONNOR—Why would a management want to intimidate its tenants?

Mrs Caruana—They do. Even when they ring up for the rent.

Mrs Sammut—To keep you frightened.

Ms Sietzema-Dickson—I think because they are frightened themselves. I honestly think—

Mrs Caruana—They are frightened about us getting together.

Ms Sietzema-Dickson—They know that they are not doing a good job. That manageress was in a previous shopping centre and the tenants there got together and got her out. Somehow she got this job and I think she has never tackled it well. The first manageress really made an effort to go around that centre and talk to people and say, 'How are you? How is business going?' and created a sense of community and a sense of caring. This one has never done it from the beginning. I think there is a fear in them that they pass down the line.

Mr O'CONNOR—I am just interested in your submission where you say:

In other places where a lessee has been making a reasonable profit the management have put in another trader close by in competition with the result that neither can make a living.

Why would a management do that?

Ms Sietzema-Dickson—I do not know why but there must be something in it for them. I presume, if they have got the shop empty, it is better that they get some rent in. But it seems to be counterproductive, from our looking at it.

Mr O'CONNOR—What happens in other shopping centre areas in this management of the relationship between the tenant and the landlord? I would have thought everybody has an interest in getting customers to the gate and through the door, and getting them to part with their money in a range of businesses that offer them an incentive to shop in that place as opposed to somewhere else. In your experience, what happens in other shopping centres to engender that sense of cooperation? What do you think needs to be put in place at Box Hill in the way of consultative mechanisms to get the outcomes that you will all be happy with?

Mrs Sammut—While I speak, there is a rally downstairs, as you might realise—

Mr O'CONNOR—I am not interested in the rally.

Mrs Sammut—No, but there is.

Mr O'CONNOR—I am interested in your experience here.

Mrs Sammut—Yes, that is what I am saying. All those people from different shopping centres are here for the same reason—and that is what we are talking about now—exactly.

Mr McCann—I think that, overall, it is very similar in all shopping centres. You will get the half dozen people who are willing to speak out and who will turn up for meetings. They are usually the people whose leases are virtually up anyhow and they are resigned to the fact that they are not going to sell. The others are very upset but, because they have got a while to go on their lease, they are not going to create ripples. If you have not got a lease, you have not got anything to sell. Once again, it is the same with the franchise. I think that was spoken about earlier today. The intimidation is that, 'Okay, we have got you, we will not allow you to have another lease. If you are a rabblerouser, you will not get another lease. That is it.'

So there are only a few people who will speak out; and they are usually the ones who are resigned to the fact that their businesses are gone.

Mr O'CONNOR—Mr Chairman, I meant no disrespect to the demonstrators down below; I was simply trying to get at the root cause of the Box Hill problem and use that as a way of enlightening us all as to what actually goes on in these centres.

Mr ZAMMIT—Everything you say is absolutely right; that has been my experience in my 12 years as a state member. It has been my experience that the centre management that I am very familiar with throughout New South Wales are playing God with people's lives. There is nothing to give you any protection against that continuing. As I said earlier, I thought in New South Wales anyway there was a retail tenancies tribunal. I think you should look at in Victoria perhaps as a short-term measure, until we come down with our recommendations, some similar type of tribunal that will look at the retail tenancies so that you have got some recourse. Can I mention this to you—that I would recommend that you speak to your local state members of parliament and get them to protect you in the parliament repeatedly and get up and name people who have acted in a way that is unconscionable—

Mrs Caruana—We have done all that. We have done it all. All the letters—

Mr ZAMMIT—You say they do not respond.

CHAIR—Could I ask you please in the public gallery—this is an inquiry of the parliament and it is a public inquiry and we are very happy for you to be here, but we have witnesses up front who are in fact giving their evidence at the moment.

Mr ZAMMIT—We can only assure you that we as a committee will work assiduously and hard to bring down our recommendations as soon as we possibly can.

CHAIR—Without pre-empting what our decision will be.

Mrs BAILEY—We have heard a lot of evidence today and we have heard a lot of very sad stories, and you obviously have all had a wide range of experience. You have talked to other tenants with similar experiences. Do you have anything that you want to put forward to us as a suggestion to correct some of these practices?

Mrs Caruana—We need a government body, a panel, not solicitors. We need a big government body where people can go to them.

Mr ZAMMIT—A low cost tribunal—is that what you want?

Mrs Caruana—Yes. We need someone in power to say to the guys, 'You're no bigger than that and you're no smaller than that.' We are all people here. We are out there and it is not like you get happy and you are buying this shop and it is great. It is not like that. I worked 29 years at my marriage, at educating three of my sons. They have got the education and I thought, all right, your house is paid for, go and get

some money, set them up. I was robbed. I was robbed by the solicitor, I was robbed by the landlord. We need somewhere to go where I can say, 'Please help me.'

CHAIR—I am conscious of time and we have another witness who is going to discuss this particular issue as well.

Ms Sietzema-Dickson—I think that there needs somehow to be a real review wider than you have got now, of an analysis of past and present traders, because obviously there is 'something rotten in the state of Denmark'. There is too much of this.

To be effective, there needs to be a real sense of immunity from reprisals for these people because of the fear that is engendered. I am not trying to tell you how to manage this but this is how I see it. Something needs to be done. Somehow there needs to be an investigation as to how landlords can go on running centres in this way and running them down—whether they are making them pay or whether they are using a centre to finance other ventures, because some of them are spending a lot of their time overseas; whether they are draining these centres for other purposes; and whether they can benefit by withholding information and not approving buyers. All these things need to be really gone into.

I think there is obviously, as came out this morning, some overall problem in the fact that some people go into business without enough experience. I wonder whether there is enough coverage for this, whether there needs to be a body set up to vet people before they actually go into business, or whether this is the function of the Small Business Council.

It seems to me that, for some of the very small traders, there does not seem to be a body that they are aware of that they can go to. I think this needs to be covered somehow, because they go in in all good faith but they just do not know the routine anymore than I would. I bought myself a business name for my publishing. If it were not for my husband, I probably would have gone hook, line and sinker and got us into debt with that, because I am so enthusiastic. Fortunately, I have a very wise man as a husband who has restrained me with great effort, but I can see how easy it is for people to do this sort of thing. Those are the things that I feel need to be looked at very carefully.

CHAIR—Could I use some effort to restrain you, because we have a final question from Mr Jenkins.

Mr JENKINS—I have a question I want to ask Mr McCann. Firstly, could you quickly describe how you managed to escape. I cannot remember your words.

Mr McCann—Freedom.

Mr JENKINS—You got your freedom. That is what I meant. The other thing was that you are also a franchisee.

Mr McCann—Yes.

Mr JENKINS—It was a franchise that you had. You had these retail problems. Were there problems

with your franchise as well at the same time?

Mr McCann—Initially, I think there were problems all around with the franchise. I guess hindsight is a great thing. I was promised, or told faithfully, that the franchise I bought was worth X amount because it was mismanaged at the time. The person who had it had cancer. He did have it; he is dead now. His wife was running it because of his illness, and she was not running it properly. I fell hook, line and sinker for all this.

The franchise was helpful along the way. They did drop their franchise fees and stuff like that for me for the last two years. In the long run—I guess at the end of the three years—I had three years with an option of two to coincide with my franchise agreement, which was five years. I was in a situation where, at the end of the three-year term, to get out of the lease I also had to get out of the franchise agreement. So they more or less had me in a corner. They knew I wanted to get out, so they offered me $10,000 for it—they had charged me $120,000 three years earlier—and so I took that option. It was either sign up a new lease or pull out the equipment and sell it individually, which I would have got $8,000 for. So the easiest way for me was to say, 'Franchise, you take it.' That is why I am out.

Mr BEDDALL—Is the franchise operating again?

Mr McCann—The franchise is currently operating the shop, yes.

CHAIR—Do you know how much they sold that franchise for?

Mr McCann—What they had initially sold it for?

CHAIR—No. They bought it off you. How much did they sell it for?

Mr McCann—I do not know. They have not sold it as yet. I have heard only today that they have it on the market for $100,000.

CHAIR—I want to thank you all.

Ms Sietzema-Dickson—I wanted to table these documents before, but I just felt it was not time to present it all.

CHAIR—That is fine. Thank you.

Ms Sietzema-Dickson—Thanks.

Mrs Caruana—Can I just say something?

CHAIR—Sure.

Mrs Caruana—Thank you very much for trying for us. We need your help.

CHAIR—We are trying. As Mr Zammit said, we are going to be doing something, but we cannot pre-empt anything.

Mrs Caruana—Thank you. It has been a hard battle to get to this stage.

CHAIR—Thank you very much.

[3.11 p.m.]

HUBER, Mr Franz Nicholaus, 2 Helene Street, Bulleen, Victoria 3105

LUDGATER, Reverend James Keith, Part-time Chaplain, Box Hill Chaplaincy Inc., 67 Salisbury Street, Blackburn, Victoria 3131

CHAIR—Welcome. This is the third time we are talking about Box Hill Central. That is not giving any indication to you, but we are talking about the same issue. So we are all hot on that. The committee 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 are not asked to take an oath or make an affirmation. You are reminded however that false evidence given to a parliamentary committee may be regarded as 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. Mr Huber, in what capacity are you appearing before the committee?

Mr Huber—I am appearing as a private citizen. I am a shopkeeper in Box Hill at the moment. I have been there for eight years.

CHAIR—Would you like to make an opening statement before we commence questioning, Rev. Ludgater?

Mr Ludgater—Thank you. With regard to an issue that was raised a few moments ago, I have submitted a copy this morning of a major tenancy report in the *Victorian Retailer*, in which Professor Millington is reported as saying:

Many, if not most, shopping centre owners seem indifferent to the needs of their retail tenants; seem to be driven solely by the quest for increased profits in the short term, seem to be oblivious to the concept of the landlord and tenant relationship being a partnership, seem to be complacent about the relationship being more adversarial in nature, and seem to be either oblivious to or indifferent to the possible long term implications of such policies and attitudes.

That is an Australia-wide research, and I think it needs to be a background to what we are saying.

With regard to Box Hill, you may be aware that it sits in the middle of the eastern suburbs and is surrounded by half a dozen shopping centres, most of which have been improved and increased in size over recent years. After seven years of chaplaincy in manufacturing and in the service industries in Telecom and Australia Post, I undertook a half-time appointment at Box Hill, knowing full well that retailing was a hard area. I found within the first three months that half a dozen families—not just at Box Hill Central, but in other parts of Box Hill—claimed between them to have lost a million and half dollars and were fighting for their financial future, for their families and for their homes. That was a little bit traumatic. I realised when this report came out that it had to be a very true statement of fact.

I want to say a couple of things to add to what I have said. First, we all know there is what has now been called a seven-year retail recession. They say that it has had its seventh birthday, so no-one is finding it

easy. You would have perhaps seen a report of Coles Myer in the last couple of days, in which sales have gone up—and that has to always be at the expense of somebody else—and profits have still gone down. As to the detail of that, Coles and Liquorland had increased sales in the 12 months of about 15 per cent and decreased profits of about 12 or 13 per cent. Target and World For Kids had a seven or eight per cent increase in sales but a decrease of between two and 35 per cent in profit. As you are aware, the major retailers are finding it very difficult. They are cutting costs and they are losing. Because of their ability to cut costs, they are taking away a lot from the independent retailers. Now all they want is Sunday trading. We will not go into that, but that will be the final nail in the coffin for many independent retailers.

I wish to mention two things in conclusion. I believe that a landlord has a duty of care. I have submitted a document from one of the retailers at Box Hill Central that maintains that very little maintenance has been done over more than a decade, despite a letter that we also submitted that said that major renovations were going to bring this shopping centre up to standard. That was in 1991. Nobody has seen any of that. There are vacant shops, there are sub-standard casual tenancies and major shops have closed.

People like Ray, who sat here before, come into the centre buying a job. They have been redundant and they are buying themselves a job and they end up losing their life savings. All that they are asking for is a fair go. I have asked Franz to come along. With Gillian's permission, he is also happy to answer questions. We have submitted several documents with regard to his experience.

CHAIR—To cover those documents, I have a submission by Mr Huber which I would like to incorporate into the transcript as evidence.

Resolved (on motion by Mr Beddall, seconded by Mrs Bailey):

That the committee receives as evidence and authorises for publication the submission from Mr Franz Huber, dated 2 October 1996, made to the House of Representatives Standing Committee on Industry, Science and Technology.

CHAIR—Mr Huber, would you like to make an opening comment about any particular issue?

Mr Huber—We have been there for eight years. We did very well for the first three years. We got in in l988. In l991 we could have sold out. They would not let me sell out. A few months later they put in direct opposition to my shop. When I went to the management and said, 'I am the only barbecue shop in Box Hill Centre and you let another sausage place in', the reply from the management was, 'Franz, there is room for two sausage places in Box Hill Centre. There is room for six sausage places in Box Hill Centre but not business for two.'

I am going to move out at Christmas. I have lost my life savings. I might even lose my house. I have a contract here but they refused to let me sell the business at the time. That is all gone. I am here. I cannot lose anything anymore. It is gone. I think I am lucky that I still have my wife and my kids and we stick together. A lot of people lost that too because of landlords like this.

CHAIR—Reverend, you mentioned that the landlords have a duty of care with their tenants. That is an assumption that the common law is, in fact, workable in these situations. Am I being wrong in assuming

that you see that common law can resolve these situations or would you be recommending some sort of legislative resolution?

Mr Ludgater—As we have tried to find some answer to the problem, the term 'duty of care' has been used in the discussion. I am not too sure of all of the implications of that. It seems obvious to me that if a shopping centre management promises to upgrade the shopping centre to its previous glory and does not do it and as a result people lose business, there has to be some element of neglect. If as a result of shops moving out, places are left vacant for anything up to two or three years and people start going to shop elsewhere, there has to be some element of neglect of duty.

I heard Franz say on one occasion at a retailer's meeting that the one-inch thick tenancy agreement could be summed up in two lines: the landlords have all the rights; the tenants have none. This is the concern. There needs to be a mutual accountability. If someone puts $100,000 of his life savings into a business, there needs to be some accountability that the people who promise the businesses there will do their part. That is what I meant by that. It seems very obvious to people who have shopped at Box Hill for a long time. I have only been working there for a couple of years but I have been around the area for about 10 years. I do believe that there has been a neglect of duty.

Mr BEDDALL—Could I play the devil's advocate. We seem to have heard two streams today. They are in part contradictory. Firstly, a number of people have been concerned that they have not been able to sell their business because the landlord will not let them sell to somebody who wishes to buy. Subsequently, the business has gone bad. In fact, it may have been somebody else who would have been sitting here today rather than the person who is here. That is one component.

It seems to me the fundamental problem is the fact that the landlord is allowing competing businesses in rather than the overall problem of being able to sell or not. Mr Huber has indicated that he was going quite well until a competition business was put in. Even if he had not been able to sell but the competition business had not gone in, he may have still continued to trade or find another person to take it over.

It seems to me that the crux of the problem is too many retailers selling the same product. There are two obligations here: there is an obligation from the tenant as well as from the landlord. It flows both ways. The tenant signs an agreement to lease a premise for a period of time. Perhaps we have to try to address how in the lease agreement the tenant can have an exclusion clause.

Mr Ludgater—The question of responsibility is a very big one. I think it starts with the Federal government down to the state government and to the local government because of the wide-ranging implications of what is happening. If you had read the *Business Review Weekly* over the last few months, there was an article on 13 May that said that many of these shopping centres that continue to expand may finally be caught and be empty. It has happened in America; it could happen in Australia.

Mr BEDDALL—It has already happened in Queensland.

Mr Ludgater—People are committing suicide as a result. They have been drawn into these things and there is no business and there is no traffic. It is all a mirage. There are so many factors. That is why I said at

the start that the general recession is something that the landlords do not seem to be taking any notice of. They think that they are immune. Professor Millington says that they are not immune. If they are not careful, they will lose their centres. We do not want that to happen; we want the centre to be successful. The last time Doncaster increased, it was determined that Box Hill would suffer to the extent of eight per cent. It has possibly suffered more but now they are going to increase again. Why?

CHAIR—How many tenants are at Doncaster?

Mr Ludgater—Probably 250 or more.

Mr O'CONNOR—Where does the problem lie? Does it lie in the behaviour of the landlords or does it lie in the local governments that legislate and allow the oversupply of retail space in particular areas, or is it a combination of both?

Mr Ludgater—It is a combination. I am sure it is a combination of the whole because there are things related to Box Hill that are specific to Box Hill. Victoria is Victoria and Australia is Australia and there are only about 20 million people.

Mr BEDDALL—Can I reiterate that. I spent three years as a minister trying to get state governments to agree on uniform retail tenancy law. They all agreed that we should have uniform tenancy law but all six states insisted their law was the law to adopt. Now, three years later we still have nothing. It is a jurisdiction of the states but it is one of the things we may have to, as a committee, consider very carefully how we recommend that the federal government becomes involved. This problem has now gone on for 20 years that I am aware of, and probably longer, ever since enclosed shopping centres became a feature of our urban society.

Mrs BAILEY—Mr Ludgater, we have heard—and I think you have been in the audience today—from a number of tenants, particularly from the Box Hill centre, describe to us methods of intimidation. There can be no other word than 'intimidation'. Could you offer us any explanation as to why either the management or the owners of Box Hill would engage in these sorts of practices when we do have this shrinking market of consumers? Doncaster is only just a short distance away from Box Hill. Could you offer us any explanation? It just seems so counterproductive.

Mr Ludgater—Professor Millington cannot. He is saying there is a need for shopping centre owners and managers to recognise that their success depends on the success of the retailers. The book *Seven habits of highly effective people* says, 'Think, win, win.' I would have thought that would be the No. 1 rule in business. Intimidation is there. Basically, power corrupts and absolute power corrupts absolutely. These people almost seem to have absolute power. Once you sign that lease, 100 pages of lease which you cannot understand half of but you are keen to get into business, you are now legally in prison.

One of the retailers I was speaking to the other day for the first time had just moved into the area. He has shops in five different areas and he said in one shopping centre he and his partner were going along quite well until his partner got involved as the secretary of the retailers' group. Management came along and said, 'There is an empty shop over there. We are thinking of putting in so and so', exactly the same commodity,

exactly the same merchandise. Then the thought was passed by him, 'By the way, your partner is the secretary of the retailers group, isn't he?' They got the message that their homes were on the line, their business was on the line, and so he pulled out as secretary of that retailers group.

CHAIR—You mentioned before the duty of care of the land owner and the managers. I would like to reverse that and get a view from you on the other side of things. The Law Institute of Victoria told us this morning that a lot of potential business people—you just alluded to it then—do not understand what their requirements are when they move into a business, because they get excited about the business, they want to invest their money, or whatever it might be. They see this as an opportunity.

We also heard evidence this morning about people going to solicitors who do not understand contract law or their leases. Is there a duty of care on potential small business operators—retailers—going into a shopping centre to, firstly, fully understand what their requirements are; and, secondly, to fully understand that what they are buying is a lease of five years or 12 years—whatever it might be—and that they have to return their investment over that period and that anything else above that is a bonus? I get the feeling that a lot of small business people going into retail, having had that experience, do not understand their requirements, their own personal duty of care. I would like to get some feedback from you. Do these people you are talking to have the experience and did they understand their responsibilities?

Mr Ludgater—I think you have touched on a problem that I do not know the answer to. Many people obviously do not read the 100 pages of the lease; they do not understand their obligations. You will have heard people speaking here who paid for good advice and were told, 'Go for it.' Yes, the accountant looked at it and the solicitor looked at it and they have been let down by the professional people. They are the ones who have tried. Then there are people who have worked for 30 years in catering, and they have still got themselves caught and trapped. I do not know the answer to that question. 'Buyer beware' is obviously very much the case. It should be in very big capital letters over all retail tenancies.

CHAIR—That is true; but going back to your point, the relationship between owners and their managers with the tenancies is also very important.

Mr Ludgater—That is right. Frank has customers. I like his pies and they are a good product, so I am a happy customer. But he is the management's customer; they have no other customers. Yet these people continually tell me—I do not just mean Box Hill central—that they find that they are wasting so much emotional energy because they do not feel supported by the people that they are paying their big money to.

CHAIR—I am also interested in your views on whether the building owners and mangers should be putting more stringent guidelines or more stringent negotiation initially to encourage people—not to enforce people—to understand what their investment will be for that lease period. We heard evidence today that goodwill is not an asset. I find that surprising, but a lot of people do not consider goodwill as an asset. But they have got to get their return investment within that lease period. Should it come back down to the building owners and the managing agents to make that a harder piece of information?

Mr Ludgater—They might be closing their centres down much more quickly if they did give all those warnings. Yes, they probably do, but one person whose evidence has come through today thought that,

because they paid a certain good amount of money for the goodwill, five years down the track they would get that sort of money back. Your goodwill is worth nothing. Your goodwill belongs to the centre, but they paid for the goodwill.

Mr Huber—You mentioned about the people going into these businesses. There are a lot of people a bit younger than me who want to go for a job but they cannot get a job any more. A few years ago I was between businesses. I had been in businesses for the last 29 years. We had a fruit shop for seven years; we had a milk bar for about three years; we had the shop in Gordon Place for two years; and a coffee lounge for seven years. In every one we did fine. In Box Hill we did extremely well for the first three years and then the customers seemed to drop off, but I have to say that they came back.

A lot of people who buy a business buy themselves a job. That is what it is. They cannot get a job. I applied once for a job in a shop in the same line as what I had been selling. I went from there and said, 'A few hours will do me just fine. I am in between jobs.' He said, 'Oh, yes,' but he never offered me the job. He said, 'Would you like to buy the shop?' I said, 'I don't want your shop. I want a job. I want a few hours for the moment to keep me going.' I did not get it. Like me, he bought a job. But, as the management said to me, 'We are cutting down on people with super paid out. We do not take these people in the centre any more because they do not have the experience.'

CHAIR—I thank you both for coming along today. I am conscious of time. If you have any final closing statements, I would be happy to hear from you.

Mr Ludgater—Somebody handed this to me on my way here today. It is from the Commonwealth Bank, dated 3 July, housing loan number such and such. The third alternative, because they were getting further and further behind, and they are mentioned in one of my submissions, says that they have to provide to the bank by 31 July 1996 with a sole agency agreement that their properties would be sold by public auction with the auction to be conducted by 31 October 1996. That is the sort of letter that breaks everyone's heart. That is what is happening, and it is happening all around Australia.

CHAIR—Thank you for your evidence today and we appreciate your time.

[3.38 p.m.]

MULDERRY, Ms Catrina, Legal Research Officer, Victorian Employers Chamber of Commerce and Industry, 50 Burwood Road, Hawthorn, Victoria

WOJTKIW, Mr Steven, Manager, Economics and Research Services, Victorian Employers Chamber of Commerce and Industry, 50 Burwood Road, Hawthorn, Victoria

CHAIR—Welcome. Can I first start by saying that committee 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 make an affirmation. You are reminded, however, that 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 make ask to do so and the committee will give consideration to your request. The committee has received your written submission and authorised its publication. Would you like to make any additions or alterations to your submission?

Mr Wojtkiw—No, not at this stage, Mr Chairman.

CHAIR—Would you like to make an opening statement before we commence questioning?

Mr Wojtkiw—Yes, I would.

CHAIR—Please go ahead.

Mr Wojtkiw—Thank you very much. From VECCI's point of view, we certainly appreciate the opportunity to participate in the public hearing today and, for that matter, to participate in the government's inquiry into fair trading. The Victorian Employers Chamber of Commerce and Industry has almost 8,000 members across a broad spectrum of industries in the primary, tertiary and secondary sectors. Some 85 per cent of those businesses are in fact small businesses with fewer than 20 employees. So, from VECCI's point of view, we are certainly well placed, we believe, to talk with some credibility in terms of the issue of fair trading. We also certainly support the notion of fair trading and its practice in the marketplace. We would also like to say at the outset that we hope that the outcome of this particular inquiry is consistent with the government's philosophy and current commitment to deregulation and reducing the regulatory burden on businesses generally and small businesses in particular. We also hope that the outcome of the inquiry is in fact commensurate with any identified problems that do emanate from hearings such as today's.

VECCI's position—if I could reinforce that at the very outset—is that we believe that market participants, whether they be consumers or businesses, are best served by self-regulation and regulation by market forces as against statutory enforcement. We also believe that existing provisions within the Trade Practices Act, in particular section 51AA, afford the appropriate level of protection or redress for businesses in instances of unconscionability.

With that in mind, VECCI has certainly traditionally taken—and also today—quite a strong position of opposition to proposals in some circles that the current provisions relating to unconscionable conduct should be strengthened by the inclusion of the words 'harsh' and 'oppressive'. We believe such amendments would in fact create more problems than the solutions that they may attempt to address. I am quite happy to address those issues in separate detail further into this inquiry. I thank you for the opportunity to make those opening remarks.

CHAIR—Part of your submission was some detail of a survey where you had 84 per cent responses. I am interested that it was a small sample compared to the 8,000-odd members that you have. You sent out 500 and you had, I think, 39 responses or something like that. You said that 29 per cent of the respondents had experienced such conduct as 'oppressionable'—I think that is probably a term we all know—and you said that was not a major problem. You said that two-thirds suggested there is no problem. If you reverse that, one-third are saying it is a problem, and you are saying that one-third is not a high indicator. Could you justify saying that one-third complaining about the current thing is not a high indicator?

Mr Wojtkiw—I would like to backtrack in terms of the first part of your statement. In terms of the timing and the size of the survey sample, certainly statistically a sample of 500 is more than adequate to gauge an appropriate response from a membership base in the order of 8,000. There is also the issue of timing in terms of when that survey was conducted. It was conducted as part of VECCI's input to the then working group as part of the Small Business Coalition which was investigating this issue of unconscionable conduct. The low level of response—in our mind at least—certainly indicates the lack of importance that businesses at that particular point in time found or at least believed was attached to the issue of unconscionable conduct.

In separate surveys in the lead-up to the recent federal election, we found that where we asked businesses to identify from their own businesses' perspective the key issues, the issue of unconscionable conduct and the need to amend the Trade Practices Act, was 49 out of 57 separate issues actually rated by business. This is not to say that it is unimportant but, once again, that gave us an indication that, in the context of the broad issues of concern to business—and there are many of those—its importance was somewhat lesser.

In terms of the one-third, we do acknowledge in that particular survey and in the appropriate report which is attached to the survey results that one-third of businesses were indicating that it is a problem. We did not, and do not, walk away from the notion that it is an issue of wider concern to the Australian business community—unconscionable conduct in business-to-business transactions—but what the survey also indicated was that for those businesses that had found that it was a problem its incidence seemed to be more prevalent in certain industry sectors. And they were in areas such as retail tenancies in the petroleum industry and also in motor vehicle franchising. So it is important, it is an issue, but its incidence seems to be perhaps more specific to certain industry sectors, and thus we come back to the conclusion that we need to look at addressing those industry sectors with separate solutions which are more appropriate than a broad-brush approach of black-letter law.

Mr BEDDALL—Is it not the reality that with any unconscionable conduct concern it is only a concern that is raised when that person suffers unconscionable conduct and it is not one of those things that

people would be sitting around worrying about? They are worrying about interest rates and a whole range of other things that are on a daily basis. It is only when there is an abuse of market power that it becomes an issue for that particular business.

We have seen some evidence today in Canberra from a particular industry sector—these probably would be members of your association—where there would be only three people in this industry group yet it affects 100 per cent of that industry group. It is easy to say it is No. 49 out of 57 until it hits you, then it is No. 1.

Mr Wojtkiw—Yes. I have no doubt about that, in that sense. And we could also draw that analogy, if you like, with respect to many other issues facing business, such as capital gains tax—you often do not get caught up until you actually find that you are looking at selling a business. But I take your point.

Ms Mulderry—If I can add to that. What Mr Wojtkiw said before was that the provisions currently in the Trade Practices Act have been more than adequate maybe to deal with these things.

Mr BEDDALL—But that is not the case. There has not been an action taken by the ACCC yet. Professor Fels has scared a couple of people on Hamilton Island but that is about it. We do not know if it is adequate or not. It has not been tested.

Ms Mulderry—There was an article in the *Sun* newspaper that went through on 5 August, 1996—and I can leave a copy—in which Allan Fels made reference in an interview to the Hamilton Island case. And he was able to successfully seek resolution of that case for that particular tenant there on that property.

Mr BEDDALL—Yes, but he threatened to use the act rather than actually used it.

Mr Wojtkiw—If I could just add in here that there is an important issue here of reputation. With even the Hamilton Island, the Wormald and the other instances that were referred to in the press in that article and others, I think it is important that parties to these types of inquiries understand that reputation, brand name, credibility and reliability in business are important; that it is important as it relates to business-to-business transactions and not all markets are characterised by, if you like, monopolistic situations or even oligopolistic situations. So there is certainly an opportunity for suppliers to exercise—as consumers do—their freedom of choice and to, effectively, vote with their feet.

On the other issue of market power, which you certainly referred to, there is nothing illegal with market power per se; it is, as you say, the abuse of power which starts to question the issue of unconscionability and so on. At VECCI we have taken the view that rather than blame or attempt to address the effects or outcomes or symptoms of market power we should really look at tackling some of the fundamental causes. The retail tenancy is often a good example where concerns have been raised—as I am sure you have heard today—from the point of view of lessees and the circumstances they have possibly found themselves in with landlords and the contracts in which they are engaged.

We would certainly point to the fact that you have to ask yourself why landlords have found themselves in that position of power in terms of the market, in terms of the location. The fact is that there are

few other landlords in existence in those particular locations or markets and that often has as its root cause the planning approval process so it is really the planning approval process which has given rise to that element of market power which in itself from time to time certainly has the tendency to lead possibly to unconscionable conduct. So we would view that those issues of planning approval processes need to be thought of a lot more than they have in the past.

CHAIR—Can I just get the qualification on your position then? What you are saying is that the Trade Practices Act is acceptable in your opinion and that if someone feels oppressed they then have to go through the litigation route.

Mr Wojtkiw—Yes. Generally, we have found that, particularly in the instances of the ACCC looking more closely into alleged circumstances or incidences of unconscionable conduct, it has set some examples for participants and players—whether they be large businesses looking at other large businesses or relationships between large and smaller businesses—and that should serve as some form of warning to other participants in markets.

Yes, and we do agree that the current provisions within the Trade Practices Act are sufficient as outlined under section 51AA. We do believe that they are appropriate. Having an amendment to include the term 'harsh and oppressive' we believe would be further adding to uncertainty and confusion in business relationships. Those terms themselves are very nebulous terms which would rely on court cases to interpret specifically.

We also believe that if there is a problem with accessing the powers that reside within the Trade Practices Act they are issues such as those that are currently very paramount in our court and legal system, that is, the cost of justice and access to justice, and those issues need to be tackled perhaps first if we are going to look at providing a better access to existing remedies under the Trade Practices Act.

CHAIR—So on that basis then you would not support a ACCC sort of mediation process or a policing process so that if someone was threatened in a harsh way by whomever they could not go and report this and get some sort of judgments made?

Mr Wojtkiw—They can, and we do not have any difficulty with that. In fact, that is an important role that the ACCC and other regulatory watchdogs do have to play at both the state and federal levels, and we do not have any problems with that. I think it is important that in any marketplace there is a degree of regulation which does provide for a minimum, if you like, of conduct that is appropriate, and the bodies like the ACCC—or, at the state level, the regulator general—do have a role to play to monitor, report on and potentially enforce legislation.

Mr O'CONNOR—I am interested in this access to justice mechanisms and to the law. Why do you see this as the area that has to be tackled first rather than the regulatory environment? Why do we not just go to the heart of it all, acknowledge that a rotten situation exists, set a framework in place to deal with it and also provide access mechanisms to ensure that that regulatory framework is adhered to by the big players? We could have held five days of hearings here, filled five days with examples from small businesses, which, I presume, your organisation represents—

Mr Wojtkiw—Yes.

Mr O'CONNOR—Saying to us that this system is not working, the regulatory environment is not working and the codes of practice are not working. And you are telling this committee that all people really have to do is access a section of the Trade Practices Act and it will all be fine.

Mr Wojtkiw—There is a lot more to it than that, and I was addressing or responding to a particular question as to whether the existing provisions within the Trade Practices Act did provide some appropriate level of remedy. But that is not the end of the story, and you are quite correct. We certainly acknowledge that is fundamental and at the heart of many of these issues and instances and examples that I am sure you have heard from today and other days during the hearing. We have looked at them ourselves within our own small business membership. We have often had cases brought to us where businesses felt that they were clearly experiencing instances of unconscionable conduct. When we did look at the matters in a little bit more detail, we found that they may well have been perhaps not as clear in terms of their rights and obligations when initially entering into contracts and that once we did provide a better degree of clarification those issues were better understood. We also found that in cases where there was the tendency, perhaps not formally, for episodes of unconscionable conduct to have been identified, but where there were certainly perhaps close parallels, we found that looking at remedies such as mediation, conciliation and alternative dispute resolution were perhaps a far more speedy, more flexible and lower cost alternative to resolving problems between businesses than needing to look towards the court system.

Mr BEDDALL—That presumes that the small business has sufficient resources and courage to take on its major supplier. For example, we talked about abuse of market power, and the Coles Myer group has an extraordinary stranglehold. It gave undertakings to the government of the day that when it was allowed to merge, because either would have gone belly up if they did not merge, that they would not abuse market power. I think it is fair to say that they have had predatory practices in the past. We understand that that is improving. So there is no mechanism for a small manufacturer who supplies Coles Myer to show a great deal of courage, and often they do not.

Mr Wojtkiw—Sure.

Mrs BAILEY—Could I just follow up. What do you say to the small business people whom you represent when, while a so-called mediation and consultation process is taking place, the small businessperson is slowly going broke?

Mr Wojtkiw—They are going broke for many reasons. Having to put before them the prospect of going before the courts at a later date at considerable legal expense, I agree with you there, that is not necessarily the solution. That is why we have said, let us look at prevention rather than solution. Particularly we have had major concerns with the proposals to go down the path of amending the Trade Practices Act. If it is a difficult area, some parties would suggest, to actually access now, why would that be improved? We have in fact seen far more unintended, if you like, disadvantages attached to that particular proposal. If there were to be a string of cases brought before the ACCC or other bodies, or courts for that matter, enforcing the Trade Practices Act under any amended section, what you might find then is larger businesses backing off at a hefty rate of knots and start to deal with other larger businesses or offshore suppliers, with the ultimate

losers being small business. That is something we are very mindful of avoiding. We want to avoid a situation where we go down the path of a much more litigious society where there is a great deal of uncertainty attached to business to business transactions.

Mr BEDDALL—If large business found it opportune now to buy offshore they would buy offshore. There is no compulsion, they do not buy for national patriotic reasons, they buy where the best price is. There is nothing to say that a fair and open trading relationship with its suppliers would not continue and maybe enhance it.

Mr Wojtkiw—But they equally buy from smaller businesses for similar reasons, for commercial reasons, because smaller businesses can often supply the appropriate products, services and know-how in niche markets that large businesses themselves can actually find that there are few alternatives to. That is important to recognise. It is not simply large businesses that are always the body that is making other parties captive; they do rely on small business.

Mr BEDDALL—I am saying that if there were an inclusion in the Trade Practices Act that took in unconscionable conduct and extended it, that would not stop people buying from small business or overseas. The factor that makes business buy is where the product is best at the best price.

Mr O'CONNOR—I would like to canvass some propositions. Obviously you see the solution not in terms of the legislative framework but in areas such as educating people adequately on their rights and responsibilities before they go into business, mediating and consultative mechanisms, counselling mechanisms to resolve disputes, perhaps improving the access of people to the legislative framework that exists. I have mentioned three areas. Could you enlarge on how effective you would see those propositions as working in practice and the role of your association in these areas?

Mr Wojtkiw—We think those areas are very important. Bodies like the University of Technology in Sydney have been pushing alternative dispute resolution, which has been quite successful in the United States. It is not successful in all cases but, as our court system and contemporary legal system is increasingly overworked and overcrowded and costly, we have found that those appropriate mechanisms of other methods of dispute resolution are winning greater recognition and understanding amongst the business community, particularly small businesses.

You commented on what business groups such as VECCI can do. I think we have a very significant role to play, and will have a bigger role in the future, in providing information on those particular mechanisms. We can also make available to our members appropriate speakers or presenters at discounted forums to ensure there is an awareness and an increased profile of those particular processes. That applies in other areas too, such as knowing and understanding your rights under contract law. That is so that all businesses—large, small and medium—have a better awareness and appreciation not just of their rights but of their obligations to other businesses. That is very important and we recognise that role, yes.

CHAIR—The problem with what you have just said is that people may not be aware that you in fact exist, that you are putting on seminars, et cetera. We spoke before about traders going in without the proper advice, getting some advice from solicitors that perhaps was not the right advice, because they did not

understand contract law or they did not understand the nuances of leases. Where is the responsibility of education here? Does it come down to the potential trader or should it be done at the level of tertiary education or perhaps even secondary education? What is your view on that?

Mr Wojtkiw—I think you have raised some very important issues which do need to be looked at in greater detail. I was only speaking from the point of view of acknowledging that business groups have a role to play. You could equally suggest that governments at the state or federal level could possibly have a role to play, not so much in delivery of those particular programs or ingredients but in providing some level of funding and support—not just within the business community but also amongst the consuming public and other traders. Yes, governments have a role. There is currently a review looking at how to improve legislation between the states and how to reduce overlap; that is certainly an opportunity that could be looked at. Business groups have a role and, yes, individuals have a role.

There is no need to say that entering into a new business or expanding an existing business is fraught with difficulties and risks. I do not think any of us would attempt to rule out risks altogether, but business individuals can get the best advice, think carefully and at length about making decisions before entering into contracts, and have the usual caveats of 'buyer beware', which we have heard of today. They are all important ingredients. So I think the onus is on a number of parties to work collectively. I do not think the buck, the burden or the responsibility should be simply thrust upon one piece of legislation, one government or one business group.

CHAIR—As we have heard today, there are a lot more people out there who are buying themselves a job because of other problems. I guess there is an immediate need then to get that 'buyer beware' message out that things are not necessarily all that rosy when you are going into business.

Mr Wojtkiw—Absolutely. We are constantly finding that it is a never ending battle, if you like. Part of that never ending battle is to advise business, members and non-members of VECCI. Other chambers of commerce throughout the nation are doing the same on behalf of their members. It is a difficult task to catch up with, let alone get on top of, the plethora of regulations attached to taxation, occupational health and safety, and so on. So it is a never ending battle, and we do not want to add to that regulatory pile, if you like. There is sufficient red tape there; we want to actually reduce that and give businesses more time to get on with what they are doing best, which is to do business, and to be able to educate themselves and train themselves and their work force in other areas as well. This is all very important.

CHAIR—One of the problems we have identified relates to accessing legal advice and support once problems start happening. Do you have any solutions that you might like to suggest about how small businesses can access proper legal advice? They can go to a solicitor but it might last only a couple of months, whereas the action could take a number of years.

Ms Mulderry—In that respect, I know that the Victorian government is looking at its Fair Trading Act. At the moment, they are intervening only in consumer matters. But they are looking at extending it so that the Office of Fair Trading is actually able to conciliate in transactions between small businesses. That would be a cheap solution, if you like, rather than having to go down the path of litigation. I think that is what we have to look at: improving ways for small businesses that are faced with these situations to access

an easy and cheap resolution.

CHAIR—Would you favour litigation insurance?

Ms Mulderry—That is quite a new concept. We have not really looked into that, but I think it would be an interesting thing to consider.

Mr BEDDALL—As well as compulsory third party we could have compulsory litigation insurance. The Law Society would probably favour it.

CHAIR—No doubt.

Mr BEDDALL—Last time we did this incarnation back in 1989, a lot of organisations were running starter courses for people intending to start a small business. Is VECCI still involved in that sort of activity?

Mr Wojtkiw—Absolutely.

Mr BEDDALL—The statistic we always had was that half the people who did those courses never went into business. It is prevention rather than cure.

Mr Wojtkiw—Absolutely. Yes, we are still heavily involved in courses dealing with computing and customer service and the legal and technical issues that business operators and their employees need to understand. We link in with the tertiary institutions and TAFE colleges and even high schools, to get very early on in the piece an awareness, a culture, as to what small business and commercial opportunities exist in the industry and in other traditional and non-traditional occupations. We go right through to dealing with existing business operators who are looking to expand or to move on to another business and help them understand exactly where they are going, making sure they are there not for the short term but for the long term.

CHAIR—I would like to thank you for your time today. Is there anything you would like to say in closing?

Mr Wojtkiw—Just that we do look to this inquiry to look at the issue as a whole. As we know from our own members, it has certainly been caught up in emotive issues. There are many competing issues here and they tend to get caught up with the notion of fair trading, with what is fair or unfair and, of course, what is illegal and legal. I think they are important dimensions. From VECCI's point of view, we would rather not see an approach which tends to throw sledgehammers at walnuts, which is an oft-coined phrase.

Ultimately, we are attempting to protect the interests of small businesses and we believe that just to move down the path that has been suggested of amending the Trade Practices Act would probably have more unintended consequences to the detriment of small businesses over the longer term than it would have benefits. We have talked at length about the need for industry self-regulation, codes of practice, and improved education and information for small businesses. To this end, VECCI is certainly looking forward to working with this inquiry and the government to ensure that occurs. Thank you.

CHAIR—Thank you for your time.

[4.07 p.m.]

GILBERT, Mr Ian, Director—Legal, Australian Bankers Association, 42/55 Collins Street, Melbourne, Victoria

CHAIR—Welcome. The committee proceedings are recognised as proceedings of 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 make an affirmation. You are reminded, however, that false evidence given to a parliamentary committee may be regarded as contempt of parliament.

The committee prefers that all evidence be given in public, but should you at any stage wish to give evidence in private you may ask to do so and the committee will give consideration to your request. The committee has received your written submission and authorised its publication. Would you like to make any additions or alterations to your submission?

Mr Gilbert—No, I do not, thank you.

CHAIR—Would you like to make an opening statement before we commence the questioning?

Mr Gilbert—Yes. The Australian Bankers Association appreciates the opportunity to speak to its submission to this inquiry. To be very brief, we have approached this matter on the basis that broad ranging legislation would be inimical to the interests of the business community and to small business particularly. But we acknowledge that there are obviously specific areas of concern which may require some form of remedial action. In the conclusion to our submission we emphasise that point, referring to the fact that industry specific solutions, where a particular need for protection has been identified and demonstrated, should not be ruled out. That should include non-legislative solutions.

We see the existing law in the Trade Practices Act as largely sufficient to deal with many of the concerns that the small business community would have. We make one observation—and I have heard evidence to support it in the brief time I have been here this afternoon. That is that many of these problems that arise and beset small businesses in these commercial relationships are those that arise from problems at the formation of the relationship. Whatever can be done should be done to ensure that when people go into commercial relationships, particularly commercial tenancies, attention is drawn to the pitfalls, the upsides, the downsides, of that relationship.

The contractual provisions conferring discretion on the other contracting party to make changes without requiring the consent of that other party are absolutely critical to avoiding circumstances in which someone is placed in a captive relationship and then has nowhere to go and no choice. We see the solutions to these problems not so much in legislation, but in informed choice right at the commencement of the relationship.

CHAIR—Can we expand on that particular point before I ask you some other questions. Who is responsible for that informed choice? Is there some sort of process that a potential business operator who is

putting in their superannuation, and whatever it might be, should go through? What are you recommending?

Mr Gilbert—Apart from the inquiry itself which has taken evidence from individual small business people, the major concerns that I have heard voiced on this over a number of years have been through small business organisations themselves, presumably representing the interests of their members. It seems to me that there is a very large and significant role that small business organisations can play for their members in resolving this threshold concern. For example, they can run training seminars, information seminars, et cetera simply on the art of negotiating. They could develop model clauses—which are industry specific, obviously—or standard contracts, which could be used either as a contract, providing the other party is agreeable, or as a basis for negotiation for better terms and conditions in what might otherwise be standard form contracts.

They could negotiate cheaper access to legal services in ways similar to what other bodies do—arranging cheaper legal services and financial services for their members through volume. They could put out to their members what I would describe as a pre-contractual checklist of things to be careful about. One of them would obviously be, 'You should take legal advice and independent financial advice before you go into these types of transactions.'

They are the sorts of warning bulletins that people need to have brought to their attention to provide that pause between the desire to go into business and invest their superannuation moneys and to consider the implications, get some advice, and make sure that they go in on a proper footing and, if there are doubts about that, exercise their choice not to go into that transaction at that time.

CHAIR—You are talking about an industry body that is providing that sort of advice for potential people coming in, but I am just thinking about the retailer who says, 'There is a shop for lease; how do I go about accessing that?' I am not aware of any body that is able to provide that advice. I do not know about Victoria, but certainly in New South Wales some nine years ago that was not available, and I certainly do not know of any body in Western Australia where a person who is potentially looking into going into business can go and say, 'I have got all this money. I want to go into business. What do I need to know? How do I go about training myself?' and that sort of thing. Is that sort of facility available now for people?

Mr Gilbert—It is. I cannot say from my own knowledge whether it is available nationally and evenly around Australia, but there are a number of places in a number of states which are called 'First Start' or something like that. They are, I believe, government funded. They provide an information service for someone intending to go into small business. They provide general information on things like the need for business planning and advice. Obviously, a focused, structured approach to that type of facility with appropriate funding would be a very significant step towards addressing this pre-contractual problem.

CHAIR—My colleague who has since left us to go back to Queensland was stating that when he went through this in his own report in 1989 there were more people dropping out of those information systems from VECCI because they suddenly realised the implications of what they were proposing to do. So you would see it as more of a protective system as well, would you?

Mr Gilbert—Yes. I think small business organisations themselves would say that there are some people who should not be in small business, and there needs to be a mechanism to, as it were, siphon off

those people who should not go in and risk that superannuation money or whatever the nest egg is that they have. It is a tragedy for the community and a tragedy for the individual when that happens.

CHAIR—The perception has been in the past, though, that you can get that advice from your banker, the local bank manager, your accountant or whatever it might be. Is that the sort of service that the banks are still giving? My perception is that it is not.

Mr Gilbert—It is not the service that banks provide, for a variety of reasons. Obviously, if a bank is involved in the funding decision as well, there are potential conflicts. Of course, the law has developed such a specificity that only professional advisers really should take on that role.

CHAIR—Next-door neighbours are stepping into the void, I guess.

Mr Gilbert—Yes; I expect that is right. I believe there is perhaps a vacuum where there is a need for a focused approach to this pre-contractual problem.

Mrs BAILEY—Mr Gilbert, I would like to follow up on that point, too. Especially for small businesses in rural and regional areas, perhaps the reason that banks are not providing that information is that they have pulled out of those areas. There is a continuing trend for banks to pull out of regional areas, and that is one of the real problems that small businesses face. Could you comment on that? Also, would groups like First Start give small business, or people intending to go into small business, the skills to negotiate with banks themselves about the level of risk premiums that banks apply to small businesses?

Mr Gilbert—Perhaps I can address the first question about banks withdrawing from rural areas. The real issue is whether banks provide the sort of advice that we are now speaking of to intending small business people. The answer is no, they do not. So whether banks withdraw from a rural community or not makes little difference.

Mrs BAILEY—But my point to you was that they could not, in any case, because they no longer exist in many regional areas.

Mr Gilbert—That may well be so, but it makes no difference to the problem that we are dealing with now.

Mrs BAILEY—I can assure you that that is so.

Mr Gilbert—On the second point, I have no personal experience of the management of the First Start business centres. I am not aware of them providing courses or instructions on negotiating with other parties, particularly with people they intend to go into business with or contract with, to enable them to carry on business.

Mrs BAILEY—But you would be aware of the level of risk premiums that banks charge to small business: premiums that they do not charge to bigger business.

Mr Gilbert—I do not know that. I work for an association which does not represent the banks in respect of discrete commercial issues such as that, and quite properly not. I could not—

Mrs BAILEY—I am astounded that you do not know that, because it is commonplace knowledge in all business communities—and, dare I say it, even in regional communities, where there are no banks.

Mr Gilbert—I am aware that different interest rates apply to different people, for a whole variety of reasons. Certainly, risk is one factor in assessing a premium on an interest rate.

Mr O'CONNOR—What sort of normal banker-customer practices would be particularly threatened, do you think, by an extension of the legislation with the introduction of a 'harsh and oppressive' provision?

Mr Gilbert—As we mentioned in our submission, the sort of area we had in mind was where a customer had clearly defaulted and there were options available to the bank as to how it might deal with that customer. It may, in the absence of concepts of the 'harsh and oppressive' description say, 'Look, let's do a work-out.' That is an expression used in the game. 'Let's do a work-out. Let's repackage this. Let's defer some payments and make a few changes to the conditions. But, in return for that, we want some pretty serious performance conditions adhered to, and some pretty serious controls over your business to do this repackaging.' It could well be that that arrangement could be tackled under the law as it was proposed last year. We certainly had a concern in relation to that. We thought that was actually bad for the small businessman. If one was confronted with a situation like that and a risk, the obvious business answer would be, 'Don't do that; do the alternative.'

CHAIR—Which is?

Mr Gilbert—Enforce the security or call up the loan or rely on your default powers, whatever they happen to be, in your loan documentation.

CHAIR—Perception is reality in a lot of senses. What do a lot of customers to banks consider to be harsh and oppressive conditions at the moment that banks might apply to them?

Mr Gilbert—Personally, I do not know. I do not have them referred to me. They are not, as I recall, catalogued in any sense in any of the previous reports that have dealt with this issue. It is not unreasonable to expect that someone would complain if a bank took a view that it had gone far enough down the risk spectrum with a particular customer to require the facility to be repaid. It is a natural reaction by someone who is placed in those circumstances to consider that as harsh and oppressive. Whether it is or not is a question not of perception but reality.

Mrs BAILEY—Would you think it would be fair to describe as oppressive behaviour that small businesses in many small rural towns throughout Victoria would have a drive of at least an hour just to make deposits from their business?

Mr Gilbert—I am a lawyer. I do not consider that oppressive.

Mrs BAILEY—I do not think you would find many of the small businesses in agreement with you.

Mr O'CONNOR—Could you just run through the banking system's self-regulatory mechanisms.

Mr Gilbert—The two that are obviously the most important are the code of banking practice, which comes into full force and effect on 1 November this year when the national consumer credit code also commences to operate, and the alternative dispute resolution scheme—the Australian banking industry ombudsman scheme—which was set up in 1990 by the banking industry. Those two mechanisms are consumer orientated mechanisms.

Mr O'CONNOR—One is not set up yet. How is the other working?

Mr Gilbert—The code of banking practice is, by arrangement with the previous government, partially in operation now in respect of the deposit side of things. The consumer credit side of things will come on stream on 1 November when the consumer credit code commences. That is basically a document which sets standards of performance, accountability and such things as confidentiality and so forth, which is effectively incorporated into consumers' dealings with banks.

The dispute resolution mechanism, the ABIO, is a natural flow on from that code of banking practice. Under section 20 of the code of banking practice there is a positive obligation on banks to set up internal dispute resolution mechanisms to deal with complaints of consumers. If those internal mechanisms break down, banks are required to inform the dissatisfied consumer that there is an alternative body that he or she can go to to have that dispute mediated and that is the banking ombudsman scheme. Building societies and credit unions have adopted a similar type of provision in their codes of practice.

CHAIR—That is a self code, isn't it?

Mr Gilbert—It is a self-regulatory code, yes.

Mr O'CONNOR—You oppose the extension of the legislation on the grounds that common law and equitable provisions are adequate. We have heard before that many small business people cannot afford to access the normal processes of the law to resolve or get satisfaction in a dispute. We have also heard that the playing field is tilted very heavily in this towards big companies and organisations or people who manage the shopping centres, as opposed to the smaller person who is affected badly in the dispute. Inevitably, when you are in a weak financial position that may have been caused or aggravated by a dispute, then you lose your capacity to seek redress. It is a compounding situation backwards for the smaller business. How do you deal with that sort of suggestion?

Mr Gilbert—There is an element of an access to justice issue in all of this. The Australian Competition Consumer Commission has, in recent months, sought to flex its muscle under section 51AA. It brought Ultra Tune to account earlier this year and there was a dispute involving the Hamilton Island resort. I am not aware of the facts of that dispute, but it was also settled on advantageous terms to the complainant. I read in the paper this morning that the Valuers Institute is to lodge a complaint with the ACCC citing, specifically, section 51AA in the context of valuations.

Section 51AA was only put there in 1992, if my memory serves me correctly. It will take some time to develop some teeth. It seems to be a vehicle which the ACCC sees it can use to command better standards of performance by businesses. We have taken a view that this is an evolutionary thing and it appears to be evolving in a way that is satisfactory to us.

Mr JENKINS—You have a lot of faith in the fact that at the time of people entering into contractual arrangements they can flesh out the issues, and I would agree that. If people were skilled up about negotiating in an ideal world, perhaps that would be all right. The submission seems to acknowledge that there are situations where there is a superior party to such negotiations, but you still maintain that, if somebody does not believe they are getting a fair deal, they should just walk away and find somebody else to deal with.

With the number of examples over the days of hearings that we have had so far in the inquiry it is hard to conjure up that really people have that choice. They are desperately trying to negotiate about something where there is only one other party that they can deal with. Perhaps I am too anti the market anyway, but I just do not understand how in those situations the market forces are not only going to get a competitive deal but a fair deal.

Mr Gilbert—Yes. I assume you are referring to a situation where there is no pre-existing relationship—someone seeking to create a new relationship.

Mr JENKINS—We can deal with that too. I want to go on to post-contractual situations too.

Mr Gilbert—I suppose inequality of bargaining power cannot be legislated away. It is a fact of life. We referred in our submission to a paper prepared jointly by Professor Philip Williams and Frances Hanks from the Melbourne Business School—and if the committee does not have a copy of that I will provide one. It discusses this whole question of inequality of bargaining power and disturbing the allocation of risks in contracts based on that power. It is also interesting to note that the US commercial code talks about unconscionability and unconscionable bargains. It deals with this question of inequality of bargaining power, but it says that the consideration of inequality of bargaining power should not disturb the allocation of risks in contracts.

There is a recognition that inequality of bargaining power is always going to be there. I think the critical question is that the person who is subjected to a high degree of power needs the resources, in a sense, to protect him or herself from him or herself—whether it should be a pausing mechanism, an advisory mechanism, education, or a combination, I do not know. We do not believe that you can legislate away that inequality. It is inevitable. Opportunism is another inevitability of any commercial relationship, which may lead to the next phase of your point.

Mr JENKINS—Some of the situations in the post-contractual situation have been where there have been circumstances that change overall, that were not envisaged at the time, and one party might decide that they just want to stick strictly to what in the legalistic terms of the contract apply, whereas the other might say, 'If we can sit down, have a pause or talk it through, we think that we could come up with an accommodation that'—to use Reverend Ludgater's paraphrasing—'is a win-win situation.'

Whilst the codes of conduct would suggest that that is the best way of resolving some of those disputes in a post-contractual situation, at the end of the day they can be because of an imbalance of power in a relationship. Also, I acknowledge what has been put to us about how the best relationships are where the parties have come to have good communication and things like that before disputes. I just think that some of the codes of conduct suggest that everything can be resolved without any legislative power underpinning them, but there is still a problem.

Mr Gilbert—Yes, the point that you have made goes right to the heart of a contract. I suppose I speak as a lawyer—I cannot help that. Where two parties contract, each is assumed to understand what they have entered into: their rights are what the other's rights are. Realistically, one should not expect anything other than what is written. Reasonable people may deal in other ways and adopt the very practices you are talking about. A mechanism which gives that opportunity to arise—some form of alternative dispute resolution—might be an appropriate mechanism in cases where there is a demonstrated need for it.

CHAIR—I am interested in expanding the point that Mr Jenkins made about codes of conduct. How long did your bankers association code of conduct take to evolve?

Mr Gilbert—I was not at the association when it emerged. It was finalised in November 1993.

CHAIR—So it is only recent?

Mr Gilbert—Yes. My understanding of the history of it is that the original draft came from the ACCC and then it was quite quickly put together. I could take this on notice and give you the time frame. My impression—I have not actually looked at the point—is that it was less than a year, but I could be wrong. I am happy to give you formal notice of that.

CHAIR—Please help me because I am unsure: who funds the banker's ombudsman?

Mr Gilbert—The banks. It is a totally independent scheme which is presided over by a council which has equal representation of banks and consumer interests and it is chaired by an independent person.

CHAIR—If the consumer is unhappy with the ombudsman's decision they then have the opportunity to go into litigation, I guess?

Mr Gilbert—Yes, they are not bound by it. But if the consumer accepts the ombudsman's decision, the bank is bound by it.

Mr JENKINS—Do you have a feel for what percentage of complaints to the banking ombudsman would be small business?

Mr Gilbert—The jurisdiction of the ombudsman's scheme does not extend to small business complaints—certainly not incorporated small business complaints—so there are presumably a number of complaints made which would have to be returned because they do not fall within the terms of reference. This was primarily a consumer redress mechanism.

CHAIR—Consumers being people who—

Mr Gilbert—Yes, individual customers involved in what is essentially personal banking.

CHAIR—Whereas businesses are in fact a consumer, though, aren't they?

Mr Gilbert—In a sense, yes.

Mrs BAILEY—Would that exclude an individual who was a single small business person?

Mr Gilbert—No, there is—

Mrs BAILEY—I mean regarding the small business matter.

Mr Gilbert—I am aware that the ombudsman has entertained complaints from individuals who are small business people. I am not privy to the facts of the complaints. I cannot say more than that.

Mrs BAILEY—Is there actually no mechanism for small business? If they have a complaint against a bank, they cannot access the ombudsman.

Mr Gilbert—An incorporated body cannot access the ombudsman scheme. There are obviously fairly sound reasons for that.

CHAIR—Can I clarify my own thinking about what you are saying? You do not recommend any changes to the act, but—and it seems to be a reasonably big 'but'—you think that there should be some sort of address to the formation of contracts for that relationship. There should be a bit more emphasis placed there, in an educational sense. You would like to see the code of conduct regarding industries beefed up a bit, and maybe get to the same stage that the bankers are, with their own independent ombudsman. You would also like to see some sort of dispute resolution process put in place.

Mr Gilbert—Yes. I think that is a fair summation of what I am saying. They are mechanisms that obviously can be looked at. I approach that from the overriding principle that these things ought only be developed where the need arises. We have had very clear instances in at least three areas that I am aware of—commercial tenancies, petroleum and franchising—where I would have thought those sorts of mechanisms would be something which a government would look towards, rather than introducing a law which in a sense covers the field and creates some adverse consequences—

CHAIR—When the problems are only coming from three major areas.

Mr Gilbert—Yes. Ideally, the model of a good regulation is that there is a need—there is a mischief that needs to be addressed—and that non-regulatory alternatives have been considered, and that ultimately the point is reached where the only appropriate solution is legislation.

CHAIR—Mr Gilbert, thanks a lot for coming along today. Those are all the questions we had to ask,

unless you have any closing comments you would like to make.

Mr Gilbert—No, I do not; thank you.

CHAIR—That concludes our public hearing. I have a couple of things I have to do before asking Mrs Bailey to move a motion. I would like to thank everyone who is still here for coming along. Mr Zumbo, it is nice to see you again. In particular, I thank *Hansard* for their efforts today. I apologise for not giving you the cue to start, this morning, but I am sure you were ready.

Resolved (on motion by Mrs Bailey):

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

Committee adjourned at 4.42 p.m.